Two Hot Topics in Family Law:
Same-Sex Marriage;
Mediated Settlement Agreements

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Winter Regional Conference A
Texas Center for the Judiciary
January 23-24, 2014
Horseshoe Bay Marriott, Horseshoe Bay

Winter Regional Conference B - Regions 2, 3, 4, 5, & 8
Texas Center for the Judiciary
February 20-21, 2014
Moody Gardens Hotel, Galveston

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Organizations and Committees:

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

Listed in Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2009, 2010 - [3rd Top Point Getter], 2012)
Recipient of the Franklin Jones, Jr. CLE Article Award for Outstanding Achievement in Continuing Legal Education (2009)
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(2003-2012)
Texas Academy of Family Law Specialists' *Sam Emison Award* (2003)
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 *Gene Cavin Award for Excellence in Continuing Legal Education* (1996)
State Bar of Texas *Certificate of Merit*, June 1995, June 1996, June 1997 & June 2004
Listed in the BEST LAWYERS IN AMERICA: Family Law (1987-2013); Appellate Law (2007-2013)

Continuing Legal Education and Administration:

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

Books and Journal Articles:

—Editor-in-Chief of the State Bar of Texas' TEXAS SUPREME COURT PRACTICE MANUAL (2005)
—Chief Editor of the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL (Vols. II & III) (1999)
— Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992) (900 + pages)
—*A Guide to Proceedings Under the Texas Parent Notification Statute and Rules,* SOUTH TEXAS LAW REVIEW (2000) (co-authored)
—*Obligations of the Trial Lawyer Under Texas Law Toward the Client Relating to an Appeal,* 41 SOUTH TEXAS LAW REVIEW 111 (1999)
—*Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress, in Connection With a Divorce*, 25 ST. MARY'S L.J. 1253 (1994), republished in the AMERICAN JOURNAL OF FAMILY LAW (Fall 1994) and Texas Family Law Service *NewsAlert* (Oct. & Dec., 1994 and Feb., 1995)
—Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)
—*Characterization of Marital Property*, 39 BAY. L. REV. 909 (1988) (co-authored)
—*Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage That Crosses States Lines*, 13 ST. MARY'S L.J. 477 (1982)

SELECTED CLE SPEECHES AND ARTICLES

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

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

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

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

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Table of Contents

TWO HOT TOPICS IN FAMILY LAW: SAME SEX MARRIAGE; MEDIATED SETTLEMENT AGREEMENTS;

by

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Board Certified in Family Law
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I. INTRODUCTION. Two issues of current interest in family law are (i) recent developments in the law pertaining to same-sex relationships and (ii) recent developments in the law pertaining to the rendition of judgment in family law matters based on mediated settlement agreements (MSAs).

II. CONSTITUTIONAL ISSUES REGARDING SAME SEX MARRIAGE/CIVIL UNION. The law pertaining to same-sex marriage is in flux as a result of the U.S. Supreme Court's decision in *U.S. v. Windsor*, ___ U.S. ___, 133 S.Ct. 2675 (June 26, 2013). There are several legal issues that are of primary importance. One issue is whether the validity of a marriage is a question of state law or federal law. If state law, then the question arises "which state's law"?

The answer to the first question, whether the validity of a marriage is a question of state law or federal law, turns on whether the U.S. Constitution requires a state to permit the creation of same-sex marriages on the same terms as the state creates heterosexual marriages, based either on a fundamental right to marry or based on the Equal Protection or Due Process of Law Clauses of the Fourteenth Amendment to the U.S. Constitution. The decision in *U.S. v. Windsor* elevates state law above Federal law when it comes to the validity of a marriage, and requires the United States government to recognize same-sex marriages for parties living in states where the marriage is recognized as being valid. The case did not specifically say what the Federal government should do if the parties are living in a state that does not recognize same-sex marriage. Nor did the case say whether state law on same-sex marriage is preempted to the extent that a state court is adjudicating rights in federal benefits (such as military retirement benefits in a same-sex divorce). These latter questions were not answered in *U.S. v. Windsor*, but they all are highlighted by the decision.

If there is no constitutional basis to force states to permit same-sex marriages, then the question arises whether one state's conception of valid marriage is binding on other states that have a different conception of valid marriage. The legal argument focuses on whether the Full Faith and Credit Clause of the U.S. Constitution, or the Fourteenth Amendment's Equal Protection or Due Process of Law Clauses, require each state to acknowledge the validity of same-sex marriages and "civil unions" that are validly created under the law of any other American state. If the same-sex marriage was created under the law of a foreign county, full faith and credit does not apply and a court would have to rely on the Equal Protection or Due Process Clauses of the Fourteenth Amendment (or some U.S. treaty) to preempt state law on the issue.

The legal issues surrounding same-sex marriage and civil union marriage issue bear a resemblance to two other issues of American history: slavery and illegal discrimination. The American Civil War, and the consequential adoption of the Thirteenth Amendment to the U.S. Constitution, abolished slavery. The post-Civil War adoption of

the Fourteenth Amendment created a right of U.S. citizens to be free from illegal discrimination under state law (i.e., discrimination based on race, creed, national origin, and later gender). The 1871 Civil Rights Act (the Anti Ku Klux Klan Act), codified at 28 U.S.C. § 1938, permits a person who is the victim of illegal discrimination to sue defendants, including state officials, for money damages. Section 1983 interfaces with other Federal laws to permit Federal judges to grant injunctive relief and declaratory judgment relief apart from damages.

Solving the problem of slavery and later illegal discrimination involved a shifting of power from the states to the Federal government. But since the court system, especially the Federal court system, is where lawsuits are brought, solving the problem of illegal discrimination also involved a shifting of power from the state legislatures and even the voters of a state to the state and federal court court systems, and thus to judges.

Proponents of equal treatment for same-sex marriage are employing the procedural framework, created to eliminate racial discrimination, to invalidate laws prohibiting and refusing to recognize same-sex marriages. In some states, when state judges have used state constitutional equal protection and due process provisions to invalidate laws rejecting same-sex marriages, the voters responded by amending the state constitution to specifically exclude same-sex marriage from equal protection and due process guarantees. Where this occurred, it essentially eliminated the power of state court judges to invalidate such laws based on the state constitutions. That forced the focus to shift to the U.S. Constitution.

Where a state has determined not to recognize same-sex marriage, the legal contest involves the interests of a minority against the interests of the majority, the ability of individual states to determine what constitutes a valid marriage independently from the decisions made by other states, the balance of Federal power as against state power, and the power of judges as against the power of elected state officials to enact law, and the power of the people of the state to adopt state constitutional provisions governing the nature of marriage.

Because the validity of marriage has traditionally been an issue of state law and not federal law, to date the main focus has been on whether a state is bound by Federal law to recognize a same-sex marriage that was validly created in another state. Thus, the first concern was the Full Faith and Credit Clause of the U.S. Constitution, and its enabling Federal legislation. More recently, the focus has been broadened to include the question of whether the Fourteenth Amendment requires states to recognize same-sex marriage from other states and even further requires all states to allow same-sex marriages on the same basis at heterosexual messages.

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

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

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

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

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

These two provisions of Federal law could serve as the basis for requiring the State of Texas to recognize the validity of a same-sex marriage or civil union lawfully established under the law of a sister state. However, as discussed in the next section, in 1996 Congress took action to avoid such an argument.

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

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

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

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

With Section 1738C, Congress circumscribed the broadly-worded Federal full faith and credit *statute* so that it could not be used by judges to force a state to recognize a same-sex marriage or civil union from another state. However, the courts, and ultimately the U.S. Supreme Court, could decide that the Full Faith and Credit Clause of the U.S. Constitution forces recognition of same-sex marriage and civil unions in other states, thus effectively holding 28 U.S.C. § 1738C unconstitutional.

C. 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. That provision is carried forward in current Family Code Section 2.401. When the Family Code was first enacted, 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. In 2003, the Texas Legislature has 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.

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

Sec. 32. MARRIAGE.

(a) Marriage in this state shall consist only of the union of one man and one woman.

(b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.

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

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

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

In the case of *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 658-59 (Tex. App.–Dallas 2010, pet. granted), the Dallas Court of Appeals held that a Texas court does not have subject-matter jurisdiction over a divorce case arising from a same-sex marriage that occurred in Massachusetts. District Judge Tena Callahan had ruled that Tex. Const. Art. I, §32(a) and Tex. Fam. Code § 6.204

violated the Equal Protection Clause of the Fourteenth Amendment. The appellate court ruled that the State of Texas, through the Attorney General, had the right to intervene in the lawsuit to raise the trial court's lack of jurisdiction, and that mandamus would lie to overturn the Trial Court's dismissal of the AG's intervention. The appellate court also ruled that, because of Family Code Section 6.204, the Trial Court had no subject matter jurisdiction over the purported divorce proceeding involving a same-sex marriage. 326 S.W.3d at 667. The appellate court held that in Texas same-sex marriages are void, meaning that they have no legal effect. *Id.* at 665. This case was consolidated by the Texas Supreme Court with *State v. Naylor* and was argued to the Supreme Court on November 5, 2013.

In *State v. Naylor*, 330 S.W.3d 434 (Tex. App.–Austin 2011), *pet. granted sub nom Angelique Nalor and Sabina Daly*, No. 11-0114 (, the Austin Court of Appeals ruled that the State of Texas did not have standing to appeal a divorce between two women who were legally married in Massachusetts, that was granted by Travis County District Judge Scott Jenkins based on an agreement between the parties. The Court also said that Texas law can be interpreted "in a manner that would allow the trial court to grant a divorce in this case." *Id.* at 441. On March 21, 2011, the State filed a petition for review[2] in the Texas Supreme Court, and on March 25, 2011 the State filed a petition for mandamus as well. Briefs werefiled, including numerous amicus curiae briefs. On July 3, 2013, the Clerk of the Supreme Court asked the parties to submit briefs on the impact if any of the U.S. Supreme Court's decision in *U.S. v. Windsor*, ___ U.S. ___, 133 S.Ct. 2675 (June 26, 2013). Those briefs are discussed in paragraph 7 below. On Friday, August 23, 2103, two years and five months after the case was filed, the Supreme Court granted review. This appeal and mandamus were both consolidated with the appeal in *In the Matter of the Marriage of J.B. and H.B.* and they were all argued on November 5, 2013.

