NO. DF-10-16083

REBECCA LOUISE ROBERTSON	§	**IN THE DISTRICT COURT**
Petitioner, Counter-Respondent	§	
v.	§	**255TH JUDICIAL DISTRICT**
JAMES ALLAN SCOTT	§	
Respondent, Counter-Petitioner	§	**OF DALLAS COUNTY, TEXAS**

RESPONDENT'S RESPONSE TO PETITIONER'S SPECIAL EXCEPTIONS AND RESPONDENT'S FIRST SUPPLEMENTAL REPLY

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Respondent James Allan Scott, Non-Movant in the Motion for Summary Judgment in the above-styled case, who files this Response to Petitioner's Original Reply to Petitioner's Special Exceptions and First supplemental Reply, and shows the Court the following in support:

1. Special Exceptions

The purpose of special exceptions in the summary-judgment procedure is to ensure that the parties and the trial court are focused on the same grounds. McConnell v. Southside ISD, 858 S.W.2d 337, 342-343 (Tex. 1993). However, Petitioner/Movant has cited no specific grounds that she maintains are unclear or ambiguous, instead providing objections and challenges to the evidence and arguments contained in Respondent's Amended Reply to Petitioner's Motion for Summary Judgment. Thus, the Respondent/Non-Movant James Allan Scott will address them as objections.

A. Authority

Respondent does not dispute the authority cited by Petitioner, and supplements as follows:

When evaluating a motion for summary judgment based on the nonmovant's pleadings, the trial court must:

1) Assume all allegations and facts in the nonmovant's pleading are true. *Natividad v. Alexsis, Inc.*, 875 S.W.2d 695, 699. *Valles v. Texas Comm'n on Jail Stds.*, 845 S.W.2d 284, 286 (Tex.App.—Austin 1992, writ denied); *see also American*

Tobacco Co. v. Grinnell, 951 S.W.2d 420, 434 (Tex.1997) (not incumbent on nonmovant-P to produce evidence supporting allegations made in her pleadings).

2) Make all inferences in the nonmovant's pleadings in the light most favorable to the nonmovant. *Medina v. Herrera*, 927 S.W.2d 597, 602 (Tex.1996); *Natividad v. Alexsis, Inc.*, 875 S.W.2d 695, 699; *Valles v. Texas Comm'n on Jail Stds.*, 845 S.W.2d 284, 286 (Tex.App.—Austin 1992, writ denied).

3) Ensure any defects in pleadings cannot be cured by amendment. *In re B.I.V.*, 870 S.W.2d 12, 13 (Tex.1994).

Objections to formal defects are objections that can be cured before judgment. *Mathis v. Bocell*, 982 S.W.2d 52, 59 (Tex.App.—Houston [1st Dist.] 1998, no pet.).

As a general rule, pleadings are not summary-judgment evidence. *Laidlaw Waste Sys. v. City of Wilmer*, 904 S.W.2d 656, 660 (Tex. 1995). A party cannot rely on factual statements contained in its own petition or answer as summary-judgment proof. *Hidalgo v. Surety S&L Ass'n*, 462 S.W.2d 540, 545 (Tex. 1971).

When a party's pleadings contain statements admitting facts or conclusions that directly contradict the party's own theory of recovery or defense, the pleadings may constitute summary-judgment proof for the other party. *See Lyons v. Lindsey Morden Claims Mgmt.*, 985 S.W.2d 86, 92 (Tex.App.—El Paso 1998, no pet.).

Although pleadings are not "evidence," when the motion for summary judgment is based on the non-movant's pleadings, the court assumes the facts in the non-movant's pleadings are true.

B. <u>Evidence Must Be Admissible in Trial</u>

Respondent does not dispute the authority cited or statement asserted by Petitioner, in that facts must be proved by the same type of evidence that would be admissible at trial, except that, in hearing a Motion for Summary Judgment, facts are proved by affidavits, depositions, interrogatories, and other discovery, rather than by oral testimony. *See* TRCP 166a(c); *Jensen Constr. Co. v. Dallas Cty.*, 920 S.W.2d 761, 768 (Tex.App.—Dallas 1996, writ denied), *disapproved on other grounds.*

Respondent shows that all evidence he has provided is fully admissible as summary judgment evidence.

C. Documents Must Be Certified or Authenticated

Some documents must be certified or authenticated. All documents tendered by Respondent that require authentication or certification have been duly authenticated or certified.

D. Affidavits of Conclusory Statements are Insufficient to Defeat Summary Judgment

The affidavit of Dr. Collier Cole (Exhibit D) consists of both facts and expert conclusions based on those facts. *See* Tex. R. Evid. 702, 703. Dr. Cole's conclusions are based on extensive research that are within his personal knowledge as one of the foremost experts in the field. Any conclusions are fully supported within the affidavit. Dr. Cole's expert testimony "is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted," and thus would not fail to support summary judgment. *Wadewitz v. Montgome*r, 951 S.W.2d 464, 466 (Tex.1997).

E. Admissibility of Expert Testimony

Dr. Collier Cole easily surpasses the Daubert standards for his qualifying as an expert witness, and for the basis of his testimony qualifying as expert testimony. See also Tex. R. Evid. 702-705. The scientific knowledge serving as the basis for his testimony has been tested quantifiably. Dr. Cole's work has been subjected to thorough peer review and published, as has the work of other qualified researchers in his field. Finally, the theories and facts serving as the basis for his testimony, including reliance on the protocols and evaluations as stated in the WPATH (Harry Benjamin) Standards of Care, has achieved widespread acceptance by others working in the field.

Dr. Cole's qualifications as an expert witness are detailed in his curriculum vitae (Exhibit E).

F. Hearsay

Respondent acknowledges that Petitioner has correctly defined hearsay.

G. Objections to Specific Documents

i. Aetna Clinical Bulletin

Petitioner objects on the grounds that this constitutes hearsay, is irrelevant, and is unauthenticated.

Hearsay:

This does not constitute hearsay because it is not being offered for the truth of the matter asserted regarding what Aetna will pay for under its insurance policies, but rather to show that it constitutes notice that Aetna recognizes transsexualism, and recognizes and uses the WPATH Standards of Care.

Irrelevant:

This is highly relevant, for it establishes that even large health insurers such as Aetna recognize transsexualism and use the WPATH standards of care. Furthermore, the bulletin cites a host of references upon which it relies, including the work of Dr. Collier Cole.

Unauthenticated:

Authentication/Identification is provided by citation to URL, and provided by affidavit of attorney for Respondent (Exhibit C). "The requirement of authentication or identification as condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Tex. R. Evid. 901(a).

ii. World Professional Association for Transgender Health, Harry Benjamin International Gender Dysphoria Association, *The Standards of Care for Gender Identity Disorders, Sixth Version*. Accessed on: September 17, 2011.

Petitioner objects on the grounds that this constitutes hearsay and is unauthenticated.

Hearsay:

This handbook, posted on WPATH's website, is commonly consulted by physical and mental health professionals, and represents decades of research. Accordingly, the document falls under the hearsay exception stated at Tex. R. Evid. 803(18), making learned treatises fully admissible.

Unauthenticated:

Authentication/Identification is provided by citation to URL, and provided by affidavit of attorney for Respondent (Exhibit C). "The requirement of authentication or

identification as condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Tex. R. Evid. 901(a).

Petitioner further objects on the grounds that "the document offered as evidence is no longer accepted by its purported sponsoring organization." This statement is purposefully misleading at best.

The claim is based on the fact that, on September 25, 2011 – eight days after Respondent accessed the site, 12 days prior to Petitioner's filing her Special Exceptions, and 15 days prior to Petitioner actually serving her special exceptions to Respondent – the sixth edition of the standards of care was replaced by the seventh version. As stated on the home page of the website, the retitled seventh edition (to *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*) expands on the sixth version to include a broader range of health issues the health care provider should address:

> "The latest 2011 revisions to the SOC realize that transgender, transsexual, and gender nonconforming people have unique health care needs to promote their overall health and well-being, and that those needs extend beyond hormonal treatment and surgical intervention ..."
> - SOC Committee Chair Eli Coleman, PhD, Professor and Director at Program in Human Sexuality, University of Minnesota. http://www.wpath.org. Accessed on: October 11, 2011.

All of the key protocol steps described in the Standards of Care that are involved in a transsexual's transition period – and to which Dr. Cole's affidavit and others in this field refer – have remained the same. The sixth version provided to the court has no more been rejected by "its purported sponsoring organization" by the publication of the seventh version, than the Restatement of Torts 2d has been rejected by litigation attorneys because of the arrival of Restatement of Torts 3d.

