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IN THE MATTER OF THE MARRIAGE OF §
REBECCA LOUISE ROBERTSON §
AND §
JAMES A. SCOTT §

IN THE DISTRICT COURT
255TH JUDICIAL DISTRICT
DALLAS COUNTY, TEXAS

PETITIONER'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT: Rebecca Louise Robertson,
Petitioner, brings this Motion for Summary Judgment to declare the parties' alleged marriage void and dismiss the Respondent's counterclaim for divorce, and for good cause shows the following.

1. **Introduction.**

- A. Rebecca Louise Robertson sued James A. Scott to have their alleged marriage declared void. James A. Scott countersued Rebecca Louise Robertson for divorce.
- B. Rebecca Louise Robertson files this motion for summary judgment based on Article I, §32(a) of the Texas Constitution¹, §6.204 of the Texas Family Code², and the Defense of Marriage Act (DOMA), 28 U.S.C. §1738C³.
- C. Petitioner filed and served this motion on the Respondent at least 21 days before the hearing on the motion.

2. **Authority to Grant Summary Judgment.**

- A. When plaintiff moves for summary judgment on its cause of action, plaintiff must conclusively prove all essential elements of its claim. *MMP, Ltd. V. Jones*, 710

¹ "Marriage in this state shall consist only of the union of one man and one woman." Article I, §32, Tex. Const.

² "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." Tex. Fam. Code §6.204(b), West 2010.

³ "No State, territory, or possession of the United States, or Indian tribe, shall be required to give any effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship

S.W.2d 59, 60 (Tex. 1986). Plaintiff must show that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Id.*; *Wesson v. Jefferson S. & L. Ass'n*, 641 S.W.2d 903, 904-905 (Tex. 1982).

- B. In deciding whether there is a disputed material fact issue that precludes summary judgment, the court assumes that all evidence favorable to the non-movant is true. *Nixon v. Mr. Property Mgmt. Co.*, 690 S.W.2d 546, 548-549 (Tex. 1985); *Svacina v. Gardner*, 905 S.W.2d 780, 782 (Tex.App. – Texarkana 1995, n.w.h.).
- C. The Petitioner is a woman and the Respondent has held herself out to be a man. Determination of gender for the purposes of marriage is a matter of law. *Littleton v. Prange*, 9 S.W.3d 223, 230 (Tex.App. —San Antonio 1999, pet. denied).
Based on the undisputed facts herein, the Respondent, as a matter of law, is a woman for the purposes of marriage.
- D. Petitioner is entitled to summary judgment as a matter of law because same sex marriages are void by statute and constitution and both parties to this suit are of the same sex.
- E. There are no fact issues in this case. The Court may decide this case on the summary judgment evidence included in the appendix in this motion.
- F. Even though Respondent asserted a counterclaim, Petitioner is entitled to summary judgment as a matter of law because Petitioner can prove its cause of action and disprove at least one element of the Respondent's counterclaim.

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.” 28 U.S. C.A. § 1738C (West 2006).

3. **Summary Judgment Evidence.** Petitioner includes the summary judgment evidence in an appendix filed with this motion and incorporates said evidence into this motion as if fully set forth below. It includes the following.

- A. Petitioner Rebecca Louise Robertson's affidavit of fact.
- B. Petitioner's First Request for Admissions to Respondent.
- C. Counter-Petitioner James Allan Scott's Responses to Counter-Respondent's [sic] Rebecca Louise Robertson's Request for Admissions.

4. **Preliminary Facts.** The determination of the Petitioner's motion for summary judgment begins, not with the parties' alleged marriage, but when the Respondent was born.

- A. Petitioner Rebecca Louise Robertson was born a female, was female at the time of the alleged marriage, and remains a female. See Exhibit A, Petitioner's Affidavit, Page 1. *See also* Exhibits B and C, Admission request and response 26.
- B. Respondent, James A. Scott, was born Susan A. Lowry on April 5, 1954 in Bentondorf, Iowa. Susan A. Lowry was born female as that gender is universally determined, as a human being with female genitalia. *Id.* *See also* Exhibits B and C, Admission requests and responses 2, 9, and 26.
- C. In March of 1998, Susan A. Lowry began medical procedures to have her breasts and ovaries removed. Exhibit A, Page 1.
- D. On March 27, 1998, Susan Annie Lowry filed a petition in an Iowa court to have her name legally changed from Susan Annie Lowry to James A. Scott and for a court order requiring the issuance of a new birth certificate indicating her sex as male. This action was unopposed and the Iowa court confirmed her choice. *Id.*

- E. The person now known as James A. Scott never completed the medical procedures that would have provided her with male genitalia. To this day, James A. Scott does not have the universally accepted physical attributes of a male of the human species. Specifically, a penis, scrotum, or testicles. Instead, the person known as James A. Scott always had and still has a vagina. See Exhibit A, Page 2, Exhibits B and C, Admission Requests and responses 6, 7, and 8.
- F. Petitioner and Respondent entered into a purported marriage on December 20, 1998. Exhibit A, Page 1, Exhibits B and C, Admission Requests and responses 3 and 4.
- G. This litigation ensued in 2010.

5. **Arguments and Authorities.** Public debate regarding same sex marriage has been well reported. The voters of this state have passed a constitutional amendment declaring that marriage can only be between a man and a woman. Art. I, §32, Tex. Constitution. Legislators, including those in our state, have passed laws prohibiting same sex marriages and denying any governmental recognition of them. Surprisingly, very few cases regarding this issue have been heard by the appellate courts. In the State of Texas, only two appellate courts have discussed the issue of whether the marriage between a transsexual and a person of their same biological sex is a same sex marriage as contemplated and prohibited by the Constitution and statutes of this State and the United States of America. The answer is yes, the marriage between a transsexual and a person of their same biological sex is a same sex marriage.