F. TEXAS ATTORNEY GENERAL OPINIONS. On December 16, 1999, Texas Attorney General John Cornyn (now a U.S. Senator) issued an AG's Opinion that county clerks were not required or permitted to accept for filing a "declaration of domestic partnership."[3] On October 27, 2005, Texas Attorney General Abbott sent a letter to a Texas Senator and a State Representative, on the subject of the then-proposed constitutional amendment relating to same-sex marriage. General Abbott said that the proposed amendment "would in fact safeguard traditional marriage in Texas."

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

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

> No person in the United States shall, on the basis of actual or perceived race, color, religion, national origin, sex, *gender identity* (as defined in paragraph 249(c)(4) of title 18,

> United States Code), *sexual orientation,* or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under the Violence Against Women Act of 1994 (title IV of Public Law 103-322; 108 Stat. 1902), the Violence Against Women Act of 2000 (division B of Public Law 106-386; 114 Stat. 1491), the Violence Against Women and Department of Justice Reauthorization Act of 2005 (title IX of Public Law 109-162; 119 Stat. 3080), the Violence Against Women Reauthorization Act of 2013, and any other program or activity funded in whole or in part with funds appropriated for grants, cooperative agreements, and other assistance administered by the Office on Violence Against Women. [Emphasis added.]

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

> Unfortunately, we cannot support the version of the "Violence Against Women Reauthorization Act of 2013" passed by the House of Representatives and the Senate (S. 47) because of certain language it contains. Among our concerns are those provisions in S. 47 that refer to "sexual orientation" and "gender identity." All persons must be protected from violence, but codifying the classifications "sexual orientation" and "gender identity" as contained in S. 47 is problematic. These two classifications are unnecessary to establish the just protections due to all persons. They undermine the meaning and importance of sexual difference. They are unjustly exploited for purposes of marriage redefinition, and marriage is the only institution that unites a man and a woman with each other and with any children born from their union.[5]

The provision only prohibits discrimination against gays and lesbians and transgender persons in the delivery of services funded under the statute, but the Bishops were no doubt reacting to Congress's decision to associate disparate treatment of gays , lesbians and transgender persons with discrimination based on race, religion, national origin or gender, which is constitutionally prohibited.

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

1. *U.S. v. Windsor*. On June 26, 2013, in *U.S. v. Windsor*, No. 12-307, ___ U.S. ___, 133 S.Ct. 2675 (June 26, 2013), the U.S. Supreme Court declared Section 3 of DOMA unconstitutional. The Majority Opinion was written by Justice Kennedy. The Court held that it was unconstitutional for the Federal government to refuse to recognize a marriage between persons of the same sex when that same-sex marriage was recognized under the law of the state where the parties reside. The Supreme Court did *not* rule that states are required to permit same-sex marriages or that states are required recognize same-sex marriages originating elsewhere. The Texas law that courts must ignore same sex marriages is still in force, except to the extent federal law preempts state law, primarily with regard to federal benefits.

In *State v. Naylor*, 11-0114, now pending in the Texas Supreme Court, the Texas Attorney General has filed a brief arguing that the decision in *U.S. v. Windsor* did not invalidate Texas law banning same-sex marriages.[6] The AG's Brief says:

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

The AG's Brief points out that "Section 2 of federal DOMA, which codifies the longstanding principle that States may refuse to recognize same-sex marriages performed in other States, was not at issue in *Windsor*. See 28 U.S.C. § 1738c." The Respondents filed a Brief saying: "In *United States v. Windsor* the Court held that a law that 'impose[s] inequality' on gays and lesbians, and that treats same-sex marriages as 'second class,' violates the constitutional principles of due process and equal protection. But neither Naylor nor Daly challenged the constitutionality of any law in their divorce action—and neither the trial court nor the court of appeals addressed the constitutionality of any Texas law in its decision."[7]

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

2. *Hollingsworth v. Perry*. After the California Supreme Court held that limiting marriage to opposite-sex couples violated the California Constitution, California voters passed a ballot initiative known as Proposition 8, amending the California Constitution to define marriage as being a union between a man and a woman. Some same-sex couples brought suit in Federal district court in California to declare the state constitutional provision unenforceable. The State of California refused to defend the validity of the constitutional provision, but proponents of the constitutional amendment were allowed to intervene to defend the amendment. The Federal District Judge declared that the constitutional provision violated the Fourteenth Amendment's Equal Protection and Due Process of Law Clauses. The State of California refused to appeal, but the proponents of the constitutional amendment were given leave to conduct the appeal. The U.S. Court of Appeals for the Ninth Circuit certified a question to the California Supreme Court asking whether the appellants had standing to appeal. The California Supreme Court said "yes." The Ninth Circuit then considered the merits, and affirmed the district judge's ruling, invalidating the provision in the California constitution. In a 5-to-4 vote, in *Hollingsworth v. Perry*, 570 U.S. ___ , 133 S.Ct. 2652 (2013) (Docket No. 12-144) (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 and the California constitutional provision unenforceable.

3. ***Sevcik v. Sandoval.*** In *Sevcik v. Sandoval,* 911 F.Supp.2d 996 (D. Nev. 2012), a Federal District Judge considered a Federal civil rights action brought against the State of Nevada for prohibiting same sex marriage. The Court dismissed the plaintiff's equal protection challenge, based on *Baker v. Nelson*, 409 U.S. 810 (1972), where the U.S. Supreme Court "summarily dismissed an equal protection challenge to Minnesota's marriage laws for lack of a substantial federal question." *Sevcik,* 911 F. Supp.2d at 1002. However, the Federal District Judge did **not** dismiss the plaintiffs' challenge that relied on *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), "concerning the withdrawal of existing rights or a broad, sweeping change to a minority group's legal status." *Sevcik,* 911 F. Supp.2d at 1021. As of the time this article was written, the Judge had not ruled on the *Romer v. Evans* claim.

4. ***Jackson v. Abercrombie.*** In *Jackson v. Abercrombie*, 884 F.Supp.2d 1065 (D. Hawai'i 2012), a Federal District Judge ruled that Hawai'i's ban on same-sex marriage did not violate the Fourteenth Amendment's Due Process Clause. The Court relied in part on *Baker v. Nelson,* 409 U.S. 810 (1972) (holding that alleged discrimination against same-sex marriage did not present a substantial federal question).

5. ***DeBoer v. Snyder.*** In *DeBoer v. Snyder*, 2013 WL 3466719, *2 (E.D. Mich. 2013), a Federal District Judge refused to dismiss a lawsuit brought by a same-sex couple to invalidate Michigan's ban on same-sex marriages, saying that the Supreme Court's decisions in *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), and *U.S. v. Windsor*, No. 12-307, ___ U.S. ___, 133 S.Ct. 2675 (June 26, 2013), were a "newly enthroned triumvirate" of authorities that arguably supported the plaintiffs' contentions. The Court has not yet ruled on the merits of the plaintiffs' claim.

6. ***Herbert v. Kitchen.*** In *Kitchen v. Herbert*, 2013 WL 6697874 (D. Utah Dec. 20, 2013), Federal District Judge Robert J. Shelby held that the State of Utah's prohibition of same-sex marriages and refusal to recognize the validity of same-sex marriages validly created in other states violated the plaintiffs' right to marry under the Fourteenth Amendment's Due Process Clause and denied the plaintiffs' equal protection of the law required by the Fourteenth Amendment's Equal Protection Clause. The Court decided that *Baker v. Nelson*, 409 U.S. 810 (1972) was no longer good law. Judge Shelby enjoined the State of Utah from enforcing the state law. In *Kitchen v. Herbert*, 2013 WL 6834634 (D. Utah Dec. 23, 2013), Judge Shelby refused to stay his injunction pending appeal, and even refused to grant a temporary stay long enough to allow the State of Utah to request a stay from the Tenth Circuit Court of Appeals.

On January 26, 2014, in *Herbert v. Kitchen*, 2014 WL 30367 (U.S. Sup. Ct.), the United States Supreme Court suspended the effect of Judge Shelby's ruling that declared invalid Utah laws that banned such marriages in Utah or denied recognition to same-sex marriage granted elsewhere. In granting the stay, the U.S. Supreme Court wrote:

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

It seems likely that the Tenth Circuit will affirm the district judge, based on the court's refusal to

stay the effect of the trial court's decision, which would have allowed same-sex marriages to occur during the pendency of the appeal. The Supreme Court's stay ends when the Tenth Circuit rules, so if the State loses in the Tenth Circuit they will have to seek another stay from the U.S. Supreme Court.

7. ***Obergefell v. Wymyslo***, 2013 WL 59340007 (S.D. Ohio, Dec. 23, 2013), a Federal District Judge held that Ohio's ban on recognizing same-sex marriages legally created in other states violated the Fourteenth Amendment's Due Process Clause and Equal Protection Clause. The Court applied an intermediate standards of scrutiny, between strict scrutiny and rational basis scrutiny.

8. Other Pending Federal Litigation. A suit was filed in October of 2013 in a Federal District Court in San Antonio, *De Leon v. Perry*, No. 5:13-CV-00982-OLG, to declare the Texas law banning same-sex marriages unconstitutional. One set of plaintiffs are Texas residents who traveled to Massachusetts to be lawfully married in that state. The other set of plaintiffs are Texas residents who wish to marry. The suit is brought under the Federal civil rights statute. The presiding judge is Hon. Orlando Garcia. On January 6, 2014, four same-sex married couples filed a class action suit in *Connally et al. v. Brewer, Governor*, seeking to declare Arizona's constitutional ban on same-sex marriage to be invalid. A similar case, *McGee v. Cole*, is pending in federal district court in West Virginia, seeking declaratory and injunctive relief under the Federal civil rights statute, 42 U.S.C § 1983. On January 14, 2014, Federal District Judge Terence Kern in Tulsa, Oklahoma ruled that the Oklahoma ban on same-sex marriage violated the Equal Protection Clause of the Fourteenth Amendment. One news report said that as of January 8, 2014, 25 such cases were pending in 16 states.