However, Respondent will provide the month-old seventh edition of the Standards of Care as an exhibit with this Reply.

iii. Gormly's Affidavit

Counsel for Respondent filed the affidavit to attest to personal knowledge that the photocopies of Exhibits A and B were exact duplicates of the text as found on the

respective websites on the date those websites were accessed. For the record, I am neither the author, editor nor publisher.

"The requirement of authentication or identification as condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Tex. R. Evid. 901(a).

iv. Affidavit of Collier Cole

Petitioner objects on the grounds that this constitutes hearsay, is uncertified, and is conclusory.

Hearsay:

Like any expert, Dr. Cole can review facts, provide his assessment of those facts as stated, and provide his opinion based on those facts, as provided under TRE 702 and 703. Furthermore, under TRE 705, an expert may testify as to his inferences or opinions even without disclosure of the underlying facts or data, unless the court requires otherwise. That the statement of facts that he reviewed constituted a summary of Dr. Cole's own writing makes neither the facts nor his assessment nor his conclusions any less admissible. TRE 1006 allows the contents of voluminous writings to be presented in the form of a summary. Dr. Cole is attesting to scientific facts regarding transsexualism, and opinions he and many others have formed based on those facts, and verifies his personal knowledge of the scientific facts and resulting opinions through sworn affidavit.

Dr. Cole's testimony is important to providing the court an understanding of the phenomenon of transsexualism. His testimony also affirms that, what Respondent James Allan Scott describes in his affidavit, demonstrates the steps involved in a full transition according to the accepted Standards of Care. Thus, this creates an additional exception to hearsay under TRE 803(4), which allows statements for purposes of medical diagnosis or treatment.

Furthermore, under TRE 702 and 703, experts are allowed to rely on hearsay evidence, historical knowledge, and any other information he or she deems relevant to the matter for testimony.

Respondent served Petitioner with the supplemented discovery of designation of expert on October 5, 2011, the same date that Respondent filed and served his Motion to

Supplement Discovery to this court. Respondent requests a ruling prior to the hearing on Petitioner's Motion for Summary Judgment.

Further, Respondent takes issue with Petitioner's characterization that Respondent "acknowledged the time for supplementation of discovery responses is long overdue." Footnote 1, page 6, of Petitioner's Special Exceptions. Respondent asked leave of court and provided justification for his Motion to Supplement Discovery, which is well within the court's discretion to grant based on the justifications provided. See Respondent's Motion to Supplement Discovery.

Uncertified:

Respondent directs the court's attention to the responses noted as "D" and "E," supra.

Conclusory:

Respondent directs the court's attention to the responses noted as "D" and "E," supra. Under TRE 702, an expert is allowed make conclusions based on facts, empirical studies, and other data.

v. Collier Cole's Curriculum Vitae

Petitioner objects on the grounds that this constitutes hearsay, is uncertified, and is unauthenticated.

Hearsay:

Dr. Cole's CV is authored by him, reflects his body of work, is supported by his affidavit, and is necessary to establish his credentials as an expert in the field. He keeps his CV as an ongoing recorded summary of his accomplishments, he maintains this record in the regular course of his business of research, it is standard practice in research (regularly kept in the course of business) for a researcher to maintain a CV, he made each entry at or about the time of the publication or presentation referenced, he has personal knowledge of each entry, and he is the custodian of the record of his own research. This qualifies as a hearsay exception under TRE 803(6). Furthermore, because the record reflects a summary or compilation of evidence, it is allowed under both TRE 803(6) and TRE 1006.

Uncertified:

If Petitioner uses the term as referring to Dr. Cole's lack of certification as a qualified witness, Respondent directs the courts attention to the responses noted as "D," "E"

and "G. iv.," supra. If Petitioner uses the term as referring to a perceived need to supply a certified copy of the document, because this document is supplied, not by a public entity, but by a private individual, there is no certification. If Petitioner actually means "verified," Dr. Cole's CV is attested by affidavit.

Unauthenticated:

Dr. Cole directly refers to his CV in his affidavit, making it admissible under TRE 901(a) as an authenticated document. "The requirement of authentication or identification as condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Tex. R. Evid. 901(a).

NOTE: Respondent offered to provide Dr. Cole for deposition. Dr. Cole is a busy clinical psychologist who lives and works in Galveston, Texas. Respondent did so as was consistent with the Texas Rules of Civil Procedure (re date, time & location) and the Local Rules of the Dallas County Family District Courts (re costs). While Respondent was attempting to obtain Dr. Cole's schedule and availability for a deposition, Petitioner served Respondent's attorney with a notice of intent to depose Dr. Cole, declaring an arbitrary time and place for deposition. Because this action violated a number of procedural rules, Respondent timely filed and served a motion to quash to temporarily stay the deposition while continuing to attempt contact with Dr. Cole. See letters from Eric Gormly to Thomas Nicol, Exhibits X & Y. As of this writing, Respondent's attorney has made contact and is obtaining Dr. Cole's availability.

vi. Respondent's Affidavit

Petitioner objects on the grounds that this constitutes hearsay and is speculative.

Hearsay:

In addition to this affidavit constituting experiences of which Mr. Scott has personal knowledge, the statements would fall under hearsay exceptions 803(3), regarding then-existing mental, emotional or physical condition, and 803(4), statements for purposes of medical diagnosis or treatment. Further, the indications given or statements made to him by his personal physician, Dr. Jaime Vasquez, are supported by Dr. Vasquez affidavit attesting to Mr. Scott's transition. However, Petitioner cites no specific examples, and thus waives any objection.

Speculation:

Statement describing one's own state of mind or regarding personal knowledge of how others reacted to him do not constitute speculation.

vii. An affidavit and letters from an individual (Jaime J. Vasquez).

Petitioner objects on the grounds that this constitutes hearsay, that opinions are offered by an individual not qualified as an expert, and statements are conclusory.

This is an affidavit, provided by Mr. Scott's personal physician, Jaime J. Vasquez, OD, PA, attesting to personal knowledge of Mr. Scott's completed transition, which Dr. Vasquez oversaw. The fact that Dr. Vasquez is a licensed, practicing physician, and further that he is Mr. Scott's personal physician, is all the qualification that is necessary.

"The requirement of authentication or identification as condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Tex. R. Evid. 901(a).

The "conclusory" statements to which Petitioner refers are actually a statement of fact by a medical professional, supported by the facts found in Respondent's affidavit. Further, even if this were ruled hearsay, it would fall under TRE 803(4) as a hearsay exception.

For the second time, Petitioner refers to a lack of opportunity to cross-examine a witness. Because this is evidence submitted in a motion for summary judgment, any testimony must be submitted through affidavit.

NOTE: Respondent offered to provide Dr. Vasquez for deposition, as consistent with the Texas Rules of Civil Procedure and the Local Rules of the Dallas County Family District Courts. Respondent has not communicated any further desire to do so.

viii. Decree Granting Name Change

Mr. Scott would refer Petitioner to Black's Law Dictionary, 9th Edition, which defines "suit" ("lawsuit") as,

"Any proceeding by a party or parties against another in a court of law."

Petitioning the court for a change of name does not, in any form, constitute being a party to a lawsuit. Petitioner confuses the terms "lawsuit" and "legal action."

Mr. Scott would also point out that Petitioner offers no support for her claim that a trial court in Texas has no authority to issue such an order, an order that is commonly issued in this state and that is issued only upon the finding of fact as required by the laws of this state.

Finally, the document submitted to the court's clerk is a certified copy of the order. As a certified copy of a public record, under TRE 902(4), the court order qualifies as a self-authenticating document.

ix. Birth Certificate

Petitioner objects on the grounds that this constitutes hearsay.

As a certified copy of a public record, under TRE 902(4), Mr. Scott's birth certificate qualifies as a self-authenticating document. In further support, Mr. Scott has attested to personal knowledge of this document in his affidavit. "The requirement of authentication or identification as condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Tex. R. Evid. 901(a).

However, if the facts are subject to rebuttal as Petitioner claims, and Petitioner can offer other facts to support that rebuttal, this creates a fact issue and defeats summary judgment.

x. Marriage License

Petitioner objects on the grounds that this constitutes hearsay, is uncertified, and is unauthenticated.

Hearsay:

Petitioner herself acknowledges her marriage to James Allan Scott, on the date and at the location shown on the certificate, in her sworn affidavit supporting her motion for summary judgment. See Exhibit A, Petitioner's Motion for Summary Judgment. As such, this is not hearsay, under TRE 801(e)(2)(A), admission by party opponent.

Petitioner also acknowledges her marriage to James Allan Scott, on the date and at the location shown on the certificate, in her videotaped deposition of September 9, 2011. As such, this is not hearsay, under TRE 801(e)(3), statement made in a deposition of the same proceeding.

Even if this were hearsay, it would fall under TRE 803(12), the exception for marriage, baptismal and similar certificates.

