

# Same-Sex Marriages and Gender Identity Issues

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**Richard R. Orsinger**  
richard@ondafamilylaw.com

Orsinger, Nelson, Downing & Anderson, L.L.P.  
San Antonio Office:  
310 S. St. Mary's Street, 26<sup>th</sup> Floor  
San Antonio, Texas 78205  
(210) 225-5567  
<http://www.orsinger.com>

and

Dallas Office:  
5950 Sherry Lane, Suite 800  
Dallas, Texas 75225  
(214) 273-2400  
<http://www.ondafamilylaw.com/our-attorneys/richard-r-orsinger>

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## CURRICULUM VITAE OF RICHARD R. ORSINGER

- Education:** Washington & Lee University, Lexington, Virginia (1968-70)  
University of Texas (B.A., with Honors, 1972)  
University of Texas School of Law (J.D., 1975)
- Licensed:** Texas Supreme Court (1975); U.S. District Court, Western District of Texas (1977-1992; 2000-present); U.S. District Court, Southern District of Texas (1979); U.S. Court of Appeals, Fifth Circuit (1979); U.S. Supreme Court (1981)
- Certified:** Board Certified by the Texas Board of Legal Specialization Family Law (1980), Civil Appellate Law (1987)

### Organizations and Committees:

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

### Professional Activities and Honors:

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

State Bar of Texas Family Law Section's *Dan R. Price Award* for outstanding contributions to family law (2001)

State Bar of Texas *Certificate of Merit*, June 1997

State Bar of Texas *Gene Cavin Award for Excellence in Continuing Legal Education* (1996)

State Bar of Texas *Certificate of Merit*, June 1996

State Bar of Texas *Certificate of Merit*, June 1995

### **Professional Recognition:**

Listed as San Antonio Scene's Best Lawyers in San Antonio (2014)

Listed in Martindale-Hubbell/ALM - Top Rated Lawyers in Texas (2014)

Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly Super Lawyers Survey* (2013)

Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly Super Lawyers Survey* (2012)

Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly Super Lawyers Survey* (2010 - 3<sup>rd</sup> Top Point Getter)

Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly Super Lawyers Survey* (2009)

Listed as Family Lawyer of the Year by BEST LAWYERS (2012)

Listed as Family Lawyer of the Year by BEST LAWYERS (2011)

Listed as Texas' Top Family Lawyer, Texas Lawyer's *Go-To-Guide* (2007)

Listed as one of Texas' Top 100 Lawyers, and Top 50 Lawyers in South Texas, *Texas Monthly Super Lawyers Survey*(2003-2013)

Listed in the BEST LAWYERS IN AMERICA: Family Law (1987-2014); Appellate Law (2007-2014)

### **Continuing Legal Education and Administration:**

Course Director, State Bar of Texas:

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

### **Books and Journal Articles:**

—Editor-in-Chief of the State Bar of Texas' TEXAS SUPREME COURT PRACTICE MANUAL (2005)

—Chief Editor of the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL (Vols. II & III) (1999)

—Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992) (900 + pages)

—*A Guide to Proceedings Under the Texas Parent Notification Statute and Rules*, SOUTH TEXAS LAW REVIEW (2000) (co-authored)

—*Obligations of the Trial Lawyer Under Texas Law Toward the Client Relating to an Appeal*, 41 SOUTH TEXAS LAW REVIEW 111 (1999)

- Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress, in Connection With a Divorce*, 25 ST. MARY'S L.J. 1253 (1994), republished in the AMERICAN JOURNAL OF FAMILY LAW (Fall 1994) and Texas Family Law Service *NewsAlert* (Oct. & Dec., 1994 and Feb., 1995)
- Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)
- Characterization of Marital Property*, 39 BAY. L. REV. 909 (1988) (co-authored)
- Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage That Crosses States Lines*, 13 ST. MARY'S L.J. 477 (1982)

## SELECTED CLE SPEECHES AND ARTICLES

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

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

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

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

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

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

## A NEW DAY: SAME SEX MARRIAGES; EMERGING GENDER IDENTITY ISSUES

by Richard R. Orsinger

*Obergefell v. Hodges*. On June 26, 2015, the United States Supreme Court determined that, in the eyes of the law, marriage in America includes marriages between two persons of the same gender. This was the decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). According to a 5-to-4 majority of the Justices, this “marriage equality” is required by the Fourteenth Amendment to the U.S. Constitution, both because substantive due process protects the fundamental right to marry the person of your choice, and because the equal protection clause requires that same sex marriages be treated as equal to heterosexual marriages. The decision requires states both to grant same-sex marriages and to recognize same-sex marriages validly granted elsewhere.