A. **Littleton v. Prange.** “What makes a man a man and what makes a woman a woman”

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woman?” So begins the opinion issued by the San Antonio Court of Appeals in *Littleton v. Prange*, 9 S.W.3d 223 (Tex.App. —San Antonio 1999, pet. denied). In the State of Texas for the purpose of marriage, that question can be answered as follows: at birth, and no amount of psychotherapy or surgery can change the answer.

- i. Christie Littleton sued Dr. Mark Prange for the wrongful death of her husband, Jonathon Mark Littleton in her capacity as surviving spouse. Dr. Prange asked the trial court for summary judgment, alleging that Christie was a man, and therefore could not be the surviving spouse. *Id.* At 225.
- ii. Christie Littleton was born male, with the usual identifying characteristics, penis, scrotum and testicles. *Id.* at 224. He was prescribed hormones and located a doctor to perform gender reassignment surgery⁴. Experts testified that Christie was a female psychologically and psychiatrically both before and after the surgery and that, subsequent to the surgery, she could also perform sexually as a female⁵. *Id.* at 225. The experts offered the opinion that Christie was psychologically and medically a female after her reassignment surgery. *Id.* In addition, Christie and Jonathon celebrated a ceremonial marriage. *Id.* The Court acknowledged that

“A transsexual, such as Christie, does not consider herself a homosexual because she does not consider herself a man. Her self-identity, from childhood, has been as a woman.

⁴ Gender reassignment surgery, depending on the original gender, is a series of medical procedures to enlarge the clitoris or attach an artificially created penis to a woman, remove her breasts and uterus, or alternatively for a man, breast enhancement surgery, throat scraping, removal of the penis, scrotum, and testicles, and the formation of a vagina. See *Littleton* at 224.

⁵ The Chief Justice, for ease of reference, referred to Christie Littleton as a female throughout the opinion, notwithstanding the ultimate conclusion. *Id.* at 224.

Since her various operations, she does not have the outward physical characteristics of a man either. Through the intervention of surgery and drugs, Christie appears to be a woman. In her mind, she has corrected her physical features to line up with her true gender.” . . . “[Christie] has been surgically and chemically altered to be a woman. ***She has officially changed her name and her birth certificate to reflect her new status.*** But the question remains whether the law will take note of these changes and treat her as if she had been born a female.” *Id.* at 226, *Emphasis added.*

- iii. The legal issue in front of the San Antonio appellate court was “Can there be a valid marriage between a man and a person born as a man, but surgically altered to have the physical characteristics of a woman?” *Id.* The Court answered no to that question. *Id.* The opposite situation and a slightly different situation is the question in this case. Specifically, can there be a valid marriage between a woman and a person born as a woman that wants to be a man? Since the Court found in the negative in the Littleton case, where gender reassignment surgery was complemented by both hormone and psychological therapy and both driver’s license and birth certificate identified the person’s new sex, it follows that the hormone and psychological therapy, surgical changes, and identification document changes in the present case will not change the sex of the person for marriage purposes.
- iv. The San Antonio court acknowledged that theirs was a case of first impression in Texas. In its analysis, it acknowledged the statutory prohibitions against same sex marriage, the multiple appellate courts upholding the constitutionality of those statutes, and turned to other

jurisdictions for the remaining analysis of the question of whether an individual, for the purposes of marriage, can alter their gender. Those other jurisdictions and citations are as follows. England, *Corbett v. Corbett*, 2 All E.R. 33, 1970 WL 29661 (P.1970); New York, *Anonymous v. Anonymous*, 67 Misc.2d 982, 325 N.Y.S.2d 499 (N.Y.Sup.Ct.1971); New Jersey, *M.T. v. J.T.*, 140 N.J.Super. 77, 355 A.2d 204, 205 (1976); and Ohio, *In re Ladrach*, 32 Ohio Misc.2d 6, 513 N.E.2d 828 (Ohio Probate Ct.1987). *Id.* at 226 – 228.

- (1) In the Corbett case, a man had undergone sexual assignment surgery, changed his name to April Ashley, and married Arthur Corbett. Arthur sought nullification of the marriage based on the fact that April was a man. The English court agreed with Arthur, using four criteria to make the determination. Chromosomes, gonadal factors, genital factors, and psychological factors. *Id.* at 226 – 227. Even though Ashley had surgery to remove her penis, scrotum, and testicles; and had constructive surgery to create a vagina, the English court found that that "[T]he biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means. The respondent's operation, therefore, cannot affect her true sex." *Id.* at 227, quoting *Corbett*.

- (2) In the New York case, a serviceman stationed at Fort Hood, Texas, married what he thought was a woman. He found out differently on his wedding night. The Court found that no marriage had taken place, since marriage must be between a man and a woman. *Id.* This case is similar to cases voiding same sex marriages, since the Court found that the parties were both male on the date of their marriage, notwithstanding any surgical procedures undertaken after the marriage.
- (3) In the Ohio case, Elaine Ladrach sought a marriage license to marry a man. Elaine was born a man, but had undergone sexual reassignment surgery. *Id.* at 228. The Court determined that gender is determined at birth and denied the license. *Id.* at 229.
- (4) Finally, the only appellate court to uphold the validity of a transsexual marriage was in New Jersey. In that case, JT was the husband and MT was the purported wife. They were two men involved in what would be classified as a homosexual relationship. They eventually decided that MT would have an operation so she could have the physical attributes of a woman. JT paid for the sexual reassignment surgery, the couple subsequently married, and consummated their relationship through sexual intercourse. In what may have been the turning point in the Court's decision, it stated "[W]e are impelled to the conclusion that for marital purposes if the anatomical or genital features of a genuine

transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards.” *M. T. v. J. T.*, 140 N.J.Super. 77 at 87, 355 A.2d 204 at 209 (N.J.Super.A.D. 1976). In other words, if an individual thinks they are female (though born with male genitalia), has their male genitalia removed, and constructive surgery to create a vagina and breasts, the New Jersey court would affirm that. The Respondent herein did not do that, and in fact, remains physically a female.