I. PREEMPTION OF STATE MARITAL PROPERTY LAW BY FEDERAL LAW. There are instances in which Texas marital property law or divorce law has been held to have been preempted by contrary Federal law. For a good discussion of preemption, see *Ex parte Hovermale*, 636 S.W.2d 828, 837 (Tex. App.–San Antonio 1982, orig. proceeding) (Cadena, C.J., dissenting). A list of cases preempting state marital property law includes: *Boggs v. Boggs*, 520 U.S. 833, (1997) (ERISA preempted a Louisiana community-property law that would have allowed a plan participant's first wife to transfer by will her interest in the participant's undistributed retirement benefits); *Mansell v. Mansell*, 490 U.S. 581 (1989) (state law relating to military retirement benefits is preempted except as provided in the USFSPA); *Ridgway v. Ridgway*, 454 U.S. 46 (1981) (provisions of the Serviceman's Group Life Insurance Act of 1965, giving an insured service member the right to freely designate and alter the beneficiaries named under the contract, prevail over and displace a constructive trust for the benefit of the service member's children imposed upon the policy proceeds by a state court divorce decree); *McCarty v. McCarty*, 453 U.S. 210 (1981) (federal law preempted power of state court to divide military retirement benefits in a divorce); *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979) (federal law preempted power of state court to divide railroad retirement benefits on divorce); *Yiatchos v. Yiatchos*, 376 U.S. 306 (1964); *Free v. Bland*, 369 U.S. 663 (1962) (U.S. savings bond survivorship provisions in treasury regulations preempted inconsistent Texas community property law); *Wissner v. Wissner*, 338 U.S. 655 (1950) (National Service Life Policy benefits are the sole property of the beneficiary, and are not community property); *McCune v. Essig*, 199 U.S. 382 (1905) (veteran's right, under federal statute, to designate beneficiary of life insurance could not be controlled by state court); *Barnett v. Barnett*, 67 S.W.3d 107 (Tex. 2001) (ERISA preempts a claim by a widow seeking to impose a constructive trust on insurance policy proceeds to remedy constructive fraud on the community); *Ex parte Burson*, 615 S.W.2d 192 (Tex. 1981) (Veterans Administration disability payments are not property and cannot be divided upon divorce); *Eichelberger v. Eichelberger*, 582 S.W.2d 395

(Tex. 1979) (railroad retirement preempted); *Perez v. Perez*, 587 S.W.2d 671 (Tex. 1979) (military adjustment benefits held to be separate property due to gratuitous nature under federal statute); *United States v. Stelter*, 567 S.W.2d 797 (Tex. 1978) (ex-Wife could not garnish ex-Husband's retirement pay, under federal statute); *Valdez v. Ramirez*, 574 S.W.2d 748 (Tex. 1978) (joint survivor annuity permitted by Civil Service Retirement Act preempted contrary state law); *Ex parte Johnson*, 591 S.W.2d 453 (Tex. 1979) (federal statute precluded division of V.A. disability benefits upon divorce); *Arrambide v. Arrambide*, 601 S.W.2d 197 (Tex. Civ. App.–El Paso 1980, no writ) (federal law prohibits division of Veterans Administration disability payments upon divorce).

J. WHAT ABOUT SEX CHANGE OPERATIONS? 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.] Apr. 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. A case in the Corpus Christi Court of Appeals, 13-11-00490-CV, *In the Estate of Thomas Trevino Araguz III, Deceased*, involves a marriage between a man and a transgender woman who claimed to have been born with male genitalia but a female brain, and who was miss-typed on her birth certificate. District Judge Randy Clapp dismissed her claims in probate. The case has been pending in the Corpus Christi Court of Appeals since July 20, 2011 with no opinion yet. Imagine a circumstance in which a man and a woman marry, then the man has a sex-change operation and becomes a woman. If the gender switch is legally recognized, did the parties' marriage become void as a same-sex marriage?

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

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

> § 402.010. Legal Challenges to Constitutionality of State Statutes
>
> (a) In an action in which a party to the litigation files a petition, motion, or other pleading challenging the constitutionality of a statute of this state, the party shall file the form required by Subsection (a-1). The court shall, if the attorney general is not a party to or counsel involved in the litigation, serve notice of the constitutional challenge and a copy of the petition, motion, or other pleading that raises the challenge on the attorney general either by certified or registered mail or electronically to an e-mail address designated by the attorney general for the purposes of this section.
>
> (a-1) The Office of Court Administration of the Texas Judicial System shall adopt the form that a party challenging the constitutionality of a statute of this state must file with the court in which the action is pending indicating which pleading should be served on the attorney general in accordance with this section.

> (b) A court may not enter a final judgment holding a statute of this state unconstitutional before the 45th day after the date notice required by Subsection (a) is served on the attorney general.
>
> (c) A party's failure to file as required by Subsection (a) or a court's failure to serve notice as required by Subsection (a) does not deprive the court of jurisdiction or forfeit an otherwise timely filed claim or defense based on the challenge to the constitutionality of a statute of this state.
>
> (d) This section or the state's intervention in litigation in response to notice under this section does not constitute a waiver of sovereign immunity.

Tex. Gov't Code § 402.010 (as amended in 2013). The OCA has put the form required by Section a-1 on-line at: <http://www.courts.state.tx.us/pdf/Constitutionality.pdf>.

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

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

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

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

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

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

7. Interpret to Avoid Unconstitutionality. "When possible, we are to interpret enactments in a manner to avoid constitutional infirmities." *General Services Com'n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 598 (Tex. 2001); *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 629 (Tex.1996); *Texas State Bd. of Barber Examiners v. Beaumont Barber Coll., Inc.*, 454 S.W.2d 729, 732 (Tex. 1970). "Legislative enactments will not be held unconstitutional and invalid unless it is absolutely necessary to so hold." *Texas State Bd. of Barber Examiners v. Beaumont Barber College,*

Inc., 454 S.W.2d 729, 731 (Tex.1970). The statute must be upheld if a reasonable construction can be ascertained which will render the statute constitutional and carry out the legislative intent. *Ely v. State*, 582 S.W.2d 416, 419 (Tex. Crim. App.1979). "Before a legislative act will be set aside, it must clearly appear that its validity cannot be supported by any reasonable intendment or allowable presumption." *Ex parte Austin Indep. Sch. Dist.*, 23 S.W.3d 596, 599 (Tex. App.--Austin 2000, no pet.).

8. "Facial Invalidity." A statute can be challenged for unconstitutionality based upon "facial invalidity." A statute is not facially invalid unless it could not be constitutional under any circumstances. *See Appraisal Review Bd. of Galveston County v. Tex-Air Helicopters, Inc.*, 970 S.W.2d 530, 534 (Tex. 1998). A statute need not be declared unconstitutional simply because it might be unconstitutional as applied to the facts of another case. *See Weiner v. Wasson*, 900 S.W.2d 316, 332 (Tex. 1995). *See Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*, 952 S.W.2d 454, 463 (Tex.1997) ("We may not hold the statute facially invalid simply because it may be unconstitutionally applied under hypothetical facts which have not yet arisen").

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

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

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

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

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

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

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

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

> In interpreting our constitution, this state's courts should be neither unduly active nor deferential; rather, they should be independent and thoughtful in considering the unique values, customs, and traditions of our citizens. With a strongly independent state judiciary, Texas should borrow from well-reasoned and persuasive federal procedural and substantive precedent when this is deemed helpful, [FN53] but should never feel compelled to parrot the federal judiciary. [FN54] With the approach we adopt, the appropriate role of relevant federal case law should be clearly noted, in accord with *Michigan v. Long*, 463 U.S. 1032, 1040-41, 103 S.Ct. 3469, 3476- 77, 77 L.Ed.2d 1201 (1983) (presuming that a state court opinion not explicitly announcing reliance on state law is assumed to rest on reviewable federal law). A state court must definitely provide a "plain statement" that it is relying on independent and adequate state law, [FN55] and that federal cases are cited only for guidance and do not compel the result reached. Id. at 1040-41, 103 S.Ct. at 3476-77. See also William J. Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U.L.Rev. 535, 552 (1986). Long offers further reason for developing state constitutional law, since now courts, rather than merely adjudicating state constitutional claims, must be prepared to defend their integrity by both quantitatively and qualitatively supporting their opinion with state authority." Duncan, STATE COURTS, at 838. Consistent with this method, we may also look to helpful precedent from sister states in what New Jersey Justice Stewart Pollock has described as "horizontal federalism." Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 992 (1985). [Footnotes omitted]

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

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

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

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

L. WHAT'S NEXT? Many existing federal policies and regulations can no longer be enforced after *U.S. v. Windsor*. On July 1, 2013, Secretary of

Homeland Security Janet Napolitano issued a directive to the Immigration Service to review immigration visa petitions treating a same-sex spouse the same as an opposite-sex spouse. On July 17, 2013, the United States Office of Personnel Management issued a letter advising Federal employees that spousal benefits would be extended to same-sex spouses. On August 13, 2013, Secretary of Defense Chuck Hagel' issued a press release saying that all spousal and family benefits offered to the military would be made available to same-sex spouses no later than September 3, 2013.[8] More changes in Federal policies and procedures were issued by various Federal departments in the following months. Note that the Defense Department policy was not limited to persons residing in states that recognize same-sex marriages as valid. The Secretary of Defense has thus gone beyond the holding in *U.S. v Windsor*, which did not invalidate DOMA in states that did not recognize same-sex marriage.

At this time, the impact of *Windsor* on a Texas divorce can only be imagined. Here are some possible areas of impact:

(1) The Fourteenth Amendment due process and equal protection analysis might in a future case be extended to invalidate DOMA Section 2, and Texas might be bound under the Fourteenth Amendment or the Full Faith and Credit Clause to recognize the validity of a same-sex marriage validly contracted in another state or nation.

(2) Preemption could ultimately be invoked, only as to federal benefits, in which event, same-sex spouses could have marital property rights in Federal retirement benefits, but not in non-federal retirement benefits.

(3) Preemption could ultimately be invoked, only as to federal benefits, in which event, same-sex spouses could have survivor benefits under Federal plans but not under private or state benefit plans.

(4) Preemption could ultimately be invoked, only as to federal benefits, in which event, same-sex spouses could have the right to extended group medical insurance coverage under COBRA, even where the plan does not recognize same-sex marriage.

(5) Preemption could ultimately be invoked, only for purposes of federal taxation, in which event, same-sex spouses filing Federal tax returns may be able to file as "married/filing jointly" even if their marriage is not recognized under the law of the state where they reside.

(6) Where one same-sex spouse is domiciled in Texas and the other spouse is domiciled in a state that recognizes same-sex marriage, is there a marriage in either or both states?