*Applies to Texas*. Texas was not a party to the *Obergefell* appeal, but Federal District Judge Orlando Garcia had previously ruled, back on February 26, 2014, that Texas’ constitutional<sup>1</sup> and statutory<sup>2</sup> bans on same-sex marriage violate the Fourteenth Amendment. Judge Garcia stayed the effect of his decision pending appeal to the Fifth Circuit Court of Appeals, but he lifted the stay hours after the *Obergefell* decision was released, and six days later his decision was affirmed by the Fifth Circuit Court of Appeals.<sup>3</sup> Initially, Texas Governor Greg Abbott announced that Texas officials were not bound to apply the *Obergefell* decision if it violated their religious beliefs. On June 28, 2015, Texas Attorney General Ken Paxton released a defiant letter, addressed to Texas’ Lieutenant Governor, calling the Supreme Court’s *Obergefell* ruling “lawless” and “flawed,” and saying that county clerks and employees might be able to refuse to issue same-sex marriage licenses based on personal religious objections, and that state judges were not required to conduct same-sex weddings if that conflicted with their personal religious views.<sup>4</sup> However, the Attorney General reconsidered his position, at least in so far as issuing an amended death certificate, when ordered to appear in Judge Orlando Garcia’s Federal District Court to show cause why he should not be held in contempt of court. Several county clerks in Texas initially refused to issue same-sex marriage licenses, but after suits were filed they all backed down. In Kentucky, a county clerk did not back down, and she was held in contempt by a federal district judge and spent five days in jail, until she agreed for her office to issue marriage certificates for same-sex marriages.<sup>5</sup> Pending appeals of cases involving the validity of same-sex marriage have been returned to the trial court by Texas courts of appeals.<sup>6</sup> A temporary injunction prohibiting the City of Houston from providing spousal benefits to same-sex spouses of city employees was reversed based on *Obergefell*.<sup>7</sup>

While the validity of same-sex marriages is now established, there are questions still to be answered about how newly-recognized same-sex marriages will mesh with other family law issues.

Precedents. While the U.S. Supreme Court’s 2015 decision in *Obergefell* was startling to some, it was actually the culmination of a long process that in America began with the Hawaii Supreme Court’s 1993 decision that Hawaii’s ban against same-sex marriage violated the equal protection clause of the Hawaii constitution.<sup>8</sup> In 2003, the U.S. Supreme Court struck down Texas’ criminal law prohibiting sodomy, based on a substantive due process protection of the right to privacy in consensual sexual matters.<sup>9</sup> Another milestone occurred in 2003 when the Massachusetts Supreme Court ruled that the Massachusetts Constitution required equal treatment of heterosexual and same-sex marriage.<sup>10</sup> In 2010, eight federal district courts ruled that the part of the 1996 Defense of Marriage Act (DOMA), that limited Federal recognition of marriage to heterosexual marriages, was unconstitutional. On February 23, 2011, U.S. Attorney General Eric Holder said in a letter addressed to the Speaker of the House of Representatives that the Justice Department would no longer defend the DOMA in litigation. On May 9, 2012, President Obama stated in a television interview that he had arrived at the personal decision to accept same-sex marriage. In 2013, in *U.S. v. Windsor*, 133 S. Ct. 2675 (2013), the Supreme Court struck down the part of the DOMA that required Federal agencies to ignore same-sex marriage even where they were legally recognized under the law of marital residence, relying on the due process clause of the Fifth Amendment and the fact that the U.S. Constitution did not give the Federal government the power over marriage. That same day, in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), the Supreme Court dismissed the appeal from a ruling invalidating California’s constitutional ban against same-sex marriages, saying that the California Attorney General’s refusal to defend the law on appeal meant that there was no case or controversy for Federal appellate courts to rule on. That ruling resulted in the recognition of same-sex marriages in California by virtue of an unreviewed decision of a single federal judge. During 2014, the U.S. Supreme Court denied review in three cases where U.S. courts of appeals had invalidated state constitutions and statutes that denied the validity of same-sex marriages. The result was to leave in place circuit court decisions invalidating such laws in West Virginia, North Carolina, South Carolina, Kansas, Colorado, and Wyoming. Thus, the decision in *Obergefell* had many precedents.