- v. The San Antonio appellate court did not find the designation on a birth certificate, driver's license, or marriage license to be dispositive, noting that “fifteen states have permitted a post-operative change of sex designation on birth records.” *Littleton* at 229, citing *In Re Ladrach*. The court concluded “The trial court that granted the petition to amend the birth certificate necessarily construed the term “inaccurate” to relate to the present, and having been presented with the uncontroverted affidavit of an expert stating that Christie is a female, the trial court deemed this satisfactory to prove an inaccuracy. However, the trial court's role in considering the petition was a ministerial one. It involved no fact-finding or consideration of the deeper public policy concerns presented.” *Id.* at 231. Whether Susan A. Lowry, when asking the Iowa authorities to change her name, included a request that a new birth certificate be created

listing her gender as male is irrelevant. Whether she obtained a Texas driver's license listing her gender as male is irrelevant.

- vi. The San Antonio appellate court, upon considering the cases presented in the other jurisdictions, ultimately came to the conclusion that Texas does not recognize gender reclassification for the purposes of marriage, even if the person seeking it has undergone hormone therapy, psychological therapy, and gender reassignment surgery. It held and concluded that Christie Littleton was born male, is male, could not have married another male, and that the marriage between Christie and Jonathon was invalid. *Id.* In the present case, Susan A. Lowry had her breasts and ovaries removed⁶. Millions of women have had either or both of these procedures for radical treatment of life threatening health conditions. All of those women are no less women because they no longer have breasts or they can no longer bear children.

- B. **Mireles v. Jack.** The Houston Appellate Court (1st Dist.) had a simpler issue in *Mireles v. Jack*, Memorandum Opinion (Tex.App.- Houston [1st Dist.] Apr. 2, 2009). Three years after a divorce was granted between Andrew Mireles and Jennifer Jack, Jack went back to get the decree vacated, claiming that Andrew Mireles was born a woman. *Id.* at 1. The opinion is unclear about surgical changes, and only refers to Mireles as Jack's former husband and having changed her name from a traditional female name to a traditional male name. *Id.* The

complaint on appeal was that Jack had to prove the elements of a bill of review when attempting to attack the judgment. The Appellate Court disagreed, stating

A void judgment may be collaterally attacked by any court of equal jurisdiction. *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985) (per curiam).

To prevail on a collateral attack, a party must show that the complained-of judgment is void. See *Gainous v. Gainous*, 219 S.W.3d 97, 105–06 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). A judgment is void when the court rendering judgment “had no jurisdiction of the parties, no jurisdiction of the subject matter, no jurisdiction to enter judgment, or no capacity to act as a court.” *Id.* at 105; see also *Browning*, 698 S.W.2d at 363; *Sotelo v. Scherr*, 242 S.W.3d 823, 830 (Tex. App.—El Paso 2007, no pet.); *Zarate*, 40 S.W.3d at 621. A judgment may also be collaterally attacked when the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas. *Zarate*, 40 S.W.3d at 621; *Glunz v. Hernandez*, 908 S.W.2d 253, 255 (Tex. App.—San Antonio 1995, writ denied).

Id. At 2. The reason this opinion matters in the present situation is because the Court found that the judgment was void because the marriage was void. In affirming the trial court, the appellate court gave effect to *Littleton*, because in order to find that the marriage was void, it had to find that the parties were of the same sex. *Id.* At 3.

C. **Other States.**

- i. **New York.** A few years after *Anonymous*, above, New York faced its first divorce case in which the Court was asked to determine the question of whether the state will recognize a marriage between two people born of the same sex, but in which one of them has been chemically and surgically

⁶ The San Antonio Court of Appeals detailed the lengthy surgical history of Christie Littleton, including the surgical creation of a vagina. In the instant case, the Respondent has admitted that she has not undergone constructive

changed. *Frances B. v. Mark B.*, 355 N.Y.S.2d 712, 78 Misc.2d 112 (N.Y.Sup.Ct.1974). This case is almost identical to the case at bar. Frances sued to have the marriage declared void. Mark requested leave to counterclaim for divorce. Mark always believed he was a masculine person (man) trapped inside of a female body. Mark had a mastectomy and a hysterectomy to attempt to conform his body to what he thought it should be. *Id.* at 715. The Court cited Mark's lack of genitalia and inability to procreate to reach the conclusion that Mark, despite surgery, feelings, and hormone treatments, remained a woman for the purposes of marriage. *Id.* at 717.

ii. **Ohio.**

(1) In *Gajovski v. Gajovski*, 81 Ohio App.3d 11, 610 N.E.2d 431 (Ohio App. 9 Dist. 1991), the Court was asked to extend the definition of concubinage to two women cohabitating. In declining to do so, the Court reconfirmed *Ladrach*, above, by stating "In fact, Ohio law permits marriage only between members of the opposite sex. R.C. 3101.01. This requirement applies even in a situation where one party has obtained such gender status by means of transsexual surgery; in the contemplation of Ohio jurisprudence, one's gender at birth is one's gender throughout life. See *In re Ladrach* (1987), 32 Ohio Misc.2d 6, 10, 513 N.E.2d 828, 832." *Id.* at 14.