(7) If persons of the same sex lawfully married in another state, and later moved to Texas, does the law of marital domicile apply to property rights vested under the law of former domicile, or must Texas courts ignore the effect of the marriage even for assets acquired while the parties were domiciled in a state that recognized the marriage as valid?

(8) If same-sex spouses obtain a declaratory judgment in another state saying that their marriage is valid, is that adjudication entitled to full faith and credit or comity in Texas?

(9) If the court of another state grants a divorce to same-sex spouses, can or must Texas courts recognize the validity of that decree based on full faith and credit or comity?

(10) Does any of this analysis apply to polygamous marriages?

III. CHOICE OF LAW ISSUES INVOLVING SAME-SEX MARRIAGES FROM OTHER STATES. Even if full faith and credit for a marriage lawfully established in another state is not required, and even if the Fourteenth

Amendment does not require all states to recognize a marriage validly created in one state, there is an issue about choice-of-law rules that might import the law of other states or nations into a Texas court proceeding.

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 sometime called "the most significant relationship test." Under the Restatement (Second), the "rules" were replaced with "principles," and the principles were as follows:

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

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

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

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

action in the courts of this state are governed by the law of this state").

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 V.J. below.

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

Another choice of law rule that might apply to the question of whether a Texas court can grant a divorce to a same-sex married couple is the rule that choice of law principles apply to substantive rights but not to procedures. Divorce is a procedure, not a substantive right.

Another choice of law rule is that a court is not required to import the law of another state that violates the forum state's public policy. See Section III.C above. Both the Texas Family Code

and the Texas Constitution indicate that the public policy of the state is to not recognize same-sex marriages.

There is precedent that Texas residents cannot travel to another jurisdiction to engage in actions that would circumvent the public policy of the state of Texas. *King v. Bruce*, 201 S.W.2d 803, 809 (Tex. 1947). However, that case applied to spouses attempting to circumvent Texas marital property law, not Texas law governing the creation of the marriage relationship. Additionally, the public policy in *King v. Bruce* (Texas domiciliaries cannot evade the marital property law of Texas by going elsewhere to sign a contract and then invoking the law of the place of contracting) would not apply to people who were lawfully married under the law of their earlier residence or legal domicile and then later moved to Texas.

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

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

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

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 determJanuary 14, 2014ined by the law of the situs of the immovables. See 3 L. Simpkins, TEXAS FAMILY LAW § 16.2, at 177 (Spear's 5th ed. 1976). Under traditional conflict of law rules, the rights of the spouses in movable property acquired during marriage were controlled by the law of the marital domicile at the time of acquisition. *Oliver v. Robertson*, 41 Tex. 422, 425 (1974); *Tirado v. Tirado*, 357 S.W.2d 468, 471-72 (Tex. Civ. App.--Texarkana 1962, writ dism'd); *Huston v. Colonial Trust Co.*, 266 S.W.2d 231, 233 (Tex. Civ. App.--El Paso 1954, writ ref'd n.r.e.). Traditionally, the rights of spouses in immovables acquired during marriage was determined by the law of the situs. *Commissioner v. Skaggs*, 122 F.2d 721, 723 (5th Cir. 1941), *cert. denied*, 315 U.S. 811 (1942); *Kaherl v. Kaherl*, 357 S.W.2d 622, 624 (Tex. Civ. App.--Dallas 1962, no writ); *Huston v. Colonial Trust Co.*, 266 S.W.2d 231, 233-34 (Tex. Civ. App.--El Paso 1954, writ ref'd n.r.e.); *Bell v. Bell*, 180 S.W.2d 466, 469 (Tex. Civ.

App.--El Paso 1944, writ ref'd w.o.m.). Traditional choice-of-law rules held that spouses' changing domiciles during marriage did not affect their rights in their property acquired while domiciled at the earlier domicile. *See Avery v. Avery*, 12 Tex. 54, 56-57 (1854) (under the law of Georgia, the first marital domicile, the husband became the owner of all personal property owned by the wife at the time of marriage; upon removal of the spouses to Texas, the husband continued to be the owner of such property).

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

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

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

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

> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 234:
>
> (1) The effect of marriage upon an interest in land acquired by either of the spouses during coverture is determined by the law that would be applied by the courts of the situs.
>
> (2) These courts would usually apply their own local law in determining such questions.

b. The Texas Case Law Since the Restatement (Second) of Conflict of Laws. In 1979, the Supreme Court of Texas rejected the traditional lex loci delicti choice-of-law rule for tort cases, and announced that henceforth the "most significant relationship" standard of the Restatement would apply to tort cases. *Gutierrez v. Collins*, 583 S.W.2d 312, 318 (Tex. 1979). In 1984, the Texas Supreme Court overturned the lex loci contractu choice-of-law rule for contract cases, and adopted Section 6 of the Restatement, 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 institutes where she suspected that her former husband had hid money from her. Both former spouses were Mexican citizens and domiciliaries of Mexico. The financial accounts were opened during marriage. The appellate court affirmed the denial of discovery to the ex-wife, partially due to lack of personal jurisdiction over the ex-husband. The appellate court also turned to Texas choice-of-law rules to justify its decision, saying that money on deposit is personalty as to which the law of marital domicile applies, and further that Mexico was the country with the most significant relationship to the parties and the issues. The appellate court then reasoned that because Mexican law applied, the ownership of the funds was a matter within the jurisdiction of the Mexican divorce court, thus depriving the Texas court of jurisdiction over the res of the lawsuit. This last step in reasoning was perhaps a misunderstanding of the use of role of choice-of-law rules, but the opinion nonetheless reflects a tendency on the part of Texas courts of appeals to evaluate marital property choice-of-law issues from the standpoint of both 1) the law of marital domicile as to personalty and 2) the most significant relationship standard. In *Ismail v. Ismail*, 702 S.W.2d 216, 222 (Tex. App.–Houston [1st Dist.] 1985, writ ref'd n.r.e.), the appellate court rejected the husband's complaint about the trial court not applying Egyptian law in a Texas divorce. The court pointed out that the Family Code provision, about dividing property that would have been community had the acquiring spouse been domiciled in Texas at the time of acquisition, specifically applied to the situation.

3. The Texas Family Code's 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 the community property and liabilities. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (1977). Choice of law issues do not arise in Texas divorces because Texas Family Code §7.002(a)(1) provides that, in a divorce, a court must divide real and personal property, "wherever situated," that was acquired while the acquiring spouse was domiciled in another state and that would have been community property had the acquiring spouse been domiciled in Texas at the time of acquisition. Under Section 7.002(a)(2), the same rule applies to property that can be traced to category (a)(1) property. These provisions apply only to a divorce or annulment, and not to inheritance rights upon death. *See Estate of Hanau v. Hanau*, 730 S.W.2d 663, 665 (Tex. 1987) (when a spouse dies in Texas, property acquired by that spouse during marriage, but while domiciled elsewhere, is governed by the marital property law of the earlier domicile, and not by Texas marital property law).

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

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

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

But these divorce-related provisions do not apply when persons in a same-sex marriage are "breaking up" and their dispute winds up in a Texas court. The 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 choice of law principles. To unravel this problem, it is helpful to look at the historical development of conflict of law principles applied to both marital property disputes and to contract disputes. The history of the development of uniform state laws regarding contracts and the American Law Institutes' Restatements of the Law of Contracts is covered in detail in Richard R. Orsinger, 170 *Years of Texas Contract Law*, State Bar of Texas HISTORY OF TEXAS SUPREME COURT JURISPRUDENCE (2013) pp. 33-38 <http://www.orsinger.com/PDFFiles/170-Years-of-Texas-Contract-Law.pdf>.

4. Claims Under Sister-State Law. Some states have adopted special legal principles that give same-sex cohabitants remedies upon the break-up of the relationship. That raises the question of whether such 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 heterosexual couple in a premarital cohabitation arrangement (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 wher e 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. Div. 3 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. Div. 1 2012) (unpublished opinion), the meretricious relationship principles were applied to two women whom the trial court found had entered

into a "committed intimate relationship." *Id.* at *6. Effective December 6, 2012, Washington began to allow and recognize same-sex marriages.

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

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

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

A. CONTRIBUTING MONEY OR LABOR TO PURCHASE PRICE. The case of *Ayala v. Valderas*, 2008 WL 4661846 (Tex. App.--Fort Worth 2008, no pet.) (memo. opinion), involved an unmarried heterosexual couple who purchased real property while together. The appellate court said:

> The record demonstrates that Valderas had a meretricious relationship or a "live-in" relationship with Antonio. If the relationship was meretricious, neither one of the individuals has a good faith belief that they are entering into a marital relationship. *Id.* Each party is entitled to the property acquired during the relationship in proportion to the value that his or her labor contributed to its acquisition. *Hovious v. Hovious*, No. 02–04–00169–CV, 2005 WL 555219, at *6 (Tex. pp.–Fort Worth Mar. 10, 2005, pet. denied) (mem.op.). If Valderas and Antonio had a live-in relationship, Valderas would be entitled to a share of the property in the same proportion that her labor contributed to the purchase price so long as she could show that the money used to buy the property was acquired in whole or in part by her labor before the property was purchased. See *Small v. Harper*, 638 S.W.2d 24, 28 (Tex. App.--Houston [1st Dist.] 1982, writ ref'd n.r.e.); see

> also 39 Aloysius Leopold, Texas Practice: Marital Property and Homesteads § 21.9–.10 (1993) (discussing live-in relationships). Thus, to the extent there is any difference between a meretricious relationship and a live-in relationship, ownership interests in property arising from such relationships are the same.FN5
>
> > FN5. Valderas and Antonio may have also held the property as tenants in common. See 16 Tex. Jur.3d Cotenancy and Joint Ownership, §§ 2, 7 (2006) (stating that tenancy in common is an undivided possessory interest in property and that a cotenancy is created when two or more persons share the unity of exclusive use and possession of the same property).