Cases; Weddings. The decision in *Obergefell*, and the few follow-up enforcement proceedings to date, make it clear that Texas judges, in ruling on cases, must recognize same-sex marriages as being valid on the same terms as opposite-sex marriages. Whether the failure to do so would subject a judge to contempt of a Federal court, or a sanction from The Judicial Conduct Commission, as opposed to reversal on appeal, are unanswered questions. Also unclear is whether Texas judges, who by law have the authority to marry couples,<sup>11</sup> are required to perform same-sex marriages. The indications coming from other states suggest that no judge is required to perform marriages, but if s/he does, s/he must perform both opposite-sex and same-sex marriages.<sup>12</sup> However, Texas has no gay anti-discrimination law, so the question of whether Texas judges are obligated to conduct same-sex marriages is more a matter of judicial ethics than law. Texas' Pastor Protection Act allows religious organizations and the clergy to refuse to perform weddings that violate "a sincerely held religious belief."<sup>13</sup> But the foundation for that exemption is the First Amendment freedom of religion, which will not extend to actions by judges acting in their official capacity. As noted above, Texas Attorney General Ken Paxton wrote, on June 28, 2015:

Justices of the peace and judges similarly retain religious freedoms, and may claim that the government cannot force them to conduct same-sex wedding ceremonies over their religious objections, when other authorized individuals have no objection, because it is not the least restrictive means of the government ensuring the ceremonies occur. The strength of any such claim depends on the particular facts of each case.<sup>14</sup>

More detail of his reasoning is set out later in the Opinion. On July 1, 2015, the Office of Harris County, Texas Attorney Vince Ryan issued a letter to all Harris County justices of the peace and county judges advising them that "[a] judge or justice of the peace is authorized to perform a marriage but is under no obligation to do so. However, once the judge elects to undertake the performance of marriages, the service must be offered to all (including same-sex couples) in a non-discriminatory manner."<sup>15</sup>

Retroactivity. Texas Attorney General Ken Paxton and others have questioned whether *Obergefell* is retroactive in effect. The start date of marriage can affect community property rights, among other things. It seems clear that a same-sex marriage, occurring in a jurisdiction where it was lawful from its inception, is valid in Texas from the inception of the marriage. Not so clear is whether a same-sex purported marriage, that occurred in a jurisdiction where it was then prohibited, is now retroactively validated back to the date of the ceremony. The State of Texas is now (thanks to Federal Judge Garcia) issuing amended death certificates for persons who died before *Obergefell* was decided, which as a practical

matter is giving that decision retroactive effect. But the legal question of retroactivity is still unresolved. The IRS applied *U.S. v. Windsor* prospectively from the date it issued the Revenue Ruling implementing that decision.<sup>16</sup> However, the IRS also permits – but does not require – administrators of qualified retirement plans to recognize same-sex marriage retroactive to a date prior to *U.S. v. Windsor*.<sup>17</sup> And the IRS allows persons to amend tax returns to take advantage of *U.S. v. Windsor* all the way back to when the limitations period has expired.<sup>18</sup>

Informal Marriage. Another question is whether an informal same-sex marriage, which in Texas requires the parties to agree to be married, followed by cohabitation and "holding out," all within the State, can exist retroactive to a time when an informal same-sex marriage was not allowed. The Internal Revenue Service has long recognized an informal marriage that was valid under the law of the state where it was entered into, without regard to the law of subsequent domiciles.<sup>19</sup> The IRS is taking the same approach to same-sex marriage: a same-sex marriage is recognized only if it was valid in the state where it was entered into.<sup>20</sup> A party claiming an informal same-sex marriage under Texas law prior to *Obergefell* cannot show that the marriage was valid under Texas law at the time it was entered into. Thus, the validity of an alleged same-sex informal marriage predating *Obergefell* turns on whether that decision has retroactive effect—a question that is yet to be answered.

Death Certificates; Birth Certificates. When the decision in *Obergefell* was announced, Federal District Judge Orlando Garcia issued an order enjoining the State of Texas from enforcing any law that prohibits or fails to recognize same-sex marriages. A new party<sup>21</sup> intervened in the case in Judge Garcia's court, alleging that the Bexar County Clerk, the Texas Attorney General, and the interim State Commissioner of Health Services, were refusing to issue an amended death certificate. Judge Garcia ordered the Attorney General and Commissioner to appear in his court and show cause why they should not be held in contempt of Judge Garcia's earlier order invalidating Texas' ban on same-sex marriage. The Attorney General filed a brief saying that the amended death certificate would issue but that a legal question existed as to the retroactivity of *Obergefell*.

Civil Unions. *Obergefell v. Hodges* requires recognition of same-sex marriages, but not of civil unions. The Texas Constitution and Texas Family Code still prohibit recognition of a civil union, which the Family Code defines as "any relationship status other than marriage that: (i) 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." So far, this prohibition has not been touched by cases interpreting *Obergefell* and it remains the

law of Texas. The IRS does not treat registered domestic partnerships or civil unions as a marriage, and that position was not altered after *U.S. v. Windsor*,<sup>22</sup> which in part was based on the due process clause in the Fifth Amendment.