Uncertified:

Unlike a copy of the original, which would be certified by the county records department as being a true and accurate facsimile of the original, this document is the original.

Certifying, according to Black's Law Dictionary, can also refer to authenticating or verifying that document. Mr. Scott has verified in his affidavit that he has personal knowledge that the document is authentic.

Unauthenticated:

Authentication is the process showing that the document is what it purports to be.

Mr. Scott has verified in his affidavit that he has personal knowledge that the document is authentic.

As noted supra, Petitioner herself acknowledges her marriage to James Allan Scott, on the date and at the location shown on the certificate, in her sworn affidavit and her deposition. "The requirement of authentication or identification as condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Tex. R. Evid. 901(a).

Finally, if Petitioner wishes to challenge this document's authenticity with rebuttal evidence, that would constitute a fact issue, defeating summary judgment.

xi. Jean Martin Affidavit

Petitioner objects on the grounds that this constitutes hearsay and is irrelevant.

This affidavit is a standard business record affidavit, commonly tendered and accepted into evidence at trial, constituting a hearsay exception under TRE 803(6).

It is relevant because it shows that the Petitioner filed joint federal tax returns with her husband throughout their marriage (this affidavit attests to seven of those twelve years), thus holding herself out to the IRS, the federal government, and any person or entity who would handle or require tax information, as being married to James Allan Scott.

xii. Incomplete Tax Returns

Petitioner objects on the grounds that this constitutes hearsay, are incomplete, and are not authenticated.

Hearsay:

Mr. Scott verified, by personal knowledge, that these are exact photocopies of the tax returns he and his wife filed, and did so with language suitable to prove up a business record per the hearsay exception stated in TRE 803(6), which was further supported by the affidavit signed by Ms. Martin's affidavit.

Incomplete:

These returns are the complete 1040 forms, which summarize income, deductions and so on, shown on such associated forms as Schedule C, that the married couple turned in for the designated years, and as such, show the relevant information to the court. They bear no signature because, as attested to by Ms. Martin, they were e-filed. They are consistent with Ms. Martin's affidavit.

Unauthenticated:

"The requirement of authentication or identification as condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Tex. R. Evid. 901(a).

Furthermore, if these were found to be incomplete, or if Petitioner were able to show rebuttal evidence calling the document's authenticity into question, that would create a fact issue.

Incomplete:

If Petitioner is objecting under TRE 107 (the Rule of Optional Completeness), she has the right to present the remainder of the tax return materials for each of those years if she believes it necessary to make the documents fully understood or to explain them to the court.

H. Failure to Designate Experts

As provided under TRCP 193.5(a), Mr. Scott supplemented his response to Petitioner's Request for Disclosures on October 5, 2011. Mr. Scott served his supplemented discovery the same day that Mr. Scott was able to communicate with and secure a commitment from Dr. Collier Cole, PhD, for his testimony by affidavit. At the same time, Mr. Scott filed and served Respondent's Motion to Supplement Discovery.

It is within the court's discretion to grant this motion. Furthermore, non-designated expert's affidavit can be considered as summary judgment evidence if the

party shows good cause or lack of unfair surprise or prejudice. *Cunningham v. Columbia/St. David's Healthcare Sys.*, 185 S.W.3d 7, 13 (Tex.App.—Austin 2005, no pet.).

Mr. Scott can show good cause in that he undertook a diligent search to locate an expert who was available testify, and had difficulty either locating or establishing contact with experts who were credentialed enough to satisfy the Daubert guidelines. Once two experts were located, which included Dr. Cole, it took additional time to make arrangements, including arranging payment, and was eventually able to secure a commitment with Dr. Cole.

Furthermore, Mr. Scott's attorney, Mr. Gormly, attempted to work with Mr. Nicol to arrange a time convenient to both that Mr. Nicol could depose Dr. Cole. Mr. Nicol declined, citing inadequate time to prepare for and conduct an interview.

GENERAL NOTE ON LANGUAGE USED BY PETITIONER:

Mr. Scott objects to, and prays the court will note, Petitioner's frequent use of female pronouns and possessives when referring to Mr. Scott in this section and elsewhere in Petitioner's pleadings and other documents. This use of feminine possessives and pronouns by Petitioner is intentional, insulting and pejorative.

Mr. Scott is quite aware of the position that Petitioner and her attorney are taking toward his gender for the purposes of this summary judgment hearing. However, Mr. Scott requests that the court admonish and instruct Ms. Robertson and Mr. Nicol to use masculine terms henceforth in referring to Mr. Scott, out of respect for who he is and what he has gone through to get to this point, and out of respect for the court's decorum. In return, Mr. Scott is willing to stipulate for the record that that he will not interpret Mr. Nicol's use of masculine pronouns and possessives as even a minor shift in Petitioner's position on the matter.

2. Supplemental Reply to Respondent's Response

A. "No Genuine Issue as to Any Material Fact"

Petitioner contends that Mr. Scott is precluded from tendering a court order showing his change of name and gender because Mr. Scott stated in his admissions he had never been party to a lawsuit. This argument is frivolous and absurd, and was addressed in Respondent's First Amended Reply.

Petitioner then misstates the record on two points:

First, as clearly stated in Respondent's First Amended Reply, Mr. Scott did *not* acknowledge being born female. In his Admissions, he acknowledged being born with female genitals. See Respondent's Reply to Request for Admissions, and Respondent's First Amended Reply.

Second, Mr. Scott did not acknowledge "wanting to be male." He acknowledged seeing himself as male and wanting to undergo treatment and procedures to make his body conform to his psychological identity. See, Respondent's Reply to Request for Admissions. See also, Respondent's First Amended Reply and Exhibits.

Texas Law Allows Issuance of New Birth Certificate Showing a Changed Gender Designation

Petitioner then misstates the law. Texas does allow a person to change the gender designation on his or her birth certificate. In Texas, by rule, the birth certificate is amended, replacing the former information with the new information "to complete or correct a record that is incomplete or proved by satisfactory evidence to be inaccurate," Texas Health & Safety Code, § 191.028, including information "that completes or corrects information relating to the person's sex, color, or race." Texas Health & Safety Code, § 192.011(a) (emphasis added). Furthermore, upon request, the county clerk will issue a new birth certificate to the requestor instead of an amending certificate attached to the original. Texas Health & Safety Code, § 192.011(b).

> **Texas Health & Safety Code, § 191.028. Amendment of Certificate**
>
> (a) A record of a birth, death, or fetal death accepted by a local registrar for registration may not be changed except as provided by Subsection (b) .
>
> (b) An amending certificate may be filed to complete or correct a record that is incomplete or proved by satisfactory evidence to be inaccurate. The amendment must be in a form prescribed by the department. The amendment

shall be attached to and become a part of the legal record of the birth, death, or fetal death if the amendment is accepted for filing, except as provided by Section 192.011(b).

.....

Texas Health & Safety Code, § 192.011. Amending Birth Certificate

(a) This section applies to an amending birth certificate that is filed under Section 191.028 and that completes or corrects information relating to the person's sex, color, or race.

(b) On the request of the person or the person's legal representative, the state registrar, local registrar, or other person who issues birth certificates shall issue a birth certificate that incorporates the completed or corrected information instead of issuing a copy of the original or supplementary certificate with an amending certificate attached.

.....

Thus, it is clear that the two relevant Texas statutes dealing with an individual's birth certificate recognize a person's change of sex to the newly designated gender, and enable that person to request and receive a new birth certificate reflecting that corrective change. This further supports the plain language of Family Code § 2.005, which recognizes an individual's change of sex status for the purposes of marriage in this state. See discussion infra.

Furthermore, Mr. Scott has presented the court with a certified copy of his birth certificate, which asserts he is male. Petitioner has offered no evidence to counter. Petitioner continues to maintain the birth certificate and many other documents and elements of status are "rebuttable presumption." First, most presumptions in law are "rebuttable presumptions." Second, arguing against such a "rebuttable presumption" requires substantive evidence with which to rebut the presumption. Petitioner has offered nothing of the sort.

Mr. Scott never stated he was a woman who decided to be a man. He stated he was born with female genitals, but knew inside that he was a woman.

Consummation

Mr. Scott made an issue of consummation because of Petitioner's obsessive and repeated focus on the presence or absence of a penis, testicles or scrotum as constituting what "universally" defines a man, and as being necessary to qualify as a man. Petitioner, in her Request for Admissions, submitted admit/deny statements that dealt with whether

Mr. Scott has a scrotum (Statement 6), a penis (Statement 7), or testicles (Statement 8), whether Mr. Scott has ever "consummated" his "alleged marriage" to Ms. Robertson (Statement 20), or whether Mr. Scott is "unable to have normal male sexual relations with a female" (Statement 21). In addition to presenting this as a key issue in her arguments, Petitioner highlights this issue in a number of cases she cites.