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

The court in *Small v. Harper*, 638 S.W.2d 24, 28 (Tex. App.–Houston [1st Dist.] 1982, writ ref'd n.r.e.), held that unmarried same-sex companions who both contributed labor or cash to the acquisition of assets had joint ownership interests in proportion to the labor or money each party contributed to the purchase money. The appellate court did not explicitly comment on the partnership theory also advanced by the plaintiff. *Small v. Harper* relied on *Hayworth v. Williams*, 116 S.W. 43 (1909), which held that a woman, who lived with a man she know was married to someone else, could establish her ownership of real property to the extent that the money used to buy the land was attributable to her labor. *Accord*, *Cluck v. Sheets*, 171 S.W.2d 860 (Tex. 1943). The appellate court in *Small v. Harper* held that there were no public policy considerations that would prevent the plaintiff from applying that law to her benefit. *Id.* at 28. *See Hovious v. Hovious*, 2005 WL 555219 (Tex. App.--Fort Worth 2005, pet. denied) (memo. opinion) (upon declaring a marriage void, "each party is entitled to the property acquired during the relationship in proportion to the value that his or her labor contributed to its acquisition") (citing Professor Leopold's publication on Texas marital property law and homesteads). In *Aaron v. Aaron*, 2012 WL 273766, *4 (Tex. App.--Houston [14th Dist.] 2012, no pet.), "[t]he trial court found that, even after Daryl and Kimberly had decided that the house would be purchased in Daryl's name alone, they purchased the Green Top Residence jointly and intended to be joint owners of the house, and that Kimberly paid one-half of the down payment and closing costs. The trial court concluded that Daryl and Kimberly jointly owned the Green Top Residence as tenants in common, each owning a one-half, undivided separate property interest in the house." The appellate court affirmed.

B. PARTNERSHIP. In *Jewell v. Jewell*, 602 S.W.2d 315, 317 (Tex. Civ. App.--Texarkana 1980, no writ), the court said: "If real property is purchased or paid for by partnership funds but record title is in one of the partners only, a court of equity may, in a proper case, impress it with a constructive or resulting trust in favor of the partnership, under the doctrine of equitable conversion." The interests in the partnership are not necessarily in proportion to the capital

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

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

> § 152.052. Rules for Determining if Partnership is Created
>
> (a) Factors indicating that persons have created a partnership include the persons':
>
> (1) receipt or right to receive a share of profits of the business;
> (2) expression of an intent to be partners in the business;
> (3) participation or right to participate in control of the business;
> (4) agreement to share or sharing:
> (A) losses of the business; or
> (B) liability for claims by third parties against the business; and
> (5) agreement to contribute or contributing money or property to the business.

(b) One of the following circumstances, by itself, does not indicate that a person is a partner in the business:

(1) the receipt or right to receive a share of profits as payment:

(A) of a debt, including repayment by installments;

(B) of wages or other compensation to an employee or independent contractor;

(C) of rent;

(D) to a former partner, surviving spouse or representative of a deceased or disabled partner, or transferee of a partnership interest;

(E) of interest or other charge on a loan, regardless of whether the amount varies with the profits of the business, including a direct or indirect present or future ownership interest in collateral or rights to income, proceeds, or increase in value derived from collateral; or

(F) of consideration for the sale of a business or other property, including payment by installments;

(2) co-ownership of property, regardless of whether the co-ownership:

(A) is a joint tenancy, tenancy in common, tenancy by the entirety, joint property, community property, or part ownership; or

(B) is combined with sharing of profits from the property;

(3) the right to share or sharing gross returns or revenues, regardless of whether the persons sharing the gross returns or revenues have a common or joint interest in the property from which the returns or revenues are derived; or

(4) ownership of mineral property under a joint operating agreement.

(c) An agreement by the owners of a business to share losses is not necessary to create a partnership.

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

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

C. JOINT VENTURE. "A joint venture is similar to a partnership, but it is ordinarily limited to a particular transaction or enterprise." *Pitts & Collard, L.L.P. v. Schechter*, 369 S.W.3d 301, 319 (Tex. App.--Houston [1st Dist.] 2011, no pet.). "A joint venture, being 'ex contractu,' must be based upon an agreement, either express or implied." *Coastal Plains Dev. Corp. v. Micrea, Inc.*, 572 S.W.2d 285, 287 (Tex. 1978). The Court continued: "Beyond this threshold requirement, several essential elements are generally recognized. These elements are (1) a community of interest in the venture, (2) an agreement to share profits, (3) an agreement to share losses, and (4) a mutual right of control or management of the enterprise." *Id.* at 287. "The intention of the parties to a contract is a prime element in determining whether or not a partnership or joint venture exists." *Id.* at 287. "A joint venture and a partnership are not synonymous, and many joint ventures are not partnerships even though there may be a sharing of profits." *Texas. Milberg Factors, Inc. v. Hurwitz-Nordlicht Joint Venture*, 676 S.W.2d 613, 616 (Tex. App.--Austin 1984, writ ref'd n.r.e.).

D. CONTRACT CLAIM. "In a suit based on contract, whether written or oral, the plaintiff is required to establish the basic elements of a

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

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

E. CLAIMS FOR SERVICES RENDERED (QUANTUM MERUIT). Non-marital companions, both same-sex and opposite sex, sometimes assert claims for services rendered. "It has long been the rule that one cannot voluntarily provide goods and services which one has no duty to provide, and then demand payment as restitution." *Intermarque Auto. Prods. v. Deldman*, 21 S.W.3d 544, 553 (Tex. App.--Texarkana 2000, no pet.). In *Martin v. de la Garza*, 38 S.W.2d 157 (Tex. Civ. App.--San Antonio 1931, writ dism'd), the appellate court quoted *Rockowitz v. Rockowitz*, 146 S.W. 1070, 1071-72 (Tex. Civ. App. 1912, no writ), where the appellate court said: "The rule is well settled that, where persons are living together as one household, services performed for each other are presumed to be gratuitous, and an express contract for remuneration must be shown or that circumstances existed showing a reasonable and proper expectation that there would be compensation." The same language was again quoted in *Salmon v. Salmon*, 406 S.W.2d 949, 951 (Tex. Civ. App.--Ft. Worth 1966, writ ref'd n.r.e.). A claim for services and money provided was rejected on summary judgment in *Coons-Andersen v. Andersen*, 104 S.W.3d 630 (Tex. App.--Dallas 2003, no pet.). There is a four-year statute of limitations on such claims, whether the claim is based on an express contract or lies in implied contract/quantum meruit. *Quigley v. Bennett*, 256 S.W.3d 356, 361 (Tex. App.--San Antonio 2008, no pet.). The limitations period begins when payment was due under an express contract. If no contract is proved, limitations on the quantum meruit claim begins to run at the time the services are rendered. *Scott v. Walker*, 141 Tex. 181, 170 S.W.2d 718 (1943).

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

1. Express Trust. An express trust comes into existence by the execution of an intention to create it by one having legal and equitable dominion over the property made subject to the trust. *Mills v. Gray*, 147 Tex. 33, 210 S.W.2d 985, 987-88 (1948). "(4) Under Tex. Prop. Code § 111.004, the term "'Express trust' means a fiduciary relationship with respect to property which arises as a manifestation by the settlor of an intention to create the relationship and which subjects the person holding title to the property to equitable duties to deal with the property for the benefit of another person." The key to an express trust is the actual intent to create a trust relationship. Thus, in *Cluck v. Sheets*, 171 S.W.2d 860, 862 (Tex. 1943), the Supreme Court upheld a jury finding "that at the time the title was conveyed to G. C. Cluck

there was an agreement between him and Mrs. Kallaher that it should be taken in the name of Cluck for the benefit of both." The Supreme Court made it clear that the claim established was an express trust, not a resulting trust. *Id.* In *Faglie v. Williams*, 569 S.W.2d 557, 566 (Tex. Civ. App.--Austin 1978, writ ref'd n.r.e.), the court considered a failed claim of common law marriage, and an alternate claim for co-ownership of land. The appellate court said: "To establish an express trust, appellant had the burden to show that at the time title was conveyed to Mike Williams there existed an agreement between appellant and Williams that the property would be taken in his name for the benefit of both of them." The appellate court cited *Cluck v. Sheets* as support.

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

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

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

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

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

> Resulting and constructive trusts are distinguishable, but there is some confusion between them. From a practical viewpoint, a resulting trust involves primarily the operation of the equitable doctrine of consideration - the doctrine that valuable consideration and not legal title determines the equitable title or interest resulting from a transaction - whereas a constructive trust generally involves primarily a presence of fraud, in view of which equitable title or interest should be recognized in some person other than the taker or holder of the legal title.

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

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

> § 1.108. Promise or Agreement Must be in Writing

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

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

At one time Texas Business & Commerce Code § 8.319 operated as a Statute of Frauds for the sale of corporate stock. In *Williams v. Gaines*, 943 S.W.2d 185, 189 (Tex. App.--Amarillo 1997, pet. denied), the court held that this Statute of Frauds did not apply to an oral agreement that contemplated the formation of a corporation and future issuance of stock. The court went on to say that "[t]he general law of contracts applies to pre-incorporation agreements." *Id.* at 190. In *GNG Gas Systems, Inc. v. Dean*, 921 S.W.2d 421, 428 (Tex. App.--Amarillo 1996, writ denied), the court held that an "agreement . . . for the parties to form the two corporations and to provide for the percentages of ownership of them" was not within the Statute of Frauds in Section 8.319. That provision of the Business and Commerce Code has been eliminated, but the view that an agreement for the future issuance of stock was not governed by the Statute of Frauds is instructive.

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

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

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

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

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

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

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

V. PARENT-CHILD ISSUES BETWEEN SAME-SEX DOMESTIC PARTNERS. 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. An adult either fits the definition of parent, or s/he doesn't. The term "parent" is defined for SAPCRs in the following way:

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

Parents automatically have standing to litigate parental rights of their children. If only one adult in a same-sex relationship is the natural or adoptive parent of a child, the adult who is not a parent will have to meet the standing requirements of non-parents in order to litigate parental rights. That typically will be "actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition." Tex. Fam. Code § 102.003(9). If the break-up is agreed-upon, parental rights and responsibilities can be awarded to the non-parent adult by an agreed order, subject to approval of the court.

VI. FAMILY VIOLENCE BETWEEN SAME-SEX DOMESTIC PARTNERS. The Texas Family Code contemplates the protection of individuals in same-sex relationships just as in traditional marital relationships. Texas Family Code Section 71.004 defines "family violence" as an act by a member of a family or household. Texas Family Code Section 71.005 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.

VII. MEDIATED SETTLEMENT AGREEMENTS. A significant area of litigation in the past year has involved the enforceability of mediated settlement agreements.