(2) Another Ohio appellate court was asked to order a probate court to issue a marriage license to a female and transsexual male. *In Re Application For Marriage License For Nash*, 2003-Ohio-7221, Cases 2002T0149, 2002T0179, (OHCA11). In addition to the gender reassignment surgery, the applicants relied heavily on the “original” birth certificate issued in Massachusetts after the surgery and driver’s license. *Id.* at paragraphs 8 and 15. In that case, the applicants went to the appellate court claiming that the probate court denied them their Fourteenth Amendment guarantee of equal protection under the law and a full faith and credit claim. After determining that the probate court treated them the same way it would any couple whose ability to obtain a marriage license was brought into question, the Court went on to analyze whether Ohio was obligated to accept a Massachusetts’ birth certificate as proof of sex. The Court said no, even Massachusetts’ law only provides that the birth certificate is *prima facie* proof, and is capable of being rebutted. *Id.* at paragraphs 26 – 27. The Court, in following *Ladrach*, above, stated that the legislature had fifteen years to change the law to include transsexuals and it did not. *Id.* at paragraphs 33 – 34. That too, helped convince the Court that the public policy of prohibiting same sex marriages included marriages between post-operative transsexuals and individuals of the same biological sex. *Id.*

The Court went on to cite the *Littleton* case from Texas with

approval. *Id.* at paragraphs 38 – 41. The Court concluded by stating “any marriage license issued by the court would have been void as against public policy.” *Id.* at paragraph 48. The Respondent in the present case has made a point of noting that his birth certificate is “original,” and it lists his sex as male, as does his driver’s license. Those documents, even though issued by the State of Texas, are not conclusive evidence of sex. Particularly when the Respondent admitted that she was born a woman and has no testicles or male genitalia.

- iii. **Kansas.** The Kansas Supreme Court stepped into the fray with an exhaustive analysis of existing national and international case law applied to a well developed fact situation in *In re Estate of Gardiner*, 273 Kan. 191, 42 P.3d 120 (Kan. 2002). There, the estranged only son of a wealthy man asked the Court to appoint him as the sole heir by finding his father’s second marriage to his transsexual wife, J’Noel, void. J’Noel was born a man, but went through every possible physical change possible to be changed into a woman, including electrolysis, taking hormones, a tracheal shave (raising the voice timbre), rhinoplasty, removing his testicles, and inverting his penis. *Id.* at 122 – 123. After surgery, she petitioned and obtained a new birth certificate, passport, health documents, and driver’s license indicating her sex as female. *Id.* Marshall, the deceased, was aware that his wife was a transsexual before the marriage. *Id.* at 122. A doctor testified that J’Noel was a fully functioning female. *Id.* at 122 –

123. J'Noel's attorney unsuccessfully attempted to present the facts as a full faith and credit case, insisting that Kansas give full faith and credit to the Wisconsin issued birth certificate for J'Noel listing her as female. *Id.* at 134. The Court instead pointed out that "We view the issue in this appeal to be one of law and not fact. The resolution of this issue involves the interpretation of K.S.A.2001 Supp. 23-101. The interpretation of a statute is a question of law, and this court has unlimited appellate review." *Id.* at 135, Citations omitted. The Court followed the majority of other states and found that J'Noel's sex was fixed at birth, notwithstanding all of her efforts, and a male for the purposes of marriage. *Id.* at 137. The Court suggested that the legislature was free to make the policy changes that it (the Court) would not. *Id.* at 136. In our case, just as in Kansas, the facts are not in dispute and the question for this Court is one of law. Just as in Kansas, the primary issue is whether the Court is free to determine that a person born of one sex has the ability, through drugs, surgery, and psychotherapy to change their sex. For the purposes of marriage, the Court cannot. The issue of whether birth certificates, driver's licenses, or other documents issued by one state or another will determine the sex of an individual is answered in the negative.

- iv. **Florida.** A relatively recent case from Florida parallels our fact situation. In *Kantaras v. Kantaras*, 29 Fla. L. Weekly D1699, 884 So.2d 155 (Fla.App. 2 Dist. 2004), the Florida court was faced with a divorce between a woman (Linda) and a post-operative transsexual man (Michael). Linda was aware

that Michael was a transsexual before the marriage. *Id.* At 155. Two children were born to the woman, one from a previous boyfriend and the other through artificial insemination from Michael's brother. *Id.* At 155 – 156. Ten years after the parties were married, Michael sued for divorce and custody of the children. *Id.* The trial court entered an order finding that Michael was male at the time of the marriage based on evidence of how he dressed and acted as a child, gender reassignment surgery, how he perceived himself as male, his ability to grow a mustache and beard, Linda's knowledge of his transsexualism, his participation with the children as a male role model, and modifications of driver's license, birth certificate, passport, and name to indicate male. *Id.* At 156. Experts testified that he was male. *Id.* At 157. The Court, following many of the cases cited herein, including *Littleton*, reversed the trial court, stating that "Until the Florida legislature recognizes sex-reassignment procedures and amends the marriage statutes to clarify the marital rights of a postoperative transsexual person, we must adhere to the common meaning of the statutory terms and invalidate any marriage that is not between persons of the opposite sex determined by their biological sex at birth." *Id.* At 161.