*Polygamous Marriages.* The states of the United States permit only marriages between two persons, not more. The history was plainly stated in *Reynolds v. U.S.*, 98 U.S. 145, 165 (1878):

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

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

In Africa polygamy is widely accepted where it is not widely practiced. Islamic law (Shari'a law) permits "plural marriages" in some situations. It is estimated that 1 to 3% of marriages in the Islamic world are polygamous. Under Shari'a law, a man can take up to four wives, provided he can afford to support them all and the children he has with them. Polygamy is legal, subject to varying conditions, in Iraq, Syria, Morocco, Algeria, Jordan, Yemen, Egypt, Indonesia, Muslims in India, Bangladesh, Pakistan, Muslims in Sri Lanka, Singapore, Camaroon, Burkina Faso, Gabon (where polygamy is the default), Bhutan, and nations in Africa that apply "African customary law." Polygamous marriage validly entered into in another country are recognized in England, Australia and New Zealand. The courts of France, Belgium, Spain, and Canada do not recognize plural marriage but will afford some marital-rights to persons in such relationships.<sup>23</sup> One National Public Radio report related that academics researching the issue estimate that 50,000 to 100,000 people in the United States live in polygamous families.<sup>24</sup> At some point, American courts will have to address persons in the United States in polygamous marriages that were valid in the country where the marriages were celebrated. The argument in *Obergefell*, that the freedom to choose whom to marry is protected by the Fourteenth Amendment, will have to be weighed against the argument that you are free to marry more than one other person. Some American polygamists have one legal marriage to one woman and "spiritual" marriages to one or more other women. The state of Utah criminalized such

relationships. In 2013, a Federal District Judge invalidated the Utah law purporting to criminalize cohabitation with more than one woman, but left intact the ban on marriage to multiple partners.<sup>25</sup> Texas Penal Code Section 25.01 criminalizes bigamy, which it defines as a married persons purporting to marry or marrying someone other than his spouse "in this state, or any other state or foreign country . . ." The statute also criminalizes a married person living with a person not his or her spouse "under the appearance of being married."<sup>26</sup> Thus, Texas law criminalizes polygamous marriages around the world. The Texas statute also makes it a crime to be married and to live "with a person other than his spouse in this state under the appearance of being married."<sup>27</sup> The statute defines "under the appearance of being married" as "holding out that the parties are married with cohabitation and the intent to be married by either party."<sup>28</sup> These are the same elements required to prove an informal marriage in Texas.<sup>29</sup>

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

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

*Marriages to Relatives.* In Texas, a person is not supposed to marry a brother or sister, an ancestor or descendant, an aunt or uncle, a niece or nephew, a first cousin, or a present or former step-child. This is accomplished by requiring an application form for marriage license in which the applicants must swear that they are not related within the prohibited degree of consanguinity or affinity.<sup>30</sup> False swearing to this part of the application is a Class A misdemeanor.<sup>31</sup> However, falsity in this part of the application does not render the marriage void.<sup>32</sup> Marriage between first cousins is omitted from the list of void marriages contained in Family Code Section 6.201. Thus, a marriage between first cousins is not supposed to occur in Texas, but such a marriage is not void. However, the Texas Penal Code makes sexual relations between first cousins a third degree felony.<sup>33</sup> The constitutionality of these strictures is in doubt. Marriage between first cousins is permitted in Alabama, Alaska, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Maryland, Massachusetts, New

Jersey, New Mexico, New York, North Carolina, Rhode Island, South Carolina, Tennessee, Vermont, and Virginia. Some states allow first cousins to marry only under certain circumstances: Arizona, if both are 65 or older, or one is unable to reproduce; in Illinois, if both are 50 or older, or one is unable to reproduce; in Indiana, if both are at least 65; in Maine, if the couple obtains a physician's certificate of genetic counseling; in Utah, if both persons are 65 or older, or if both are 55 or older and one is unable to reproduce; Wisconsin, if the woman is 55 or older, or one is unable to reproduce.<sup>34</sup> Texas law does not prohibit recognition of marriages between first cousins that were valid where contracted.

*Under Age Marriage.* In Texas, ordinarily a person must be 18 years of age or older, in order to marry.<sup>35</sup> However, a person as young as 16 years can marry with parental consent.<sup>36</sup> And a court can authorize a minor to enter into a marriage.<sup>37</sup> If persons divorcing in Texas were married in a place that permitted marriage at a younger age, will a Texas court recognize the validity of that marriage?