A. ORDINARY MARITAL PROPERTY AGREEMENTS. The Texas Family Code contains a long-standing provision for the settlement of divorce through written agreements, Section 7.006:

> Tex. Fam. Code § 7.006
>
> (a) To promote amicable settlement of disputes in a suit for divorce or annulment, the spouses may enter into a written agreement concerning the division of the property and the liabilities of the spouses and maintenance of either spouse. The agreement may be revised or repudiated before rendition of the divorce or annulment unless the agreement is binding under another rule of law.
>
> (b) If the court finds that the terms of the written agreement in a divorce or annulment are just and right, those terms are binding on the court. If the court approves the agreement, the court may set forth the agreement in full or incorporate the agreement by reference in the final decree.
>
> (c) If the court finds that the terms of the written agreement in a divorce or annulment are not just and right, the court may request the spouses to submit a revised agreement or may set the case for a contested hearing.

Thus, Section 7.006(a) permits either party to a "written agreement concerning the division of the property and the liabilities of the spouses and maintenance of either spouse" to repudiate the agreement prior to rendition of divorce "unless the agreement is binding under another rule of law." As explained below, the provisions in the Texas Family Code pertaining the non-revocable MSAs are such other rule of law.

Section 7.006(c) permits the trial court to reject such a written agreement if the court finds that the terms are not "just and right." However, the court may not dictate other terms; the court may tell the parties to go negotiate further, or the court can set the case for trial.

B. MSAs UNDER THE CIVIL PRACTICE AND REMEDIES CODE. Chapter 154 of the Texas Civil Practice and Remedies Code, entitled "Alternative Dispute Resolution Procedures," Section 154.071, Effect of Written Settlement Agreement, relates to settlements reached in alternate dispute resolutions procedures, including mediation. That statute provides:

> Tex. Civ. Prac. & Rem. Code § 154.071
>
> (a) If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract.
>
> (b) The court in its discretion may incorporate the terms of the agreement in the court's final decree disposing of the case.
>
> (c) A settlement agreement does not affect an outstanding court order unless the terms of the agreement are incorporated into a subsequent decree.

The appellate court in *In Matter of Marriage of Ames*, 860 S.W.2d 590, 592 (Tex. App.--marillo 1993, no writ), said this about an MSA in a divorce case:

> If voluntary agreements reached through mediation were non-binding, many positive efforts to amicably settle differences would be for naught. If parties were free to repudiate their agreements, disputes would not be finally resolved and traditional litigation would recur. In order to effect the purposes of mediation and other alternative dispute resolution mechanisms, settlement agreements must be

> treated with the same dignity and respect accorded other contracts reached after arm's length negotiations. Again, no party to a dispute can be forced to settle the conflict outside of court; but if a voluntary agreement that disposes of the dispute is reached, the parties should be required to honor the agreement.

However, under the law at the time, if a party to an MSA withdrew consent prior to rendition of judgment, the court could not render an agreed judgment. The Supreme Court said, in *Mantas v. Fifth Court of Appeals*, 925 S.W.2d 656, 658 (Tex. 1996):

> We recently reaffirmed that a written settlement agreement may be enforced though one party withdraws consent before judgment is rendered on the agreement. *See Padilla v. LaFrance*, 907 S.W.2d 454, 461 (Tex. 1995). Where consent is lacking, however, a court may not render an agreed judgment on the settlement agreement, but rather may enforce it only as a written contract. *Id.* at 462. Thus, the party seeking enforcement must pursue a separate breach-of-contract claim, which is subject to the normal rules of pleading and proof. *Id.*

Subsequent legislative action has changed the law for MSAs in divorces and suits affecting the parent-child relationship.

C. TITLE 1 MSAs (DIVORCE). At the time that *Padilla v. LaFrance* was decided a mediated settlement (MSA) agreement in a family law case was treated like any other contract. If either party backed out of the settlement agreement before judgment was rendered, the court could not render a consent judgment. Instead, the party seeking enforcement had to amend pleadings and seek specific performance, then file a motion for summary judgment on the contract. *See Padilla v. La France*, 907 S.W.2d 454, 462 (Tex. 1995). That still is the law outside of the Family Code. See Tex. Civ. Prac. & Rem. Code § 154.071(a) (" If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract"). The Legislature was not satisfied with this process in divorce cases, where parties were notorious about suffering "buyers' remorse" and wanting to get out of MSAs they had signed.

The Legislature desired to create a streamlined process for the rendition of judgment based on mediated settlement agreements. So the Legislature enacted Family Code Section 6.602, which now provides:

> § 6.602. Mediation Procedures
>
> (a) On the written agreement of the parties or on the court's own motion, the court may refer a suit for dissolution of a marriage to mediation.
>
> (b) A mediated settlement agreement is binding on the parties if the agreement:
>
> (1) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation;
>
> (2) is signed by each party to the agreement; and
>
> (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.
>
> (c) If a mediated settlement agreement meets the requirements of this section, a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.
>
> (d) A party may at any time prior to the final mediation order file a written objection to the referral of a suit for dissolution of a marriage to mediation on the basis of family violence

> having been committed against the objecting party by the other party. After an objection is filed, the suit may not be referred to mediation unless, on the request of the other party, a hearing is held and the court finds that a preponderance of the evidence does not support the objection. If the suit is referred to mediation, the court shall order appropriate measures be taken to ensure the physical and emotional safety of the party who filed the objection. The order shall provide that the parties not be required to have face-to-face contact and that the parties be placed in separate rooms during mediation.

The appellate court in *Toler v. Sanders*, 371 S.W.3d 477, 480 (Tex. App.--Houston [1st Dist.] 2012, no pet.), said of MSAs in a divorce: "When the agreement complies with these three requirements, it 'is binding on the parties' as soon as it is executed, and a party is 'entitled to judgment on the agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.'" The appellate court continued: "The Family Code does not authorize a court to modify an MSA, to resolve ambiguities or otherwise, before incorporating it into a decree." *Id.* And the court then said: "A mediated settlement agreement under section 6.602 is 'more binding than a basic written contract' because, except when a party has procured the settlement through fraud or coercion, nothing either party does will modify or void the agreement 'once everyone has signed it.'" *Id.*

However, exceptions to the rule have been recognized. In *Boyd v. Boyd*, 67 S.W.3d 398, 404–05 (Tex. App.--Fort Worth 2002, no pet.), the appellate court said that a trial court could refuse to enforce an MSA for "intentional failure to disclose substantial marital assets" when the agreement included a representation that "[e]ach party represents that they have made a fair and reasonable disclosure to the other of the property and financial obligations known to them"). In the case of *In re Joyner*, 196 S.W.3d 883, 889 (Tex. App.--Texarkana 2006, pet. denied), the appellate court said that a trial court is not required to enforce a mediated settlement agreement "if it is illegal in nature or was procured by fraud, duress, coercion, or other dishonest means." In *Morse v. Morse*, 349 S.W.3d 55, 56 (Tex. App.--El Paso 2010, no pet.), the appellate court noted that the appellant had cited "no authority that an MSA can be revoked due to a party's alleged intentional breach." However, the appellate court did not actually hold that intentional breach was not a ground for defeating an MSA. In *In re Marriage of Fannette*, 2013 WL 3533238, *5 (Tex. App.--Waco 2013, n.p.h.), the appellate court recognized that an MSA could be defeated where is was "illegal in nature or procured by fraud, duress, coercion, or other dishonest means," but ruled that the grounds had not been proven in that case.

In *Milner v. Milner*, 361 S.W.3d 615 (Tex. 2012), the parties disagreed about the way their mediated settlement agreement treated the division of husband's interest in a partnership. Under the Texas Business Organizations Code, a divorcing spouse can receive only an "transferee's interest" in the partnership. Tex. Bus. Org. Code § 152.406(a)(1).[1] The divorce court does not have the power to award a full partnership interest to the non-partner spouse. Tex. Bus. Org. Code § 152.406(a)(1). The MSA in *Milner* said: "Jack agrees to transfer to Vicki all of his beneficial interest and record title in and to the 44.055% community property interest in Thelin Recycling Company, LP, and the 44.5% community property interest in Thelin Management Company, LLC, subject to all liabilities thereon, (except a portion of the mineral interests, as set out herein) and all provisions of the existing Partnership Agreement." *Id.* at 620. Attached to the MSA was an exhibit for the partners to sign, allowing Wife to become a limited partner and not just hold a transferee's interest. Later it turned out that one of husband's

[1] The transferee's interest has the right to receive partnership distributions, but no right to management, Tex. Bus. Org. Code § 152.402(3), nor is the assignee subject to any liability as a partner, *Id.* at 152.402(c), this includes no duty to meet capital calls. *Id.* at § 152.403.

partners would not sign the exhibit. Wife sought to vitiate the MSA on the grounds that her status as a partner could not be achieved. The MSA contained an arbitration clause, but the parties took the issue to the Trial Court, which rejected wife's arguments and signed a decree of divorce. Wife appealed. The Court of Appeals reversed, saying that no "meeting of the minds" had occurred, so that the MSA was not a binding contract. The Supreme Court reversed the Court of Appeals, saying that the MSA was binding, but concluding that it was ambiguous. The Supreme Court remanded the case to the trial court to refer the case to arbitration to determine the meaning of the MSA regarding Wife's partnership interest. A three-Justice minority dissented from the majority Opinion, saying that the MSA was not ambiguous and clearly stated that the award of Husband's interest to Wife was subject to the provisions of the partnership agreement. In essence the Supreme Court *sub silencio* overturned the Court of Appeals ruling that the MSA did not constitute a binding contract, thereby avoiding a precedent that could have had troubling consequences for the streamlined rendition of divorces based on non-revocable mediated settlement agreements. In *Milner*, the Court made the statement: "Unlike other settlement agreements in family law, the trial court is not required to determine if the property division is 'just and right' before approving an MSA." *Id.* at 618. This is a clear indication that a trial court cannot refuse to approve an MSA because the Court does not think the property division is just and right.