D. Same Sex Marriage Void.

- i. **Case Law.** The Dallas Court of Appeals confirmed the validity and constitutionality of the statutes cited herein last year in the case of *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654 (Tex.App.-Dallas 2010). In that case, two men married under Massachusetts law, sought a divorce in

the 302nd Judicial District Court of Dallas County. The primary issue was whether a Texas district court have subject matter jurisdiction over a divorce case from a same sex marriage occurring in a different jurisdiction. *Id.* At 658 – 659. The Court reviewed Article I, §32 of the Texas Constitution and §6.204, §2.001(b), and §2.401 of the Texas Family Code, in which marriages are defined as a union between one man and one woman, same sex marriages are void and against public policy, and neither the state, an agency, or a political subdivision can give effect to a public act, record or judicial proceeding that recognizes or validates a marriage or civil union between persons of the same sex. *Id.* At 663, citations omitted. The Court upheld the constitutionality of the statutes, which were based on the Constitution. *Id.* at 659. The Court found that these statutes and the Constitution precluded the trial court from giving any effect to the marriage license and that even denying the petition would give it some effect. *Id.* At 665. The Appellate Court stated that the trial court could not address the merits but must dismiss the petition for lack of subject matter jurisdiction. *Id.* “The Texas Constitution and the Texas Family Code single out one particular social unit for purposes of defining a legally valid marriage in Texas: opposite-sex couples.” *Id.* At 678. *But See, State v. Naylor*, 330 S.W.3d 434 (Tex.App.-Austin 2011)⁷.

⁷ *Naylor* is an interesting case out of Austin in which two women with children obtained a divorce from the trial court. Neither was a transsexual, but there was a substantial amount of property. The trial court urged them over and over again to settle their differences, as the cost to try the property issues and determine the validity of the marriage would be staggering. The court must have been aware that the same sex marriage would have to be declared void. The parties reached an agreement and read it into the record. The court accepted their agreement and

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ii. **Constitution.** “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.” Article 1, Section 32(a) of the Texas Constitution. The Petitioner and the Respondent are of the same sex. They were when they were born, when they married, and they remain so.

iii. **Statutes.** The purported marriage is void and of no effect under the provisions of the Texas Family Code

(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.

rendered judgment on divorce. The Attorney General, on the following day, attempted to intervene and have the marriage declared void. The Austin Appellate Court issued a very narrow opinion based on whether the Attorney General had standing to intervene after the court rendered judgment. It found that the Attorney General did not have standing, as neither party invoked a constitutional claim or defense during the trial proceedings and since it was over, it was too late for the intervention. One wonders whether, based on the *Mireles* case, whether the trial court or the Austin Appellate Court would vacate the divorce decree if one of the parties requested it at a later time.

§6.204 Tex. Fam. Code

- iv. **Federal Statutes.** The purported marriage is also void under the Defense of Marriage Act (DOMA), 28 U.S. C. § 1738C, which states “No State, territory, or possession of the United States, or Indian tribe, shall be required to give any 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.” 28 U.S. C.A. § 1738C (West 2006).

6. **Dismissal of Respondent’s Counterclaim.**

- A. §6.204 of the Texas Family Code and The Defense of Marriage Act, both cited above, do not allow this Court to give effect to any claim or right arising out of any public act or record respecting a relationship between persons of the same sex. 28 U.S. C.A. § 1738C (West 2006) and §6.204 Tex. Fam. Code.
- B. A suit for divorce in this state is a claim by one person against another for rights or duties that arise out of the marriage relationship.

Section 6.204(c)(2) forbids the state and its subdivisions from giving any effect to a “right or claim to any legal protection, benefit, or responsibility asserted as a result of a” same-sex marriage. Thus, the State may not give any legal effect even to a claim to a protection or benefit predicated on a same-sex marriage. A petition for divorce is a claim—that is, “a demand of a right or supposed right,” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 414 (1981)—to legal protections, benefits, or responsibilities “asserted as a result of a marriage,” TEX. FAM.CODE ANN. § 6.204(c)(2), one example of such a benefit being community-property rights. Under section 6.204(c)(2), the State cannot give any effect to such a petition when it is predicated on a same-sex marriage. If a trial court were

to exercise subject-matter jurisdiction over a same-sex divorce petition, even if only to deny the petition, it would give that petition some legal effect in violation of section 6.204(c)(2). In order to comply with this statutory provision and accord appellee's same-sex divorce petition no legal effect at all, the trial court must not address the merits. **In other words, the court must dismiss for lack of subject-matter jurisdiction.** See *Ysasaga*, 279 S.W.3d at 864 ("Jurisdiction refers to the power of a court, under the constitution and laws, to determine the merits of an action between the parties and render judgment.") *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 665 (Tex.App.-Dallas 2010) Emphasis added.

7. **Conclusion.**

- A. The Petitioner is asking this Court to find that the marriage between her and the Respondent is void. The Respondent is asking the Court to find that they were married and divorce them. Marriage is defined by Constitution, statute, and case law as being between one man and one woman. A person's sex is determined at birth according to the Texas Courts of Appeals and almost all other state's appellate courts. Both parties admit and acknowledge being born female. No other facts are necessary for this Court's determination that the marriage is void and of no effect.
- B. Every state that has been asked to determine the sex of a transsexual for the purposes of marriage, except one, has answered that it sex is determined at birth. Our appellate courts have stated that a person's sex is determined at birth for the purposes of marriage. The *Littleton* opinion from the San Antonio appellate court was written eleven years ago and the *Mireles* opinion from the Houston appellate court was written two years ago. While it appears that the Houston court was the last court in *Mireles*, Christie Littleton petitioned the Texas Supreme Court (and

ultimately the United States Supreme Court) for relief and was denied. The Texas Supreme Court appears to agree with the San Antonio Court of Appeals.

- C. Courts in state after state have challenged their legislatures to revise their statutes if the legislature disagreed with their interpretations. See, e.g., *In Re Gardiner* (Kansas) and *In Re Application For Marriage License For Nash* (Ohio), *But see M.T. v. J.T.* (New Jersey)⁸. Our own legislature has had numerous opportunities to include individuals that have expressed the desire and effort to change their sex. It has not done so.
- D. Upon admitting that she was born female, the Respondent has foreclosed any possibility for this Court to validate the marriage, as this Court is bound by the Dallas Court of Appeals and it has stated clearly that the constitutional and statutory prohibitions against same sex marriages are to be upheld.
- E. Petitioner requests that the Court follow the Texas Appellate Courts and our sister states in finding that the sex of the Respondent at the time of her birth is her sex for the purposes of marriage, that same sex marriages are void in the State of Texas, that the purported marriage between the Petitioner and Respondent is therefore void, and dismiss the Respondent's counterclaim for divorce.