*Gender Identity Issues.* Gender identity issues are making their way into the cultural and legal consciousness in America. The American Psychiatric Association<sup>38</sup> notes: "The area of sex and gender is highly controversial and has led to a proliferation of terms whose meanings vary over time and within and between disciplines."<sup>39</sup> An example is the phrase "sexual preference" versus the phrase "sexual orientation." The former connotes a subjective choice while the latter connotes a genetic or biological condition.<sup>40</sup> The American Psychological Association has distinct definitions for sex,<sup>41</sup> gender,<sup>42</sup> gender identity,<sup>43</sup> gender expression,<sup>44</sup> transgender,<sup>45</sup> and sexual orientation.<sup>46</sup>

The American Psychiatric Association defines *gender assignment* as "the initial assignment as male or female. This occurs usually at birth, and, thereby, yields the 'natal gender.'" "*Gender reassignment* denotes an official (and usually legal) change of gender."<sup>47</sup> The DSM-5 uses the term "posttransition" when "[t]he individual has transitioned to full-time living in the desired gender (with or without legalization of gender change) and has undergone (or is preparing to have) at least one cross-sex medical procedure or treatment regimen—namely, regular cross-sex hormone treatment or gender reassignment surgery confirming the desired gender (e.g., penectomy, vaginoplasty in a natal male; mastectomy or phalloplasty in a natal female)."<sup>48</sup>

*Gender Dysphoria Disorder.* Between 1994 and 2013 the American Psychiatric Association defined "Gender Identity Disorder" as a condition where the person has a "strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex." The diagnosis also requires "evidence of persistent discomfort

about one's assigned sex or a sense of inappropriateness in the gender role of that sex." In order for the condition to be considered a "disorder," "there must be evidence of clinically significant distress or impairment in social, occupational, or other important areas of functioning."<sup>49</sup>

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

For a person to be diagnosed with gender dysphoria, there must be a marked difference between the individual's expressed/experienced gender and the gender others would assign him or her, and it must continue for at least six months. In children, the desire to be of the other gender must be present and verbalized. This condition causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.<sup>50</sup>

DSM-5 does not consider cross-gender identity in and of itself a disorder. Rather the disorder exists only if the cross-gender identity causes distress or impairment. The focus of treatment thus is not attempting to reduce or eliminate the cross-gender identity, but rather to reduce or eliminate the distress associated with the condition. This view is supported by assigning Gender Dysphoria Disorder to its own chapter, in contrast to Gender Identity Disorder which was lumped together in the same chapter with Sexual Disorders in DSM-4. The subgroup that developed the new Disorder indicated that separating the Gender Dysphoria Disorder from Sexual Disorders was intended to reduce the stigma associated with the diagnosis.<sup>51</sup>

*Gender Identity Under Texas Law.* In *Littleton v. Prang*, 9 S.W.3d 223 (Tex. App.—San Antonio 1999, pet. denied), the appellate court held that a person's gender was not changed by a sex change operation, and that the designation of gender on the birth certificate controlled over a sex-change operation. That view of the law was confirmed in *Mireles v. Mireles*, No. 01-08-00499-CV, 2009 WL 884815, at \*1 (Tex. App.—Houston [1st Dist.] April 2, 2009, pet. denied) (mem. opinion). However, in 2009, the Legislature amended Section 2.005(8) of the Family Code to provide that proof of identity for purposes of obtaining a marriage license could consist of "an original or certified copy of a court order relating to the applicant's name change or sex change . . ." This impliedly says that a court can judicially recognize a change in gender for purposes of marrying.



In February of 2014, the Corpus Christi Court of Appeals decided *In the Estate of Thomas Trevino Araguz III, Deceased*, 443 SW3d 233 (Tex. App.—Corpus Christi 2014), *pet. denied*, a case involving a marriage between a man (Thomas) and another man (Nikki) who was born with male genitalia but claimed to have a female brain, and who said she was miss-typed on her birth certificate. The facts showed that Thomas married Nikki at a time when both Thomas and Nikki had male sex organs. After the marriage ceremony, Nikki underwent surgery which removed her male sex organs and created female sex organs. The trial court dismissed Nikki's surviving spouse claims in probate on the grounds that Thomas and Nikki had a same-sex marriage that was prohibited under Texas law. The Corpus Christi Court of Appeals reversed, saying a fact issue was presented as to whether Nikki was male or female at the time of the marriage ceremony and thereafter. The appellate court held that genitalia at birth or at the time of marriage is not determinative of gender, and that Nikki's expert testimony that she was "medically and psychologically" a female created a fact issue that precluded summary judgment.<sup>52</sup> In doing so, the appellate court credited Nikki's medical expert's opinion that "sexuality per se is a complex phenomenon which involves a number of underlying factors . . . includ[ing] chromosomes, hormones, sexual anatomy, gender identity, sexual orientation, and sexual expression."<sup>53</sup> The import of the Corpus Christi Court of Appeals' decision is that a person's self-perceived gender identity can prevail over physical attributes in determining whether a person is male or female. The court specifically said that a sex-change operation is not determinative. On September 4, 2015, the Texas Supreme Court denied appellate review of the decision.

At this point in time, there is no definitive indication of how and when a sex change, mentioned in Family Code Section 2.005(8), becomes legally effective. The fact that Section 2.005(8) mentions a "court order relating to sex change" suggests that the law does not recognize the sex change until a court issues an order to that effect. A bright line such as that would have the advantage of eliminating guesswork over when a person's gender changes from the initial gender assignment reflected in the birth certificate.