The "meeting of the minds" view of contract formation, dating back to the famous "Peerless case" of *Raffles v. Wichelhaus*, [1864] EWHC Exch. J19, held that a contract arose only when the subjective intents of the contracting parties was identical. Since subjective intent was in the mind of each contracting party, a party seeking to avoid a contract after-the-fact had wide latitude to claim a misunderstanding as to the meanings of terms in the contract. The Parol Evidence Rule was developed to curtail evidence of intent that varied from the written words of the contract. In the late 1800s, Harvard law professor Christopher Columbus Langdell, followed by Massachusetts legal scholar and judge, Oliver Wendall Holmes, Jr., advocated the "objective view" of contract formation, in which the question of whether a contract arose was decided according to what a reasonable person would conclude, based on the language of the offer and acceptance in the context of surrounding circumstances. The objective theory of contract formation was adopted by Harvard law professor Samuel Williamson, who molded it into his famous Treatise on the Law of Contracts (1920) and later into the American Law Institute's Restatement of the Law of Contracts (1933), from whence it became bedrock contract law in the United States. While the equitable remedies of rescission or reformation are available to rectify injustices arising from flaws in reaching and drafting of agreements, equitable rescission rests upon fraud in the inducement or mutual mistake of fact, neither of which appear to have been established in the *Milner* case.

The troubling aspect of a pure "meeting of the minds" approach to divorce-related nonrevocable mediated settlement agreements is the fact that a post-mediation inquiry into the parties' subjective intents could lead to hearings or trials (even possibly jury trials) regarding intent, which would thwart the Legislature's intent to require courts to render judgment upon a simple motion, as prescribed by Family Code Section 6.602(c). Such hearings or trials would be complicated by the cloak of secrecy imposed on the mediation process by Texas Civil Practice and Remedies Code Sections 154.053 and 154.073, and the practical problem that in most mediations the parties do not negotiate directly with each other but rather communicate through the mediator. The mediator, by necessity, would be the central witness as to expressions of intent in the separate "caucus rooms." Such a deconstruction of the stages of the mediation process would be messy and is not likely to lead to a better resolution than just holding the parties to the mediated settlement agreement that

they signed. Even worse, the main selling point of mediation – complete privacy and achieving final resolution--would be jeopardized, causing a loss of confidence in mediation as an alternate dispute resolution process. As the Fourteenth Court of Appeals said in *Cayan v. Cayan*, 38 S.W.3d 161, 165, 166 (Tex. App.--Houston [14th Dist.] 2000, no pet.), "the purpose of alternative dispute measures is to keep parties out of the courtroom." Any approach that opens up wide vistas for litigating the enforceability of MSAs defeats that purpose.

In *Bracamontes v. Bracamontes*, 2013 WL 3895361 (Tex. App.--Corpus Christi 2013, n.p.h.) (mem. opinion), the Trial Court encountered a post-mediation dispute over the meaning of three provisions in a MSA. The first provision said that husband's debt to wife "shall be secured by all community assets including DHR stock." Husband argued that he should only have to put up collateral equal in value to the debt. The Trial Court agreed. The Court of Appeals reversed, holding that the Trial Court improperly deviated from the unambiguous language of the MSA. *Id.* at *2. The second provision of the MSA said that the provisions of the temporary orders pertaining to child support would be included in the decree. The temporary orders required husband to pay 100% of the children's health insurance premiums. Husband argued that he would pay 100% only if he could take the children as deductions on his tax return; otherwise he wanted to pay only half. The Trial Court ordered that husband would pay half. The Court of Appeals reversed, since the MSA unambiguously required that the decree include a provision that husband would pay 100%. *Id.* at *4. The third issue was a provision in the MSA saying that money from a "tax account" would be used to pay both parties' tax liabilities on income distributions from a certain business. Husband argued that he had saved this money to pay his own part of the tax liability on the income from the business, and he should have the sole benefit of that saving. The Trial Court ruled that wife had no right to funds from the tax account. The Court of Appeals reversed, saying that the MSA unambiguously required that the money be used to pay both parties' tax liabilities for that income. *Id.* at *5.

D. TITLE 5 MSAs (SAPCRS). The statute that governs the enforcement of mediated settlement agreements in SAPCRs is Texas Family Code Section 153.0071. That statute provides:

> (d) A mediated settlement agreement is binding on the parties if the agreement:
>
> > (1) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation;
> >
> > (2) is signed by each party to the agreement; and
> >
> > (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.
>
> (e) If a mediated settlement agreement meets the requirements of Subsection (d), a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.
>
> (e-1) Notwithstanding Subsections (d) and (e), a court may decline to enter a judgment on a mediated settlement agreement if the court finds that:
>
> > (1) a party to the agreement was a victim of family violence, and that circumstance impaired the party's ability to make decisions; and
> >
> > (2) the agreement is not in the child's best interest.

In the case of *In re Kasschau,* 11 S.W.3d 305, 310–11 (Tex. App.--Houston [14th Dist.] 2000, orig. proceeding), the appellate court affirmed the trial court's decision to refuse to enforce a mediated settlement agreement that required the destruction of illegally-recorded tape recordings, on the ground that the MSA required an illegal act (i.e., the destruction of evidence of a crime).

In *In re C.H.C.*, 396 S.W.3d 33 (Tex. App.--Dallas 2013, no pet.), the appellate court asked whether the defenses of lack of consideration and failure of consideration apply to non-revocable mediated settlement agreements, but did not answer that question because the defenses had not been established in that case.

A serious dispute regarding the rendition of judgment on a non-revocable MSA in a SAPCR arose in *In re Lee*, 411 S.W.3d 445, 449 (Tex. 2013). In that case trial court refused to render judgment on an MSA when the court believed that the MSA was not in the child's best interest. The Court of Appeals affirmed. The Supreme Court split 5-to-4 in favor of requiring rendition of judgment on the MSA. The Supreme Court handed down a 5-4 decision requiring that judgment be rendered on the MSA. The Majority Opinion by Justice Deborah Lehrmann framed the case in the following way:

> The sole issue before us today is whether a trial court presented with a request for entry of judgment on a validly executed MSA may deny a motion to enter judgment based on a best interest inquiry.FN6 While Texas trial courts have numerous tools at their disposal to safeguard children's welfare, the Legislature has clearly directed that, subject to a very narrow exception involving family violence, denial of a motion to enter judgment on an MSA based on a best interest determination, where that MSA meets the statutory requirements of section 153.0071(d) of the Texas Family Code, is not one of those tools. Accordingly, the trial court in this case abused its discretion by denying entry of judgment on the MSA and setting the matter for trial.

Id. at 450. Justice Lehrmann went on to say that a trial court concerned about the welfare of a child in the face of an MSA can (i) report the child to Child Protective Services, (ii) enter temporary orders pending finality of judgment or pending appeal, (iii) appoint an attorney ad litem or amicus attorney, (iv) grant a motion to modify (if one is filed), or (v) grant a habeas corpus order (upon proper motion). *Id.* at 456-57. Justice Guzman's Concurring Opinion points out that "a majority of the Court agrees that if there is evidence of endangerment, an additional mechanism the trial court possesses to protect the child is to refuse to enter judgment on the MSA." *Id.* at 462. Justice Guzman goes on to explain that "I write separately because although I agree with Court that section 153.0071 precludes a broad best-interest inquiry, I also believe that it does not preclude an endangerment inquiry." *Id.* at 462. Justice Guzman continues: "I agree with the dissent to the extent it believes that a contextual reading of the Family Code allows a narrow inquiry into whether entering judgment on an MSA could endanger the safety and welfare of a child." *Id.* at 463-64. Justice Guzman concludes: "In sum, I believe section 153.0071 of the Family Code precludes a broad best-interest inquiry. A trial court may, however, when presented with evidence that entering judgment on an MSA could endanger the safety and welfare of a child, refuse to enter judgment on the MSA." *Id.* at 466. Justice Green, in his Dissenting Opinion, said:

> Trial courts, therefore, should refrain from performing a broad best interest inquiry or conducting a full evidentiary hearing on every MSA presented. The question here is what happens when the trial court believes, based on evidence, that the parties have entered into an MSA without safeguarding the child's best interest. Can the presumption that parties act in the child's best interest, and protect the child's safety and welfare, be rebutted or

> negated? And does the Family Code, in that situation, allow the trial court to ensure that the child's safety and welfare are protected by refusing to enter judgment on an MSA that places the child in danger? I believe the answer to both questions is yes.

Id. at 470. Justice Green goes on to describe his view as "[a]llowing trial court discretion to consider the terms of an MSA in rare cases such as this . . . ." Thus, Justice Green, and the three Justices who joined his Dissenting Opinion, seem to envision a limited factual inquiry that would lead to rejection of MSAs only in "rare cases." It should be noted, however, that Justice Green was disturbed by the language of the MSA itself, for it gave the mother unsupervised possession of the child even though she had married a convicted sex offender and had allowed him unsupervised access to the child. *Id.* at 475. Justice Green noted that the MSA required the husband to stay away from the child, but the MSA did not impose any restriction on Stephanie, a party, but instead imposed a restriction on her husband, who was not a party to the proceeding. Justice Green said that he saw no abuse of discretion in the trial court's "refusing to enter judgment on the MSA and ordering a *full evidentiary hearing*." [Emphasis added.]

So, what does a trial court do in such a situation, given these Opinions to work with? As Justice Guzman explains in her Concurring Opinion, Justice Lehrmann's Opinion is a majority opinion as to parts I, II, III, V, VII, but only a plurality opinion as to Parts IV and VI. *Id.* at 461 n. 1. Furthermore, Justice Guzman agrees with the dissenting justices that the Family Code "does not preclude an endangerment inquiry." *Id.* at 62. When the U.S. Supreme Court splits into partial pluralities, concurrences, and dissents, it is customary to interpret the majority view to extend only as far as the partially concurring justice agrees, and to interpret the dissenters' view to be a majority view to the extent that the concurring justice's view gives it a majority. Using that principle, and reading Justice Guzman's swing vote in this light, we can say that, where the parties have signed a nonrevocable MSA in a SAPCR, a majority of the Supreme Court thinks that a broad-based inquiry into best interests is not allowed, but that a factual inquiry into endangerment of the child is allowed. The recitals about public policy favoring settlement, and the use of the words "narrow" and "rare" in these Opinions, suggest that a trial court engaging in such review should limit the scope of such proceedings (perhaps by limiting the number of witnesses) and keep the presentation of evidence focused on endangerment and excluding evidence that might address best interest without rising to the level of endangerment.