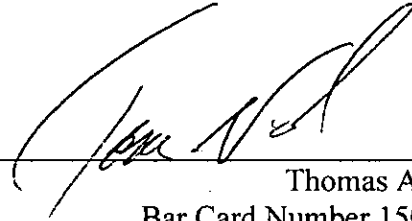
8. **Prayer.**

- A. Petitioner prays that the Court set this matter for hearing.

⁸ New Jersey did, in fact, revise their statutes, although it was almost 30 years after the *M.T. v. J.T.* case was decided. In 2003, the New Jersey legislature passed the "Domestic Partnership Act," §26:8A New Jersey Permanent Statutes, and in 2006 added statutory language to clarify that same sex unions are provided the same benefits and responsibilities as marriages. See §37:1-28 New Jersey Permanent Statutes, *et seq.* New Jersey attempts to cover every situation with marriage, civil unions, and domestic partnerships, although, the legislature has yet to define where a transsexual would fit, since civil unions are defined as same sex partnerships (See §37:1-29 New Jersey Permanent Statutes) and marriage is for heterosexual couples. *Id.*

- B. Petitioner prays that the Court find that the parties' marriage is void.
- C. Petitioner prays that the Court dismiss the Respondent's counterclaim.
- D. Petitioner prays for general relief.

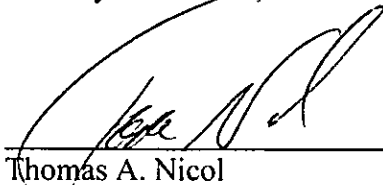
Respectfully Submitted,



Thomas A. Nicol
Bar Card Number 15015200
Attorney for the Petitioner
901 Main Street
Suite 6300
Dallas, Texas 75202
Telephone (214) 722-7400
Facsimile (214) 722-7401

CERTIFICATE OF SERVICE

I hereby certify that I have served the above entitled Petitioner's Motion for Summary Judgment was served on the Respondent, James A. Scott, by delivering to his attorney of record, Eric K. Gormly, located at 8144 Walnut Hill Lane, Suite 1080, Dallas, Texas 75248 by hand delivery on June 27, 2011.



Thomas A. Nicol

TABLE OF AUTHORITIES

1. **Constitution.** Article I, §32(a) of the Texas Constitution.
2. **Statutes.**
 - A. **Federal.** Defense of Marriage Act (DOMA), 28 U.S. C. § 1738C (West 2006).
 - B. **Texas.**
 - i. §2.001(b) Tex. Fam. Code (West 2010)
 - ii. §2.401 Tex. Fam. Code (West 2010).
 - iii. §6.204 Tex. Fam. Code (West 2010).
 - C. **New Jersey.**
 - i. §26:8A New Jersey Permanent Statutes.
 - ii. §37:1-28 New Jersey Permanent Statutes, *et seq.*
 - iii. §37:1-29 New Jersey Permanent Statutes.
3. **Case Law.**
 - A. **Texas.**
 - i. *MMP, Ltd. V. Jones*, 710 S.W.2d 59 (Tex. 1986)
 - ii. *Nixon v. Mr. Property Mgmt. Co.*, 690 S.W.2d 546 (Tex. 1985)
 - iii. *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985) (per curiam).
 - iv. *Wesson v. Jefferson S. & L. Ass'n*, 641 S.W.2d 903 (Tex. 1982)
 - v. *State v. Naylor*, 330 S.W.3d 434 (Tex.App.-Austin 2011).
 - vi. *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654 (Tex.App.-Dallas 2010)
 - vii. *Mireles v. Jack* (Tex.App.- Houston [1st Dist.] 2009).
 - viii. *Ysasaga v. Nationwide Mut. Ins. Co.*, 279 S.W.3d 858 (Tex.App.-Dallas 2009)

- ix. *Sotelo v. Scherr*, 242 S.W.3d 823, 830 (Tex. App.—El Paso 2007, no pet.)
- x. *Gainous v. Gainous*, 219 S.W.3d 97, 105–06 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).
- xi. *Zarate v. Sun Operating Ltd., Inc.*, 40 S.W.3d 617 (Tex.App. —San Antonio 2001)
- xii. *Littleton v. Prange*, 9 S.W.3d 223, 230 (Tex.App. —San Antonio 1999, pet. denied).
- xiii. *Svacina v. Gardner*, 905 S.W.2d 780, 782 (Tex.App. —Texarkana 1995, n.w.h.).
- xiv. *Glunz v. Hernandez*, 908 S.W.2d 253 (Tex. App.—San Antonio 1995, writ denied).

- B. **Florida.** *Kantaras v. Kantaras*, 29 Fla. L. Weekly D1699, 884 So.2d 155 (Fla.App. 2 Dist. 2004)

- C. **Kansas.** *In re Estate of Gardiner*, 273 Kan. 191, 42 P.3d 120 (Kan. 2002)

- D. **New Jersey.** *M. T. v. J. T.*, 140 N.J.Super. 77, 355 A.2d 204 (N.J.Super.A.D. 1976).