Beyond the cosmetic appearance of the appendage called a penis, and the fact that it carries the channel through which urine passes, a penis has but one function, which is sexual. And, when functioning properly during sex between a heterosexual couple, the most common use of that appendage is for penetration. Hence, "consummation." The court should note that Mr. Scott is not arguing that a penis is necessary for sex, simply that sex defines the primary use of the organ.

Further, Petitioner makes the frequent – and false – claim that Mr. Scott has not fully completed his transition. She bases this contention on the fact that Mr. Scott opted against the risky and largely ineffective procedure known as phalloplasty, which consists of surgically attaching a sausage-like section of skin-covered tissue between his legs. See Cole Affidavit, Exhibit D, Respondent's First Amended Reply to Petitioner's Motion for Summary Judgment.

Finally, as discussed infra, Petitioner references Family Code § 1.101 in her inaccurate assertion that a marriage's presumed validity is based on establishing parentage and providing for children. In a traditional, fertile heterosexual couple in which neither partner has any other physical complications, if the timing is correct, the aforementioned children result from a penis penetrating a vagina, also known in more archaic terms as consummation. Indeed, as Mr. Scott points out, under Texas law and under certain circumstances, male impotence serves as one of the reasons a marriage can nullified. Tex. Fam. Code § 6.106.

Thus, despite the fact that Petitioner never uses the term "consummate" in her motion for summary judgment, much of her argument revolves around the concept, so Mr. Scott felt it appropriate to confront the issue directly.

Additionally, Petitioner ignores the scientific and social issues presented and supported throughout Mr. Scott's First Amended Reply. Relating to Petitioner's repeated references to what she alleges is Mr. Scott's "incomplete transition," she ignores and

dismisses significant facts and issues of which she is fully and directly aware, having experienced her husband going through this process. Robertson Videotaped Deposition, at 11:01 (September 9, 2011). These include the current state of medical technology, the risks involved with the procedure Mr. Scott has opted not to take, and the advantages of the procedure Mr. Scott did opt for.

Petitioner continues to argue based on the faulty assumption that the current state of medical technology enables a surgeon to create a fully functioning penis with full sensation. The science is simply not there, as pointed out by Dr. Cole in his affidavit. Cole Affidavit, Reply to Motion for Summary Judgment, Exhibit D. And, Petitioner ignores the fact that there are two general avenues a female to male transsexual can take, and Mr. Scott chose to take the one that is proven to be viable, safer, not prohibitively expensive, and provides a far better quality of life for the person going through it. Mr. Scott cannot grow a penis or have one cloned to satisfied the arbitrary and unfounded demands that Ms. Robertson now seems to be making.

In so doing, however, Petitioner has made the argument that a male to female transsexual, whose surgery is irreversible (implying that Mr. Scott's somehow is not), has "completed" the transition, in alleged contrast to Mr. Scott. If that were a legitimate point, Petitioner seems to be saying that a completed transition would qualify, thus recognizing that a transsexual who has completed the transition could be recognized as being of the newly designated gender – which, by Petitioner's standards, leaves out Mr. Scott. Taking the position a step further, using that logic, it is a matter of degree. If you have a surgically constructed vagina, clitoris and labia, along with breasts, no body hair and facial reconstruction, you are in the club. And current surgical technology can do exactly that.

So by closely examining Petitioner's rationale, either, a) what she considers full transition is achieving physical attributes that more closely resemble the typical body that sex, in which case she is acknowledging transsexualism, or, b) the level to which the physical attributes more closely resemble the typical body that sex are irrelevant to Petitioner, in which case, there is no reason to make the point in the first place.

Furthermore, Petitioner is apparently saying that, setting aside the role of the brain in determining gendered identity, all of the therapy, the struggle and ridicule and personal

challenges that person faces, living full time as a member of that sex, the hormone therapy and its permanent changes, the surgeries the person does have to endure, challenges in finding relationships ... after all of that arduous struggle, if the person does not subject himself to a single, risky, expensive and highly problematic surgery, it does not count.

One does not perceive the world or oneself through his or her genitals. One perceives the world and oneself through his or her mind. That is the window through which a human being views his life. And for most people, that psychological reality is matched by the physical body, but not always. *See* Cole Affidavit, Reply to Motion for Summary Judgment, Exhibit D..

B. A Question of Law

Petitioner incorrectly asserts that no material facts are disputed. This is addressed in Respondent's First Amended Reply as well as within this document supra.

Petitioner makes a point of complaining over Mr. Scott's use of the term "overruled by operation of law," maintaining Mr. Scott should have used the term, "overturned by statute." As defined by Black's Law Dictionary, "operation of law" refers to "[T]he means by which a right or a liability is created for a party regardless of the party's actual intent." Black's Law Dictionary, 1201 (9th ed. 2009). The term "overrule" refers to a decision specifically aimed at ruling against or rejecting a prior decision or rule, and is typically used in relation to a court overturning or setting aside a precedent, "by expressly deciding that it should no longer be controlling law." Black's Law Dictionary, 1213 (9th ed. 2009).

Most of the enacted statutes cited by Mr. Scott were not specifically intended to overturn, or even address, the court decisions made moot by those statutes. However, the statutory changes nonetheless nullified any authority the court decision might have had, regardless of the intent of, and without requiring affirmative action by, the parties affected by the new law.

In her Special Exceptions, Petitioner frequently misquotes the record and mischaracterizes Respondent's positions. In doing so, however, Petitioner fills most of the pages with repeats of many of the same arguments that she previously has made, and

that Mr. Scott previously has addressed and rebutted in Respondent's First Amended Reply.

Thus, at this point, rather than engage in a tit-for-tat attempt to answer, section by section and paragraph by paragraph, all of the assertions and misstatements that Petitioner makes in her Special Exceptions, it may be more useful and would take less of the court's time to state the key points and issues, offer response and rebuttal for each, and provide support for Mr. Scott's position and conclusion.

Presumption of Validity of Marriage

The Family Code begins with § 1.101, a statute titled Every Marriage Presumed Valid. There is a legal presumption which exists to support the public policy of this state:

> **§ 1.101. Every Marriage Presumed Valid**
>
> In order to promote the public health and welfare and to provide the necessary records, this code specifies detailed rules to be followed in establishing the marriage relationship. However, in order to provide stability for those entering into the marriage relationship in good faith and to provide for an orderly determination of parentage and security for the children of the relationship, it is the policy of this state to preserve and uphold each marriage against claims of invalidity unless a strong reason exists for holding the marriage void or voidable. Therefore, every marriage entered into in this state is presumed to be valid unless expressly made void by Chapter 6 or unless expressly made voidable by Chapter 6 and annulled as provided by that chapter. (Emphasis added.)

James Scott entered into his marriage with Rebecca Robertson in good faith, believing and maintaining that he had a valid, legitimate marriage – a marriage that began nearly 13 years ago. Indeed, Ms. Robertson herself has acknowledged that she believed she had a valid marriage, even when she decided she wanted to end the marriage in July of 2010, up until the point that she met with her first attorney later that year. Robertson Videotaped Deposition, at 16:14 (September 9, 2011).

As argued in Respondent's Amended Reply, and stated in the statute, § 1.101 creates a legal presumption that the marriage is valid, and frames this as the public policy of the state of Texas. To overcome this presumption, the Petitioner must present evidence as expressly required under Chapter 6 of the Code, which Petitioner has failed to do.

Chapter 6, Subchapter B states grounds for annulment for voidable marriages, such as an underage minor marrying without parental consent, or one party concealing he or she divorce within 30 days prior to the new marriage. *See* Tex. Fam. Code, §§ 6.102 – 6.111. With the exception of being underage, the petitioner loses standing to sue if he or she voluntarily lived with the other after learning of the issue.

Chapter 6, Subchapter C states grounds to declare the marriage void. *See* Tex. Fam. Code §§ 6.201 – 6.206. These deal with ages of the parties and types of

relationships banned for marriage, with three exceptions. One deals with acts committed under the 1925 Texas Penal Code. The other two follow:

> **§ 6.202. Marriage During Existence of Prior Marriage**
> (a) A marriage is void if entered into when either party has an existing marriage to another person that has not been dissolved by legal action or terminated by the death of the other spouse.
> (b) The later marriage that is void under this section becomes valid when the prior marriage is dissolved if, after the date of the dissolution, the parties have lived together as husband and wife and represented themselves to others as being married.
>
> **§ 6.204. Recognition Of Same-sex Marriage Or Civil Union**
> .....
> (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.

Neither applies to this marriage. Mr. Scott was not married to another when he entered into his marriage with Ms. Robertson. In addition, as has been argued throughout this process, Mr. Scott is and should be considered a man, Ms. Robertson acknowledges being a woman, and therefore, the parties are not the same sex. There is no justification for Petitioner declaring the marriage void.