E. CANNOT VARY THE TERMS OF AGREED JUDGMENT. It has long been the law in Texas that a court may not vary the terms of an agreed judgment from what the parties agreed upon. In *Matthews v. Looney*, 132 Tex. 313, 317, 123 S.W.2d 871, 872 (1939), the Supreme Court said:

> It is elementary that a judgment by consent is one the terms and provisions of which are settled and agreed upon by the parties, and which is entered of record by the sanction and authorization of the court. It is of course essential that the parties themselves agree upon all of the terms and provisions, and the court has no power to supply terms, provisions, or essential details not previously agreed to by the parties.

The same principle applies to judgments based on MSAs.

F. AMBIGUITY. Apart from the question of rescission based on misrepresentation, fraud, and illegality, many late-night, last-gasp, hand-written MSAs present the issue of ambiguity as to the meaning of the MSA. In *Bracamontes v. Bracamontes*, 2013 WL 3895361 (Tex. App.--Corpus Christi 2013, no pet.) (mem. op.), the appellate court applied ordinary rules for interpreting contracts to a claim of ambiguity in an

MSA. So, too, did the Supreme Court in *Milner v. Milner*, 361 S.W.3d 615 (Tex. 2012).

G. AGREEMENT TO ENTER INTO A FUTURE CONTRACT. In many instances, the parties will agree at the time of mediation to enter into a later contract such as an agreement incident to divorce. The Texas Supreme Court recently ruled that an agreement that includes all the terms necessary for the contract's enforcement is an enforceable contract as a matter of law, even if some of its terms seem to imply that the parties contemplate forming an additional contract in the future. *See McCalla v. Baker's Campground, Inc.*, 2013 WL 5228494 (Tex. August 23, 2013).

H. AN ARBITRATION CLAUSE. The State Bar of Texas' Family Law Section's Texas Family Law Practice Manual contains a form MSA. The form does not contain an arbitration clause, but many MSAs do. The following imaginary arbitration clause is adapted from the language in the form book MSA.

> If any dispute arises with regard to the interpretation or performance of this agreement or any of its provisions, the parties will attempt to mediate the disputes, and failing agreement the mediator shall act as arbitrator of the disputes. The decision of the arbitrator shall be final and binding.

This is a short paragraph in a long document, but it has a large impact. This paragraph is an arbitration clause. Although the issues to be arbitrated are disputes regarding "interpretation or performance" (the language is taken from the form MSA), a disagreement as to interpretation of the MSA is a disagreement about what it is that the parties agreed to. Some MSAs agree to arbitrate "drafting disputes." However, disputes about *drafting* can result from disagreements about *interpretation*. But the arbitration provision does not say "drafting *and interpretation*." Can disputes over interpreting the MSA be distinguished from disputes over drafting, so that we can say drafting interpretation are not subject to arbitration while disputes over drafting are? That's a very fine distinction to try to draw.

Another arbitration provision might read:

> All disputes arising from this MSA shall be resolved in binding arbitration before the mediator acting as arbitrator. The arbitrator's decision will be final.

The "all disputes" language has been interpreted many times in many courts across the country (albeit in contracts that are not MSAs) to include questions regarding the enforceability of the agreement.

Many judges are inclined to resolve disputes over the decretal language in a court hearing, notwithstanding an arbitration clause. A trial court will be reversed on interlocutory appeal for failing to refer a dispute to arbitration where the dispute comes within the scope of an arbitration provision. *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51 (Tex. 2008).

1. The Scope of the Arbitration Provision. "Arbitration of disputes is strongly favored under federal and state law." *Prudential Securities Inc. v. Marshall*, 909 S.W.2d 896, 898 (Tex. 1995). Courts must resolve any doubts as to the agreement's scope, waiver, and other issues unrelated to its validity in favor of arbitration. *Ellis v. Schlimmer*, 337 S.W.3d 860, 862 (Tex. 2011). Once the existence of a valid arbitration agreement is established, "courts should resolve any doubts as to the agreement's scope, waiver, and other issues unrelated to its validity in favor of arbitration." *Ellis v. Schlimmer*, 337 S.W.3d 860, 862 (Tex. 2011). "A court should not deny arbitration unless the court can say with positive assurance that an arbitration clause is not susceptible of an interpretation that would cover the claims at issue." *Baty v. Bowen, Miclette & Britt, Inc.*, --- S.W.3d ----, 2013 WL 2253584 (Tex. App.--Houston [14th Dist.] 2013, pet. denied).

The recent Supreme Court case of *Milner v. Milner*, 361 S.W.3d 615 (Tex. 2012), involves a written MSA with a clause saying that any dispute regarding the language in the Agreed Final Decree or other documents necessary to effectuate the MSA's terms would be arbitrated. *Id.* at 622. The husband and the wife put forth competing interpretations of the MSA. The wife claimed that these differing interpretations showed that they had never really reached an agreement in the first place. The court of appeals ruled that the parties meant different things with regard to one passage in the MSA, so that there was no meeting of the minds (one of Delia's allegations in this case) and the MSA therefore failed. *Id.* at 616. The Supreme Court rejected the meeting-of-the-minds analysis and held that there was an ambiguity in the MSA, but that the ambiguity would have to be resolved in arbitration. *Id.* at 622.

2. Matters That Are Intertwined. Case law holds that related claims are subject to arbitration if the facts alleged "touch matters" or have a "significant relationship" to the issue that is the subject of the arbitration agreement. *In re BP America Production Company*, 97 S.W.3d 366, 370 (Tex. App.--Houston [14th Dist.] 2003, orig. proceeding) ("To be within the scope of an arbitration provision, the allegations need only be factually intertwined with arbitrable claims or otherwise touch upon the subject matter of the agreement containing the arbitration provision"); *accord*, *Enterprise Field Services, LLC v. TOC-Rocky Mountain,* 405 S.W.3d 767, 773 (Tex. App.--Houston [1st Dist.] 2013, pet. denied) (quoting In re BP America Production Company); *In re Medallion, Ltd.*, 70 S.W.3d 284, 288 (Tex. App.–San Antonio 2002, orig. proceeding) ("if the facts alleged 'touch matters,' have a 'significant relationship' to, are 'inextricably enmeshed' with, or are 'factually intertwined' with the contract that is subject to the arbitration agreement, the claim will be arbitrable"); *In re Profanchik*, 31 S.W.3d 381, 385 (Tex. App.--Corpus Christi 2000, orig. proceeding); *Pennzoil Co. v. Arnold Oil Co., Inc.*, 30 S.W. 494, 498 (Tex. App.–San Antonio 2000, no pet.); *Hou-Scape, Inc. v. Lloyd*, 945 S.W.2d 202, 205–06 (Tex. App.--Houston [1st Dist.] 1997, orig. proceeding).

3. Are Defenses to Enforcement of the MSA Arbitratable? Many times when a litigant wants to escape from a contract, particularly an MSA, they will allege fraud in the inducement, duress, overreaching, and more recently a lack of a meeting of the minds. Are those defenses subject to arbitration? The answer to that question turns on the scope of the arbitration provision. If the arbitration provision in the MSA is broad enough to include a question regarding the enforceability of the MSA, then there are rules about whether those claims are to be arbitrated or litigated in court. The Supreme Court explained in *In re Labatt Food Service, L.P.*, 279 S.W.3d 640, 647-48 (Tex. 2009):

> There are two types of challenges to an arbitration provision: (1) a specific challenge to the validity of the arbitration agreement or clause, and (2) a broader challenge to the entire contract, either on a ground that directly affects the entire agreement, or on the ground that one of the contract's provisions is illegal and renders the whole contract invalid. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006). A court may determine the first type of challenge, but a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator. *Id.* at 448–49, 126 S.Ct. 1204; *see Prima Paint*, 388 U.S. at 403–04, 87 S.Ct. 1801 (claim of fraud in the inducement of arbitration clause itself may be adjudicated by court, but court may not consider claim of fraud in the inducement of the contract generally) . . . .

The Supreme Court has laid down the rule that applies when a party to an agreement containing an arbitration provision claims fraud in the

inducement. In *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 56 (Tex. 2008), the Court said:

> While an arbitration agreement procured by fraud is unenforceable,[FN12] the party opposing arbitration must show that the fraud relates to the arbitration provision specifically, not to the broader contract in which it appears. [FN13] If a trial court finds that the claim falls within the scope of a valid arbitration agreement, the "court has no discretion but to compel arbitration and stay its own proceedings."

This agrees with the earlier decision of *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 756 (Tex. 2001), where the Court said that "defenses must specifically relate to the Arbitration Addendum itself, not the contract as a whole, if they are to defeat arbitration." The Court restated this rule in *In re Lyon Financial Services, Inc.*, 257 S.W.3d 228, 232 (Tex. 2008), where it said: "We have held that fraudulent inducement to sign an agreement containing a dispute resolution agreement such as an arbitration clause or forum-selection clause will not bar enforcement of the clause unless the specific clause was the product of fraud or coercion." The Supreme Court explained the supporting rationale in *In re Prudential Ins. Co. of America*, 148 S.W.3d 124, 134-35 (Tex. 2004):

> Any provision relating to the resolution of future disputes, included as part of a larger agreement, would rarely be enforced if the provision could be avoided by a general allegation of fraud directed at the entire agreement. The purpose of such provisions—to control resolution of future disputes—would be almost entirely defeated if the assertion of fraud common to such disputes were enough to bar enforcement. The United States Supreme Court has explained that arbitration and forum-selection clauses should be enforced, even if they are part of an agreement alleged to have been fraudulently induced, as long as the specific clauses were not themselves the product of fraud or coercion. We have applied the same rule in the context of arbitration.

I. INFORMAL SETTLEMENT AGREEMENTS. Texas Family Code Section 6.604 describes an informal settlement conference, a sort of mediation without a mediator. Informal settlement conferences can be conducted with or without the parties' attorneys. Tex. Fam. Code § 6.604(a). If the parties sign a written settlement agreement, that agreement can be made nonrevocable by providing, in a prominently displayed statement that is boldfaced type or in capital letter or underlined that the agreement is not subject to revocation. *Id.* at § 6.604(b). If a party's attorney is present, s/he also must sign. If these conditions are met, either party is entitled to judgment on the agreement. The court has the power to reject an informal settlement agreement, and to send the parties back to negotiations or to set the case for trial. There are unmistakable parallels between the MSA procedures and the informal settlement agreement procedures, but note that MSAs are not subject to being rejected by the court. While the MSA procedures for divorce and SAPCRs are fairly parallel, there is no counterpart to informal settlement agreements for SAPCRs.

END

ENDNOTES

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

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

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

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

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

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

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

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

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