- E. **New York.**
 - i. *Frances B. v. Mark B.*, 355 N.Y.S.2d 712, 78 Misc.2d 112 (N.Y.Sup.Ct.1974).
 - ii. *Anonymous v. Anonymous*, 67 Misc.2d 982, 325 N.Y.S.2d 499 (N.Y.Sup.Ct.1971)

- F. **Ohio.**

- i. *In Re Application For Marriage License For Nash*, 2003-Ohio-7221, Cases 2002T0149, 2002T0179, (OHCA11)
 - ii. *Gajovski v. Gajovski*, 81 Ohio App.3d 11, 610 N.E.2d 431 (Ohio App. 9 Dist. 1991)
 - iii. *In re Ladrach*, 32 Ohio Misc.2d 6, 513 N.E.2d 828 (Ohio Probate Ct.1987).
- G. **England.** *Corbett v. Corbett*, 2 All E.R. 33, 1970 WL 29661 (P.1970).

IN THE MATTER OF THE MARRIAGE OF

REBECCA LOUISE ROBERTSON

AND

JAMES A. SCOTT

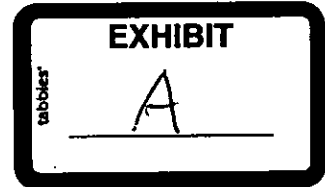
§
§
§
§
§

IN THE DISTRICT COURT

255TH JUDICIAL DISTRICT

DALLAS COUNTY, TEXAS

AFFIDAVIT IN SUPPORT OF SUMMARY JUDGMENT MOTION



State Of Florida

County Of Alameda

}
}
}

Before me, the undersigned authority, personally appeared Rebecca Louise Robertson, who, by me duly sworn, testified as follows.

"I, Rebecca Louise Robertson, am the Petitioner in the above-entitled and numbered cause. I am over eighteen years of age and under no legal disability. I have personal knowledge of the facts stated herein and they are all true."

"I was born female. I am now and always have been female. I have female body parts, chromosomes, and DNA."

"When I first met James A. Scott, her name was Susan A. Lowry. She told me that she was a girl born on April 5, 1954 in Bentondorf, Iowa. In other words, that she was born with female genitalia and breasts. When I first met her, she had female genitalia and breasts."

"In 1998, Susan A. Lowry underwent some surgeries and began taking hormones. Her appearance changed and became more masculine. On March 27, 1998, she sought a court order changing her name to James A. Scott and the designation on her birth certificate to be changed from female to male. Her request was granted by the court."

"We were ceremonially married in Texas on December 20, 1998. At the time of the

ceremony, Susan A. Lowry, aka James A. Scott, did not have a penis. She does not have a penis or testicles now or then.”

SIGNED ON June 24th, 2011.

Rebecca Louise Robertson
Rebecca Louise Robertson

SIGNED under oath before me on June 24th, 2011

STATE OF FLORIDA
COUNTY OF Alachua

The foregoing instrument was acknowledged before me this 24 day of June, 2011 by Rebecca Robertson

Stacie G. Fowler
Notary Public, State of Florida

Personally Known or produced
Identification type TX Driver license

Stacie G. Fowler
Signature of Notary Seal



CAUSE NUMBER 10-16083

IN THE MATTER OF THE MARRIAGE OF	§	IN THE DISTRICT COURT
	§	
REBECCA LOUISE ROBERTSON	§	255TH JUDICIAL DISTRICT
AND	§	
JAMES A. SCOTT	§	DALLAS COUNTY, TEXAS

PETITIONER'S FIRST REQUEST FOR
ADMISSIONS TO RESPONDENT

To: James A. Scott, by and through your attorney of record, Eric K. Gormly, located at 8144 Walnut Hill Lane, Suite 1080, Dallas, Texas 75248.

Petitioner, Rebecca Louise Robertson, requests Respondent, James A. Scott to admit the truth of the matters, including statements of opinion or of the application of law to fact or the genuineness of any documents served with this request, as set forth in the attachment. These requests for admissions are made under rule 198.1 of the Texas Rules of Civil Procedure, and each of the matters of which an admission is requested shall be deemed admitted unless a response is delivered The Nicol Law Firm, PLLC within thirty days after service of this request. Unless Respondent states an objection or asserts a privilege, Respondent must specifically admit or deny each request or explain in detail the reasons that Respondent cannot admit or deny the request. A response must fairly meet the substance of the request. Respondent may qualify an answer, or deny a request in part, only when good faith requires. Lack of information or knowledge is not a proper response unless Respondent states that a reasonable inquiry was made but that the information known or easily obtainable is insufficient to enable Respondent to admit or deny. An assertion that the request presents an issue for trial is not a proper response.

Admissions

1. Admit or Deny that your name is James A. Scott.

Admit or Deny

2. Admit or Deny that your parents named you Susan A. Lowry.

Admit or Deny

3. Admit or Deny that you obtained a marriage license from a county clerk in Texas to marry

Rebecca Louise Robertson.

Admit or Deny

4. Admit or Deny that you participated in a marriage ceremony with Rebecca Louise Robertson

in Texas.

5. Admit or Deny that you are the Respondent in this proceeding.

Admit or Deny

6. Admit or Deny that you do not have a scrotum.

Admit or Deny

7. Admit or Deny that you do not have penis.

Admit or Deny

8. Admit or Deny that you do not have testicles.

Admit or Deny

9. Admit or Deny that you were born a female.

Admit or Deny

10. Admit or Deny that you ingest testosterone.

Admit or Deny

11. Admit or Deny that you have had your birth certificate amended.

Admit or Deny

12. Admit or Deny that you are transgender.

Admit or Deny

13. Admit or Deny that you are transsexual.

Admit or Deny

14. Admit or Deny that you have been married before.

Admit or Deny

15. Admit or Deny that you have been a party to a lawsuit other than the above-styled and numbered cause.

Admit or Deny

16. Admit or Deny that you have no physical disability.

Admit or Deny

17. Admit or Deny that you have no medically diagnosed mental or physical disability.

Admit or Deny

18. Admit or Deny that a medical expert has not diagnosed you as having a mental disability.

Admit or Deny

19. Admit or Deny that a medical expert has not diagnosed you as having a physical disability.

Admit or Deny

20. Admit or Deny that you have never consummated your alleged marriage to Rebecca Louise

Robertson.