**Family Violence.** The Texas Family Code's family violence provisions protect individuals in same-sex relationships just as in traditional marital relationships. Texas Family Code Section 71.004 defines "family violence" as an act by a member of a family or household. Texas Family Code Section 71.003 defines "family" as including "individuals related by consanguinity or affinity," individuals who are former spouses, individuals who are parents of the same child, and a foster child and foster parent. Texas Family Code Section 71.005 defines "household" as "a unit composed of persons living together in the same dwelling, without regard to whether they are related to each other." Texas Family Code

Section 71.0021 defines "dating violence" as an act against someone with whom the actor has or had a dating relationship. Texas Family Code Section 71.0021(b) defines "dating relationship" as "a continuing relationship of a romantic or intimate nature." The court in *Ochoa v. State*, 355 S.W.3d 48 (Tex. App.—Houston [1st Dist.] 2010, *pet. ref'd*), held that "dating relationship" applies to both same-sex and opposite-sex relationships.

**Parent-Child Issues.** Marriage equality should not affect the standing to litigate parent-child claims. Parents automatically have standing to litigate parental rights of their children and the definition of a parent in the Texas Family Code is independent of marital status.<sup>54</sup> 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."<sup>55</sup>

The parental presumption may be an issue in the break up of a same-sex couple. If a child is born to a female couple by assisted reproduction followed by childbirth to one of the women, that birth mother will be a parent and the other female spouse will not be a parent unless she adopts the child. The Family Code creates a presumption that a parent should be appointed as sole managing conservator in a custody fight with a non-parent, and to prevail the non-parent must prove that the appointment would significantly impair the child's physical health or emotional development.<sup>56</sup> So the spouse who is not a biological or adoptive parent may face this elevated burden of proof. Family Code Section 160.203 provides a presumption of paternity for children born into marriage, but the presumption is stated in terms that a man is presumed to be the father of a child born to the wife during marriage.<sup>57</sup> A similar issue could arise between two married men, where one is the biological father and the other spouse has not adopted. The constitutionality of that wording will no doubt be challenged.

**Conclusion.** The legal acceptance of same-sex marriage in America has developed in just over two decades, with state court decisions, statutory enactments, amendments to state constitutions, lower federal court decisions, and finally a decision of the U.S. Supreme Court. Two decades is a long time measured by the lives of individuals, but a remarkably short period of time considering that marriage equality had no legal recognition 20 years ago and now is considered to be a fundamental right protected by the U.S. Constitution.

ENDNOTES

1. Tex. Const. Art. I, § 32 of the Texas Constitution states:

- (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.

2. Tex. Fam. Code § 6.204, states:

§ 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.

3. *DeLeon v. Abbott*, 791 F.3d 619 (5<sup>th</sup> Cir. July 1, 2015).

4. *Attorney General Paxton: Religious Liberties of Texas Public Officials Remain Constitutionally Protected After Obergefell v. Hodges* <<https://www.texasattorneygeneral.gov/oagnews/release.php?id=5144>>, describing Opinion No. KP-0025 (June 28, 2015).

5. After the *Obergefell* decision was announced, Kim Davis, County Clerk of Rowan County, Kentucky, refused to issue marriage licenses, first to same-sex applicants and then to all applicants, citing her religious beliefs. Four couples filed suit in the U.S. District Court for the Eastern District of Kentucky to require that marriage licenses be issued, and Federal District Judge David Bunning ordered Davis to issue the licenses. Davis sought review from the Sixth Circuit, which refused, writing that "[i]t cannot be defensibly argued that the holder of the Rowan County Clerk's office ... may decline to act in conformity with the United States Constitution as interpreted by a dispositive holding of the United States Supreme Court." Davis sought review in the U.S. Supreme Court, which refused to hear her appeal. Davis persisted in refusing to issue marriage licenses, and after a hearing she was incarcerated for a period of five days, when she was released with the understanding that she would not interfere with her deputy clerks issuing marriage licenses.

6. *Powell v. Long*, No. 02-14-00397-CV, 2015 WL 4776109 (Tex. App.–Fort Worth August 13, 2015) (memo. opinion) (case remanded for reconsideration); *In re Marriage of A.L.F.L and K.L.L. and in the Interest of K.A.F.L.*, No. 04-14-00364-CV, 2015 WL 4561231 (Tex. App.,–San Antonio July 29, 2015) (memo. opinion) (appeal from denial of plea to the jurisdiction dismissed as moot).

7. *Parker & City of Houston v. Pidgeon*, No. 14-14-00899-CV, 2015 WL 5438670 (Tex. App.–Houston [14<sup>th</sup> Dist.] July 28, 2015).