AUTHORITY CITED BY PETITIONER: CASE LAW

Littleton v. Prange

This case serves as the foundation for Petitioner's claim that her marriage to Mr. Scott is void. In his Amended Reply, Mr. Scott pointed a number of facts that render the *Littleton* decision irrelevant to this court and any other court in the state. Mr. Scott provides more evidence in the sections that follow.

Mireles v. Mireles

Regarding *Mireles*, given Petitioner's claims in prior documents, a review of the case is required to clarify what was at issue.

Mireles v. Mireles, 2009 WL 884815, No. 01-08-00499-CV (Tex.App.—Houston [1st Dist.] 2009, pet. denied) (memo op.; 4-2-09), is an unreported memorandum opinion involving one Andrew Mireles and one Jennifer Mireles (later Jennifer Jack), a formerly married couple who were granted a divorce in April of 2005.

Mireles was a transsexual man. Jack was unhappy with the terms of the divorce decree, and Mireles wanted to keep it intact. Jack later filed a petition requesting the trial court set aside and vacate the divorce decree, alleging the marriage was void because both she and Mireles were female. In March of 2008, the trial court heard the petition.

Jack filed her petition as a bill of review, which Mireles argued could not allow a final order without an evidentiary hearing one or more of Jack's claims (in this case, fraud). On examining the information supplied by the parties, the judge saw that both Jack and Mireles had agreed before the court that they were women, and that Mireles had offered no evidence or statements to the contrary. Because both parties stated that they were of the same sex, the court had no choice but to declare the marriage void, denying Mireles the chance to put on evidence arguing against Jac and entered a final order setting aside the divorce decree.

The appellate court held that what Jack filed was actually a collateral attack – attempting to void a judgment in proceedings brought for some other purpose – and not a bill of review – which would replace an earlier judgment with a single, correct one. Jack was using the right procedure, but called it by the wrong name, so the court proceeded on the basis that Jack was actually pursuing a collateral attack.

To prevail on collateral attack, the party must show that the complained-of judgment is void. The court then noted that both parties agreed they were female. Based on evidence stipulated by both parties, that they were both of the same sex, the court had no choice but to declare the marriage void under Texas law. The decision had nothing to do with whether Mireles was a transsexual man. The finding rested solely on the fact that both parties declared they were the same sex, thus they were in a same-sex marriage by admission of both parties, thus the marriage was void under Texas law, and thus the divorce decree to that marriage was void and could be collaterally attacked.

To summarize: The court held that the complained of judgment (divorce decree) was void because the underlying claim on which that judgment was based (the marriage)

was void. The marriage was void because both Mireles and Jack stated to the court, without qualification, that they were the same sex, thus making their union a same-sex marriage, which is void by law in Texas. The fact that Mireles was a transsexual man had no bearing on the decision because Mireles never asserted that to the court as an argument. Based on the only evidence before the court, the court had no other choice.

AUTHORITY CITED BY PETITIONER: STATUTES

As discussed earlier, the Texas Health and Safety Code recognizes a change of sex designation for one's birth certificate, and further allows the individual to get a new certificate rather than an amending certificate to attach to the original. Texas Health & Safety Code, §§ 191.028, 192.011(a)-(b).

However, the statute at the heart of what destroys the Petitioner's argument is Tex. Fam. Code § 2.005, which specifies what documents suffice to show a county clerk proof of identity and age when one applies for a marriage certificate.

To understand the statute and its intent, it is important to understand the statute's history, the context in which it was created, and legislative action on the statute since its passage in September of 2009.

THE PRIOR STATUTE – PROOF OF IDENTITY AND AGE

Until September 1, 2009, those applying for a marriage license could show any document that fell under a broadly worded statute:

> § 2.005. PROOF OF IDENTITY AND AGE.
>
> (a) The county clerk shall require proof of the identity and age of each applicant.
>
> (b) The proof must be established by a certified copy of the applicant's birth certificate or by some certificate, license, or document issued by this state or another state, the United States, or a foreign government.
>
> (c) A person commits an offense if the person knowingly provides false, fraudulent, or otherwise inaccurate proof of an applicant's identity or age under this section. An offense under this subsection is a Class A misdemeanor.
>
> *Added by Acts 1997, 75th Leg., ch. 7, § 1, eff. April 17, 1997. Amended by Acts 2005, 79th Leg., ch. 268, § 4.06, eff. Sept. 1, 2005.*
>
> Tex. Fam. Code § 2.005 (Vernon's 2005).

Stated succinctly, and to correct a misstatement by Petitioner in her Special Exceptions, § B. iv., someone could apply for a marriage license showing a birth certificate or any state-issued document suitable for identification. Typically, this was a driver's license. In fact, a driver's license is what Mr. Scott presented to the Dallas County clerk when he and Ms. Robertson applied for their marriage license in 1998.

Between the years 2005 and 2008, news of a polygamist cult in West Texas began to spread. Soon after a group from the Fundamentalist Church of Latter Day Saints had built a compound near Eldorado, Texas, the Texas Legislature began to learn of children being married at an early age, sometimes to close family members. In April of 2008, the Texas Department of Family and Protective Services removed 450 children from the compound, and interviews with the children led to more information about the forced marriages. The concern prompted review of and significant changes to a number of laws regarding who could be issued marriage licenses, such as a prohibition on marrying first cousins or step-relatives, and raising the age for marrying with parental consent from 14 to 16. *Comment to §§ 2.004, 2.005, 2.006, 2.006, and 2.009, Sampson & Tindall's Texas Family Code Annotated*, 9 (18th ed. 2008). The amendments to Chapter 2, Subchapter A of the Texas Family Code, effective following the 80th Texas Legislature, Regular Session (2007) and moving into the 81st legislature convening in 2009, "regulate the prohibited marriages through the otherwise ministerial function of the county clerk to issue marriage licenses." *Id. See also* Tex. Fam. Code Ann. §§ 2.102, 2.103, 6.102, 6.205, 6.206; Tex. Pen Code Ann. §§ 25.01, 25.02.

PLAIN LANGUAGE OF THE CURRENT STATUTE

In 2009, the legislature passed § 2.005 in its current form, which reads:

> **§ 2.005. Proof of Identity and Age**
>
> (a) The county clerk shall require proof of the identity and age of each applicant.
>
> (b) The proof must be established by:
> (1) a driver's license or identification card issued by this state, another state, or a Canadian province that is current or has expired not more than two years preceding the date the identification is submitted to the county clerk in connection with an application for a license;
> (2) a United States passport;

(3) a current passport issued by a foreign country or a consular document issued by a state or national government;
(4) an unexpired Certificate of United States Citizenship, Certificate of Naturalization, United States Citizen Identification Card, Permanent Resident Card, Temporary Resident Card, Employment Authorization Card, or other document issued by the federal Department of Homeland Security or the United States Department of State including an identification photograph;
(5) an unexpired military identification card for active duty, reserve, or retired personnel with an identification photograph;
(6) an original or certified copy of a birth certificate issued by a bureau of vital statistics for a state or a foreign government;
(7) an original or certified copy of a Consular Report of Birth Abroad or Certificate of Birth Abroad issued by the United States Department of State;
(8) an original or certified copy of a court order relating to the applicant's name change or sex change;
(9) school records from a secondary school or institution of higher education;
(10) an insurance policy continuously valid for the two years preceding the date of the application for a license;
(11) a motor vehicle certificate of title;
(12) military records, including documentation of release or discharge from active duty or a draft record;
(13) an unexpired military dependent identification card;
(14) an original or certified copy of the applicant's marriage license or divorce decree;
(15) a voter registration certificate;
(16) a pilot's license issued by the Federal Aviation Administration or another authorized agency of the United States;
(17) a license to carry a concealed handgun under Subchapter H, Chapter 411, Government Code;
(18) a temporary driving permit or a temporary identification card issued by the Department of Public Safety; or
(19) an offender identification card issued by the Texas Department of Criminal Justice.

The point of issue in this statute revolves around the wording of § 2.005(8), which explicitly allows an individual to present "an original or certified copy of a court order relating to the applicant's name change or sex change."