Admit or Deny

21. Admit or Deny that you are unable to have normal male sexual relations with a female.

Admit or Deny

22. Admit or Deny that a test of your chromosomes would show you to be female.

Admit or Deny

23. Admit or Deny that your original birth certificate listed your gender as female.

Admit or Deny

24. Admit or Deny that there was no error in your original birth certificate at the time it was created.

Admit or Deny

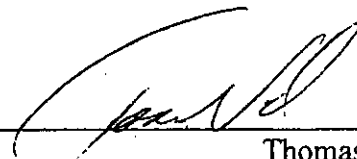
25. Admit or Deny that there was no fraud committed in the creation of your original birth certificate.

Admit or Deny

26. Admit or Deny that you were born anatomically a female.

Admit or Deny

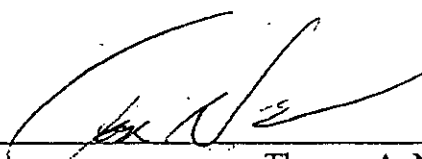
Respectfully Submitted,



Thomas A. Nicol
Attorney for Rebecca Louise Robertson
Bar Card #15015200
901 Main Street
Suite 6300
Dallas, Texas 75202
Telephone (214) 722-7400
Facsimile (214) 722-7401
email tnicol@nicollaw.com

Certificate of Service

I hereby certify that the above entitled Petitioner's First Request for Admissions to Respondent has been served on James A. Scott by sending it to his or her attorney of record, Eric K. Gormly located at 8144 Walnut Hill Lane, Suite 1080 Dallas, Texas 75248 by hand delivery on May 13, 2011.



Thomas A. Nicol



CAUSE NO. DF-10-16083

MATTER OF THE MARRIAGE OF REBECCA LOUISE ROBERTSON, PETITIONER/COUNTER-RESPONDENT, AND JAMES ALLAN SCOTT, RESPONDENT/COUNTER-PETITIONER	§ § § § § §	IN THE DISTRICT COURT 255TH JUDICIAL DISTRICT DALLAS COUNTY, TEXAS
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**COUNTER-PETITIONER JAMES ALLAN SCOTT'S RESPONSES TO
 COUNTER-RESPONDENT'S REBECCA LOUISE ROBERTSON'S
REQUEST FOR ADMISSIONS**

TO: Petitioner/Counter-Respondent Rebecca Louise Robertson, by and through her attorney of record, Thomas A. Nicol, The Nicol Law Firm, PLLC, 901 Main Street, Suite 6300, Dallas, Texas 75202.

COMES NOW, Counter-Petitioner, James Allan Scott, pursuant to Rule 198.2(b) of the Texas Rules of Civil Procedure, serves these answers to Counter-Respondent Rebecca Louise Robertson's Request for Admissions:

1:

Admit.

2:

Admit.

3:

Admit.

4:

Admit.

5:

Admit with Clarification: Admit to being Respondent/Counter-Petitioner.

6:

Admit.

7:

Admit.

8:

Admit.

9:

Admit with Clarification: Admit to being born with female genitals and organs.

10:

Admit with Clarification: Admit to having ingested testosterone.

11:

Deny.

12:

Admit.

13:

Admit.

14:

Deny.

15:

Deny.

16:

Deny.

17:

Deny.

18:

Deny.

19:

Deny.

20:

Unable to admit or deny – terminology in the statement is vague and not clearly defined.

21:

Unable to admit or deny – terminology in the statement is vague and not clearly defined.

22:

Unable to admit or deny – calls for a scientific conclusion, and respondent lacks adequate information or knowledge to answer.

23:

Deny with Clarification: The birth certificate in James Allan Scott's possession is an original birth certificate, issued by the state of Iowa, which lists his sex as male.

24:

Admit with Clarification: There was no error in the creation of the original birth certificate in James Allan Scott's possession, which lists his sex as male.

25:

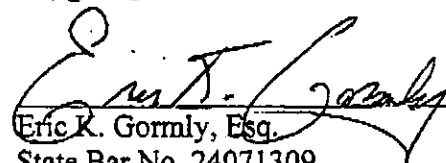
Unable to admit or deny – calls for a conclusion or proposition of law, and respondent lacks adequate information or knowledge to answer.

26:

Admit.

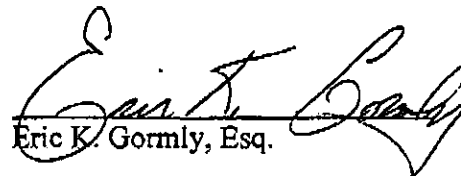
Respectfully submitted,
The Gormly Law Firm, PLLC
8144 Walnut Hill Lane, Suite 1080
Dallas, Texas 75231
(214) 242-0596 (Voice)
(214) 739-8959 (Fax)
ekg@thegormlylawfirm.com

By:


Eric K. Gormly, Esq.
State Bar No. 24071309
Attorney for Counter-Petitioner
James Allan Scott

Certificate of Service

I certify that a true and correct copy of Respondent/Counter-Petitioner's Response to Petitioner/Counter-Respondent's Request for Admissions, by and through her attorney of record, Thomas A. Nicol, Esq., 901 Main Street, Suite 6300, Dallas, Texas 75202 by facsimile transmission to 214-722-7401, on June 10, 2011, before 5:00 p.m.


Eric K. Gormly, Esq.