8. *Baehr v. Miike*, 910 P.2d 112 (Hawaii 1993).

9. *Lawrence v. Texas*, 539 U.S. 558 (2003).

10. *Goodridge v. Dept. of Public Health*, 798 N.E. 2d 941 (Mass. 2003).
11. Tex. Fam. Code § 2.202(4) & (5).
12. In 2013, the State of Washington's Commission on Judicial Conduct admonished a judge who refused to solemnize same-sex marriages in contravention of state legislation recognizing same-sex marriage. The Commission said the judge was not required to solemnize marriage, but if he chose to do so he could not perform only opposite-sex marriages. The Commission cited Washington's Code of Judicial Conduct, Rules 1.1 & 1.2, and 3.1(C), about avoiding the appearance of impropriety and promoting public confidence in the judiciary's impartiality. *In re Tabor*, CJC No. 7251-F-158 (October 4, 2013). In May of 2014, the Deputy Counsel for the Pennsylvania Judicial Conduct Board published a newsletter article advising judges that to refuse to perform all marriages would be ethical, but performing opposite-sex marriages while refusing to perform same-sex marriages would violate the Code of Judicial Conduct. Elizabeth Flaherty, *Impartiality in Solemnizing Marriages*, Newsletter of the Judicial Conduct Board of Pennsylvania (No. 3 Summer 2014). In March of 2015, the Arizona Supreme Court's Judicial Ethics Advisory Board issued an Advisory Opinion stating that judges are not required to perform marriage ceremonies, but if they do perform them for any members of the public they cannot refuse to perform same-sex weddings. The Opinion says a judge can perform marriages for friends and family without triggering the duty to members of the public. *Az. Jud. Ethics Advisory Op. 15-01* (March 9, 2015). In May, 2015, North Carolina enacted a statute permitting judges to recuse themselves from performing marriage ceremonies due to "sincerely held religious objection." The recusal applies to all marriages, not just same-sex marriages, and the state has to provide a substitute magistrate to perform the ceremony. N.C. Gen. Stat. 51-5.5. The recusal form is at <http://www.nccourts.org/Forms/Documents/1662.pdf>. In June of 2015, the Nebraska Judicial Ethics Committee issued an Opinion saying that judges are not required to perform marriage ceremonies, but if they do they must not refuse to perform same-sex marriage, regardless of the judge's personal religious views. *Neb. Jud. Ethics Com. Op. 15-1* (June 29, 2015). In August of 2015, the Board of Professional Conduct of the Supreme Court of Ohio issued an Opinion saying that a judge who performs opposite-sex marriages cannot refuse to perform same-sex marriages, and further saying that the refusal to perform any marriages in order to avoid performing same-sex marriages reflects a lack of impartiality that may lead to disqualification in cases involving homosexuals. However, the Board acknowledged that it had no authority to opine on a judge's refusal to perform any marriages at all.
13. The Texas Pastor Protection Act established Texas Family Code Section 2.601, Rights of Certain Religious Organizations.
14. Opinion No. KP-2005, p. 2 (June 28, 2015) <https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2015/kp0025.pdf>.
15. Letter from Robert Soard, First Assistant County Attorney for Harris County, Texas, addressed to all Harris County Judges and Justices of the Peace (July 1, 2015).
16. Rev. Rul. 2013-17, p. 2 (Aug. 29, 2013); IRS Notice 2013-61, ¶ 3.
17. IRS Notice 2014-19.
18. Rev. Rul. 2013-17 (Aug. 29, 2013); IRS Notice 2014-19, pp. 4-5.
19. Rev. Rul. 2013-17, p. 2 (Aug. 29, 2013).
20. Rev. Rul. 2013-17, p. 9 (Aug. 29, 2013).
21. According to The Texas Tribune, the intervening plaintiff needed the amended death certificate in order to obtain surviving spouse benefits to help pay for the cost of cancer treatments. <http://www.texastribune.org/2015/08/05/federal-judge-rules-gay-spouse-named-death-certifi/>.
22. Rev. Rul. 2013-17 p. 12 (Aug. 19, 2014).
23. See Angela Campbell, et al., *Polygamy in Canada: Legal and Social Implications for Women and Children* (A Collection of Policy Research Reports) (Nov. 2005) [www.vancouver.sun.com/pdf/polygamy\\_021209.pdf](http://www.vancouver.sun.com/pdf/polygamy_021209.pdf).
24. "Some Muslims in U.S. Quietly Engage in Polygamy," National Public Radio (May 27, 2008).