In Respondent's Amended Reply to Petitioner's Motion for Summary Judgment, Mr. Scott demonstrated the logical conclusion one must reach based on the plain language of the statute:

a) Tex. Fam. Code § 2.005(b)(8) explicitly names a court order relating to sex change, with no stated limitation regarding jurisdiction, as sole requisite proof of identity for the purpose of obtaining a marriage certificate;

b) Explicit reference to documentation throughout the statute establishes that there was legislative intent to recognize the elements of identity as would be stated in such documents, including a court order showing change of sex;

c) Such documentation shows the sex of the individual as the sex designated following the sex change or transition, thus affirming that the state recognizes person's re-designated sex as that person's sex for the purpose of obtaining a marriage license;

d) Texas law explicitly forbids recognition of a marriage or marital relationship between two people of the same sex, and further defines marriage as being between one man and one woman, concluding that any marriage between two people of the same sex is void;

e) The Texas legislature would not explicitly recognize the legitimacy of a certificate for a marriage that is void under Texas law; thus

f) This necessarily means that the legislature recognizes the legitimacy of a marriage between a man and a transsexual woman, or between a woman and a transsexual man.

Petitioner reaches a different conclusion based on a tenuous line of reasoning. She asserts that, in the alternative, the Texas legislature might have drafted the amendment to provide for someone who had gone through a change of sex transition and had documents showing the newly designated sex to marry someone with documents showing the same sex designation. By showing the change of sex court order, by this reasoning, a transsexual woman would marry a genetic woman by explaining to the clerk that, despite the documents showing both individuals to be women, one is "really a man," so it is allowed.

This rationale defies both logic and the facts. First, the transsexual woman sees herself as a woman, would be viewed by others as a woman, has the same genitals and other physical attributes of a woman, and would be, by all appearances and behavior, a woman. Marrying another woman would constitute a same-sex marriage to both women as well as society. Any attraction one would have for the other would, by definition, be a

same-sex attraction, and any sexual relations between the two would be same-sex relations: same bodies, same genitals, same sex. Using Petitioner's reasoning, this is perfectly fine because one of those women was born with a penis, setting aside the fact that the penis is no longer there and had been replaced with a vagina and clitoris.

Next, if both women happen to be transsexual, and both are same-sex attracted, by Petitioner's reasoning, they could get married if one of them shows the change-of-sex court order, and the other keeps that fact from the clerk issuing the license. By anyone's definition, including even Petitioner's, this would be a same-sex relationship. Yet, by showing one of the women's court order, they could still be married.

Third, this reasoning would require that a transsexual only be allowed to marry based on a same-sex attraction. In other words, only transsexual lesbians or gay transsexual men would be allowed to marry those to whom they are attracted. A heterosexual transsexual man would want to have romantic relations with and marry a woman. Using the Petitioner's reasoning, what would otherwise have to be classified as a heterosexual relationship would be artificially and arbitrarily barred, which would contradict the basic principle behind Texas' policy banning same-sex marriages.

To restate, Petitioner maintains that allowing use of a court order showing change of gender would prove to the clerk that the requestor is not really the sex they appear to be and is designated on all of their documents. This also assumes that the person, after having gone through full transition, had changed, not just the basic identity documents – driver's license, passport, birth certificate, and court orders showing change of name or change of sex designation – but each and every one of the remaining documents listed under Section 2.005. This would require that the applicant have changed the sex designation on his military ID card, insurance policy, vehicle certificate of title, pilot's license, license to carry a concealed weapon, and all records from colleges and secondary schools attended. Only the court order would remain to show the person's former sex designation, thus allow that person to marry someone of the same current sex.

Also, this ignores the fact that, if someone were intending to marry another of the same sex as stated on all the documents, that person could show an amended birth certificate, which would show the original certificate to which the amendment would be

attached. Applying Petitioner's rationale to real-life situations shows how illogical this position is.

FROM LEGISLATIVE INTENT TO THE LEGISLATURE'S INTERPRETATION

Regardless, all must agree that the Texas Legislature itself would provide the clearest and most accurate look at how a statute should be interpreted and how its effect should be understood. Petitioner is correct in stating that, at the time HB 3666 was passed, there was little debate. According to the legislative history on record, H.B. No. 3666 was passed by the House on May 12, 2009, by a vote of 149 Yeas, 0 Nays, and 1 present, not voting; the same bill passed the Senate on May 27, 2009, by a vote of 31 Yeas 31 and 0 Nays; and Tex. Fam. Code 2.005 was amended to its current form effective September 1, 2011. Act of May 27, 2009, 81st Leg., R.S., ch. 978 (codified as amendments to Tex. Fam. Code §§ 2.002, 2.005(b), 2.006(b), 2.009(a), 2.102, 2.209, 2.403(a), 2.404, and repealing § 2.011).

During the 2011 session, conservative legislators recognized the impact of a statute stating that, as proof of identity or age, an applicant for a marriage certificate may present to the clerk, "an original or certified copy of a court order relating to the applicant's name change or sex change." Tex. Fam. Code § 2.005(8). The impact they recognized was confirmation of the right of a transgendered individual, as the post-transition sex designated on such a document, to enter into a heterosexual marriage. An article in the *Washington Times* summarized the situation:

> "Two years after Texas became one of the last states to allow transgendered people to use proof of their sex change to get a marriage license, Republican lawmakers are trying to reverse the decision. . . . The legislation by Mr. [Tommy] Williams of Houston, and Rep. Lois Kolkhorst, of Brenham, would prohibit county and district clerks from using a court order recognizing a sex change as documentation to get married, effectively requiring the state to recognize a 1999 state appeals court decision that said in cases of marriage, gender is assigned at birth and sticks with a person throughout their life even if they have a sex change. . . . Gov. Rick Perry' spokesman Mark Miner said the governor never intended to allow transgendered people to get married. He said the three-word sex change provision was sneaked through on a larger piece of legislation Mr. Perry signed two years ago regarding marriage licensing rules for district and county clerks."

Jim Vertuno (AP), *GOP Lawmakers Try to Reverse Law on Transgendered*, WASH. TIMES, Apr. 25, 2011.

The concerned legislators began to work aggressively on S.B. 723, a bill whose sole purpose was to strike the three-word phrase, "or sex change," from § 2.005(8). The Senate Research Center's Bill Analysis, 82R4936 KSD-F, was clear in the Statement of Intent:

> H.B. 3666, 81st Legislature, Regular Session, 2009, allowed applicants for a marriage license to use an original or certified copy of a court order relating to the applicant's name change or sex change.
>
> In a 1999 decision, *Littleton v. Prange*, by the Fourth Texas Court of Appeals in San Antonio, Chief Justice Phil Hardberger concluded that an individual's sex is decided by biological factors at birth, as indicated on a birth certificate. In Chief Justice Hardberger's opinion regarding the transsexual marriage between two male born men, he stated, "We hold, as a matter of law, that Christie Littleton is a male. As a male, Christie cannot be married to another male. Her marriage to Jonathon was invalid...".
>
> S.B. 723 amends Section 2.005(b), Family Code, by removing "or sex change" in reference to documents acceptable in proving an applicant's identity for obtaining a marriage license.
>
> As proposed, S.B. 723 amends current law relating to the proof of an applicant's identity and age required for the issuance of a marriage license.
>
> .....
>
> **SECTION BY SECTION ANALYSIS**
>
> SECTION 1. Amends Section 2.005(b), Family Code, to delete existing text requiring that proof of identity be established by an original or certified copy of a court order relating to the applicant's sex change.
>
> SECTION 2. Makes application of this Act to an application for a marriage license submitted to a county clerk, prospective.
>
> SECTION 3. Effective date: September 1, 2011.

http://www.legis.state.tx.us/tlodocs/82R/analysis/html/SB00723I.htm

According to Texas Legislature Online, *http://www.legis.state.tx.us/BillLookup*, the bill was reported out of committee on April 14, 2011. Thereupon, the bill died – but not before clarifying for the state and the nation that the Texas Legislature viewed Tex. Fam. Code § 2.005(8) as confirming a right that the sponsors of S.B. 723 vehemently opposed: the right of a transgendered man to marry a woman, or a transgendered woman to marry a man.

Finally, Petitioner dismisses § 2.005 as a "technical change" to the Family Code, implying that, as a "technical change," the law somehow carries less weight or should be ignored. The claim is unfounded, but even if it were true, the distinction is irrelevant: technical change or not, Texas Family Code § 2.005 is still law, and as such, is ruling authority for every court in the state.

Affirming the Right to Marry

A statute affirming a group's right to marry achieves exactly that. Passage of a statute clarifying rights does not mean that those rights did not exist prior to such clarification.

The Petitioner is asking the court to dissolve what now has been declared a legitimate marriage, concluding that Mr. Scott's marriage would have been legitimate had he married in good faith on or after September 1, 2009, but that the state should act against its own strong public policy and dissolve his marriage because he and his wife in good faith exchanged their vows a few years too early.

When the U.S. Supreme Court decided Loving v. Virginia, 388 U.S. 1 (1967), the Court did not add the caveat that all marriages of mixed race in Virginia existing prior to the decision were nullified. Indeed, that reasoning would have nullified the very marriage of the couple who brought the suit.

Taking an example from our own Family Code, a statute exists prohibiting bigamy, stating in clear terms that marrying someone while still married to another makes the second marriage void from the beginning:

> § 6.202. Marriage During Existence of Prior Marriage
> (a) A marriage is void if entered into when either party has an existing marriage to another person that has not been dissolved by legal action or terminated by the death of the other spouse.
> .....

However, that same statute provides for legitimizing what previously had been, by law, a void marriage:

> § 6.202. Marriage During Existence of Prior Marriage
> .....
> (b) The later marriage that is void under this section becomes valid when the prior marriage is dissolved if, after the date of the dissolution, the parties have lived together as husband and wife and represented themselves to others as being married.

To review, Petitioner has taken the position that the exchange of vows occurring prior to the passage of a statute affirming a couple's right to marry somehow mandates that the state now intervene to dissolve a marriage that the legislature has affirmed as being legitimate. This position is not only contrary to public policy, but it defies both logic and established jurisprudence and statutory principles in this state. Furthermore, even if one accepted this logic and maintained the marriage between James Allan Scott

and Rebecca Louise Robertson were void on the date it was celebrated, under settled Texas law, the marriage would have been legitimated as a valid informal marriage as of September 1, 2009, the date the law took effect.

PRINCIPLES OF EQUITY AND ESTOPPEL

Respondent has an issue with Mr. Scott's invoking the principle of equity, ignoring the fact that the concept of fairness underlies our very system of laws and justice. As defined in Black's, "equity" refers to "a right, interest or remedy recognizable by a court of equity," and is often invoked as "the recourse to principles of justice to correct or supplement the law as applied to particular circumstances." Black's Law Dictionary, 619 (9th ed. 2009). The concepts of equity and of estoppel, about which Respondent also complains, support an entire body of contract law. The defensive doctrine of equitable estoppel exists to prevent one party from taking unfair advantage of another through deception, and promissory estoppel to prevent injustice when one party reasonably relied on a stated or implied promise of another. See, e.g., Restatement (Second) of Contracts, §§ 72, 75, 80, 94 (1979); Restatement (Second) of Agency, §§ 8B, 354, 378 (1958); Restatement (Second) of Torts, §§ 323, 537, 872, 894 (1965); Restatement (First) of Restitution, § 55 (1936).

CONCLUSION

Mr. Scott has laid out multiple lines of authority, in this document and those that preceded it, showing that his marriage is valid under the laws of Texas. Mr. Scott's case has nothing to do with same-sex marriage. Mr. Scott's case is about affirming the right of a transgendered man or woman to enter into a heterosexual marriage in Texas, confident that neither the state nor a vindictive spouse can declare it to be anything than what it is: a valid, legitimate marriage.

OBJECTION

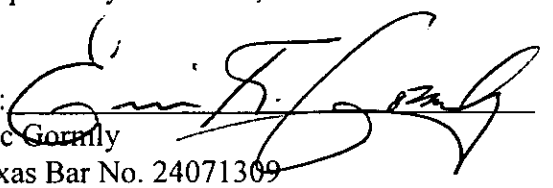
Petitioner has requested that Mr. Scott pay attorney's fees and costs, and return what the Petitioner provided him in temporary spousal support. Such a request is

audacious and outrageous, given the circumstances. We object in the strongest terms, and request the court set this matter for hearing if Petitioner presses the matter.

PRAYER

James Scott, Respondent, prays the court weigh the evidence and arguments, deny Petitioner's Motion for Summary Judgment, and dismiss Petitioner's Petition to Declare the Marriage Void.

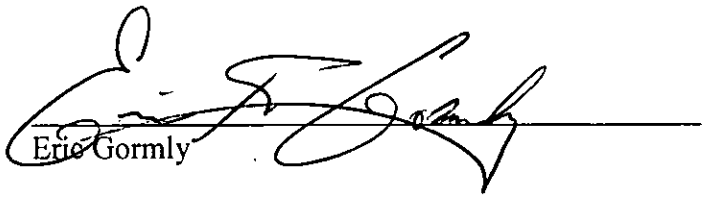
Respectfully submitted,



By:
Eric Gormly
Texas Bar No. 24071309
6211 W. Northwest Highway
Suite 251
Dallas, TX 75225
Tel. (214) 242-0596
Fax. (214) 242-0597
Attorney for Respondent
James Scott

CERTIFICATE OF SERVICE

I certify that on November 3, 2011 a true and correct copy of Respondent's Response to Special Exceptions was served by personal delivery to Thomas Nicol.



Eric Gormly

BILL ANALYSIS

http://www.legis.state.tx.us/tlodocs/82R/analysis/html/SB00723I.htm

Senate Research Center
82R4936 KSD-F

S.B. 723
By: Williams
Jurisprudence
2/28/2011
As Filed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

H.B. 3666, 81st Legislature, Regular Session, 2009, allowed applicants for a marriage license to use an original or certified copy of a court order relating to the applicant's name change or sex change.

In a 1999 decision, *Littleton v. Prange*, by the Fourth Texas Court of Appeals in San Antonio, Chief Justice Phil Hardberger concluded that an individual's sex is decided by biological factors at birth, as indicated on a birth certificate. In Chief Justice Hardberger's opinion regarding the transsexual marriage between two male born men, he stated, "We hold, as a matter of law, that Christie Littleton is a male. As a male, Christie cannot be married to another male. Her marriage to Jonathon was invalid...".

S.B. 723 amends Section 2.005(b), Family Code, by removing "or sex change" in reference to documents acceptable in proving an applicant's identity for obtaining a marriage license.

As proposed, S.B. 723 amends current law relating to the proof of an applicant's identity and age required for the issuance of a marriage license.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 2.005(b), Family Code, to delete existing text requiring that proof of identity be established by an original or certified copy of a court order relating to the applicant's sex change.

SECTION 2. Makes application of this Act to an application for a marriage license submitted to a county clerk, prospective.

SECTION 3. Effective date: September 1, 2011.

Texas Legislature Online
Bill Stages

Bill: SB 723 **Legislative Session:** 82(R) **Author:** Williams

Stage 1		Stage 2		Stage 3	Stage 4	Stage 5
Filed	✓	**Out of Senate Committee**	X	**Voted on by Senate**	**Out of House Committee**	**Voted on by House**
2/15/2011		4/14/2011				

Stage 6	Stage 7
Governor Action	**Bill Becomes Law**

Legend

✓ Indicates bill passed stage
X Indicates bill has not reached stage
Indicates bill failed to complete stage

Bill filed by

Helpful Links

Legislative process	Floor action	Diagram - House
Introducing a bill	Governor's action	Diagram - Senate
Referral to a committee	Effective date	
Committee reports	Legislative glossary	

Stage 1 Williams on 2/15/2011.

Stage 2 Bill reported out of Senate committee on Jurisprudence with vote of 4 Ayes, 2 Nays, 1 Present Not Voting, 0 Absent.

Stage 3 Not reached.

Stage 4 Not reached.

Stage 5 Not reached.

Stage 6 Not reached.

Stage 7 Not reached.

TEXAS FAMILY CODE

§ 1.101. Every Marriage Presumed Valid

In order to promote the public health and welfare and to provide the necessary records, this code specifies detailed rules to be followed in establishing the marriage relationship. However, in order to provide stability for those entering into the marriage relationship in good faith and to provide for an orderly determination of parentage and security for the children of the relationship, it is the policy of this state to preserve and uphold each marriage against claims of invalidity unless a strong reason exists for holding the marriage void or voidable. Therefore, every marriage entered into in this state is presumed to be valid unless expressly made void by Chapter 6 or unless expressly made voidable by Chapter 6 and annulled as provided by that chapter.

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§ 2.301. Fraud, Mistake, or Illegality in Obtaining License

Except as otherwise provided by this chapter, the validity of a marriage is not affected by any fraud, mistake, or illegality that occurred in obtaining the marriage license.

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§ 2.005. Proof of Identity and Age

(a) The county clerk shall require proof of the identity and age of each applicant.