25. *Brown v. Buhman*, 947 F. Supp.2d 1170 (U.S. Dist. Ct. Utah 2013). The court issued a 91-page opinion that delved deeply into the history of polygamy and efforts to ban it in the United States, and found no fundamental right to enter into a second legal marital union when already legally married.
26. Texas Penal Code § 25.01. This part of the Texas statute is much like the Utah law that was invalidated.
27. Tex. Penal Code § 25.01(a)(1)(B).
28. Tex. Penal Code § 25.01(b).
29. Tex. Fam. Code § 2.401.
30. Tex. Fam. Code § 2.004(b)(6).
31. Tex. Fam. Code § 2.004(c).
32. Tex. Fam. Code § 2.301.
33. Tex. Penal Code § 25.02(a)(6) & (c).
34. <<http://www.ncsl.org/research/human-services/state-laws-regarding-marriages-between-first-cousi.aspx>> [1-14-2015].
35. Tex. Fam. Code § 2.101.
36. Tex. Fam. Code § 2.102.
37. Tex. Fam. Code § 2.103.
38. The American Psychiatric Association publishes the leading authority on naming and diagnosing mental disorders in the United States, the Diagnostic and Statistical Manual of Mental Disorders (DSM). The Manual is updated every few decades. The Fourth Edition, the DSM-4, was published in 1994. The Fifth Edition, DSM-5, was published in 2013.
39. DIAGNOSTIC AND STATISTICAL MANUAL 5, p. 451 (2013).
40. Bedi, Sonu, *Sexual Preference vs. Sexual Orientation: Identity and Same Sex Marriage*, paper presented at the annual meeting of the Northeastern Political Science Association, Crown Plaza, Philadelphia, PA, Nov. 17, 2011 <[http://citation.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/5/2/6/2/0/p526209\\_index.html](http://citation.allacademic.com/meta/p_mla_apa_research_citation/5/2/6/2/0/p526209_index.html)> [1-20-2015].
41. “Sex refers to a person's biological status and is typically categorized as male, female, or intersex (i.e., atypical combinations of features that usually distinguish male from female). There are a number of indicators of biological sex, including sex chromosomes, gonads, internal reproductive organs, and external genitalia.” *Practice Guidelines for Lesbian, Gay, and Bisexual Clients* (American Psychological Association, Feb. 18-20, 2011).
42. “Gender refers to the attitudes, feelings, and behaviors that a given culture associates with a person's biological sex. Behavior that is compatible with cultural expectations is referred to as gender-normative; behaviors that are viewed as incompatible with these expectations constitute gender non-conformity.” *Practice Guidelines for Lesbian, Gay, and Bisexual Clients* (American Psychological Association, Feb. 18-20, 2011).
43. “Gender identity refers to ‘one's sense of oneself as male, female, or transgender’ (American Psychological Association, 2006). When one's gender identity and biological sex are not congruent, the individual may identify as transsexual or as another transgender category (cf. Gainor, 2000).” *Practice Guidelines for Lesbian, Gay, and Bisexual Clients* (American Psychological Association, Feb. 18-20, 2011).
44. “Gender expression refers to the ‘...way in which a person acts to communicate gender within a given culture; for example, in terms of clothing, communication patterns and interests. A person's gender expression may or may not be consistent with socially prescribed gender roles, and may or may not reflect his or her gender identity’ (American Psychological Association, 2008, p. 28).” *Practice Guidelines for Lesbian, Gay, and Bisexual Clients* (American Psychological Association, Feb. 18-20, 2011).

45. “Transgender is an umbrella term for persons whose gender identity, gender expression or behavior does not conform to that typically associated with the sex to which they were assigned at birth.” *Practice Guidelines for Lesbian, Gay, and Bisexual Clients* (American Psychological Association, Feb. 18-20, 2011).

46. “Sexual orientation refers to the sex of those to whom one is sexually and romantically attracted. Categories of sexual orientation typically have included attraction to members of one's own sex (gay men or lesbians), attraction to members of the other sex (heterosexuals), and attraction to members of both sexes (bisexuals). While these categories continue to be widely used, research has suggested that sexual orientation does not always appear in such definable categories and instead occurs on a continuum (e.g., Kinsey, Pomeroy, Martin, & Gebhard, 1953; Klein, 1993; Klein, Sepekoff, & Wolff, 1985; Shiveley & DeCecco, 1977). In addition, some research indicates that sexual orientation is fluid for some people; this may be especially true for women (e.g., Diamond, 2007; Golden, 1987; Peplau & Garnets, 2000).” *Practice Guidelines for Lesbian, Gay, and Bisexual Clients* (American Psychological Association, Feb. 18-20, 2011).

47. DSM-5, p. 451 (2013).

48. DSM-V p. 453 (2013).

49. DSM-4, pp. 532-33 (1994).

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

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

52. *Id.* at 248-49.

53. *Id.* at 246.

54. Texas Family Code § 101.024. Parent, provides:

(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. . . .

55. Tex. Fam. Code § 102.003(9).

56. Family Code Section 153.131.

57. Tex. Fam. Code § 160.204.