(b) The proof must be established by:

(1) a driver's license or identification card issued by this state, another state, or a Canadian province that is current or has expired not more than two years preceding the date the identification is submitted to the county clerk in connection with an application for a license;

(2) a United States passport;

(3) a current passport issued by a foreign country or a consular document issued by a state or national government;

(4) an unexpired Certificate of United States Citizenship, Certificate of Naturalization, United States Citizen Identification Card, Permanent Resident Card, Temporary Resident Card, Employment Authorization Card, or other document issued by the federal Department of Homeland Security or the United States Department of State including an identification photograph;

(5) an unexpired military identification card for active duty, reserve, or retired personnel with an identification photograph;

(6) an original or certified copy of a birth certificate issued by a bureau of vital statistics for a state or a foreign government;

(7) an original or certified copy of a Consular Report of Birth Abroad or Certificate of Birth Abroad issued by the United States Department of State;

(8) an original or certified copy of a court order relating to the applicant's name change or sex change;

(9) school records from a secondary school or institution of higher education;

(10) an insurance policy continuously valid for the two years preceding the date of the application for a license;

(11) a motor vehicle certificate of title;

(12) military records, including documentation of release or discharge from active duty or a draft record;

(13) an unexpired military dependent identification card;

(14) an original or certified copy of the applicant's marriage license or divorce decree;

(15) a voter registration certificate;

(16) a pilot's license issued by the Federal Aviation Administration or another authorized agency of the United States;

(17) a license to carry a concealed handgun under Subchapter H, Chapter 411, Government Code;

(18) a temporary driving permit or a temporary identification card issued by the Department of Public Safety; or

(19) an offender identification card issued by the Texas Department of Criminal Justice.

(c) A person commits an offense if the person knowingly provides false, fraudulent, or otherwise inaccurate proof of an applicant's identity or age under this section. An offense under this subsection is a Class A misdemeanor.

History. Amended by Acts 2009, 81st Leg. - Regular Session, ch. 978, Sec. 2, eff. 9/1/2009.

Amended by Acts 2005, 79th Leg., ch. 268, Sec. 4.06, eff. 9/1/2005.

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Title 3. Vital Statistics

Chapter 191. ADMINISTRATION OF VITAL STATISTICS RECORDS

Subchapter B. RECORDS OF BIRTHS, DEATHS, AND FETAL DEATHS

Current through the 81st First Called Session

§ 191.027. Review of Certificate by Local Registrar

(a) The local registrar shall carefully examine each birth or death certificate when presented for registration to determine if it is completed as required by this title and by the state registrar's instructions.

(b) If a death certificate is incomplete or unsatisfactory, the local registrar shall call attention to the defects in the return.

(c) If a birth certificate is incomplete, the local registrar shall immediately notify the informant and require the informant to supply the missing information if it can be obtained.

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Current through the 81st First Called Session

§ 191.028. Amendment of Certificate

(a) A record of a birth, death, or fetal death accepted by a local registrar for registration may not be changed except as provided by Subsection (b) .

(b) An amending certificate may be filed to complete or correct a record that is incomplete or proved by satisfactory evidence to be inaccurate. The amendment must be in a form prescribed by the department. The amendment shall be attached to and become a part of the legal record of the birth, death, or fetal death if the amendment is accepted for filing, except as provided by Section 192.011(b) .

(c) Not later than the 30th business day after the date the department receives an amending certificate, the department shall notify the individual of whether the amendment has been accepted for filing.

History. Amended by Acts 2009, 81st Leg. - Regular Session, ch. 758, Sec. 2, eff. 9/1/2009.

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Chapter 192. BIRTH RECORDS

Subchapter A. GENERAL REGISTRATION PROVISIONS

Current through the 81st First Called Session

§ 192.001. Registration Required

The birth of each child born in this state shall be registered.

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Chapter 192. BIRTH RECORDS

Subchapter A. GENERAL REGISTRATION PROVISIONS

Current through the 81st First Called Session

§ 192.002. Form of Birth Certificate

(a) The department shall prescribe the form and contents of the birth certificate.

(b) The section of the birth certificate entitled "For Medical and Health Use Only" is not part of the legal birth certificate. Information held by the department under that section of the certificate is confidential. That information may not be released or made public on subpoena or otherwise, except that release may be made for statistical purposes only so that no person, patient, or facility is identified, or to medical personnel of a health care entity, as that term is defined in Subtitle B, Title 3, Occupations Code, or appropriate state or federal agencies for statistical research. The board may adopt rules to implement this subsection.

(c) The form must include a space for recording the social security numbers of the mother and father and the signatures of the biological mother and biological father. These social security numbers and signatures are not a part of the legal birth certificate, shall be made available to the agency administering the state's plan under Part D of Title IV of the federal Social Security Act (42 U.S.C. Section 651 et seq.) , and may not be used or disseminated for any purpose other than the establishment and the enforcement of child support orders.

(d) The social security numbers of the mother and father recorded on the form shall be made available to the federal Social Security Administration.

History. Amended by Acts 1999, 76th Leg., ch. 556, Sec.69, eff. 9/1/1999.

Amended by Acts 2001, 77th Leg., ch. 1420, Sec. 14.785, eff. 9/1/2001.

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HEALTH AND SAFETY CODE

Title 3. Vital Statistics

Chapter 192. BIRTH RECORDS

Subchapter A. GENERAL REGISTRATION PROVISIONS

Current through the 81st First Called Session

§ 192.003. Birth Certificate Filed or Birth Reported

(a) The physician, midwife, or person acting as a midwife in attendance at a birth shall file the birth certificate with the local registrar of the registration district in which the birth occurs.

(b) If a birth occurs in a hospital or birthing center, the hospital administrator, the birthing center administrator, or a designee of the appropriate administrator may file the birth certificate in lieu of a person listed by Subsection (a) .

(c) If there is no physician, midwife, or person acting as a midwife in attendance at a birth and if the birth does not occur in a hospital or birthing center, the following in the order listed shall report the birth to the local registrar:

(1) the father or mother of the child; or

(2) the owner or householder of the premises where the birth occurs.

(d) Except as provided by Subsection (e) , a person required to file a birth certificate or report a birth shall file the certificate or make the report not later than the fifth day after the date of the birth.

(e) Based on a parent's religious beliefs, a parent may request that a person required to file a birth certificate or report a birth delay filing the certificate or making the report until the parent contacts the person with the child's name. If a parent does not name the child before the fifth day after the date of the birth due to the parent's religious beliefs, the parent must contact the person required to file the birth certificate or report the birth with the name of the child as soon as the child is named. A person required to file the birth certificate or report the birth who delays filing the certificate or making the report in accordance with the parent's request shall file the certificate or make the report not later than the 15th day after the date of the child's birth.

History. Amended by Acts 2005, 79th Leg., ch. 68, Sec. 1, eff. 5/17/2005.

Amended by Acts 1999, 76th Leg., ch. 556, Sec.81, eff. 9/1/1999.

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Chapter 192. BIRTH RECORDS

Subchapter A. GENERAL REGISTRATION PROVISIONS

Current through the 81st First Called Session

§ 192.006. Supplementary Birth Certificates

(a) A supplementary birth certificate may be filed if the person who is the subject of the certificate:

(1) becomes the child of the person's father by the subsequent marriage of the person's parents;

(2) has the person's parentage determined by a court of competent jurisdiction; or

(3) is adopted under the laws of any state.

(b) An application for a supplementary birth certificate may be filed by:

(1) an adult whose status is changed; or

(2) a legal representative of the person whose status is changed.

(c) The state registrar shall require proof of the change in status that the board by rule may prescribe.

(d) Supplementary birth certificates and applications for supplementary birth certificates shall be prepared and filed in accordance with board rules.

(e) In accordance with board rules, a supplementary birth certificate may be filed for a person whose parentage has been determined by an acknowledgment of paternity.

History. Amended by Acts 1999, 76th Leg., ch. 556, Sec.71, eff. 9/1/1999.

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Chapter 192. BIRTH RECORDS

Subchapter A. GENERAL REGISTRATION PROVISIONS

Current through the 81st First Called Session

§ 192.010. Change of Name

(a) Subject to board rules, an adult whose name is changed by court order, or the legal representative of any person whose name is changed by court order, may request that the state registrar attach an amendment showing the change to the person's original birth record.

(b) The state registrar shall require proof of the change of name that the board by rule may prescribe.

(c) Repealed by Acts 1991, 72nd Leg., ch. 14, Sec. 59, eff. Sept. 1, 1991.

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Chapter 192. BIRTH RECORDS

Subchapter A. GENERAL REGISTRATION PROVISIONS

Current through the 81st First Called Session

§ 192.011. Amending Birth Certificate

(a) This section applies to an amending birth certificate that is filed under Section 191.028 and that completes or corrects information relating to the person's sex, color, or race.

(b) On the request of the person or the person's legal representative, the state registrar, local registrar, or other person who issues birth certificates shall issue a birth certificate that incorporates the completed or corrected information instead of issuing a copy of the original or supplementary certificate with an amending certificate attached.

(c) The department shall prescribe the form for certificates issued under this section.

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Subchapter B. RECORDS OF BIRTHS, DEATHS, AND FETAL DEATHS

Current through the 81st First Called Session

§ 191.028. Amendment of Certificate

(a) A record of a birth, death, or fetal death accepted by a local registrar for registration may not be changed except as provided by Subsection (b) .

(b) An amending certificate may be filed to complete or correct a record that is incomplete or proved by satisfactory evidence to be inaccurate. The amendment must be in a form prescribed by the department. The amendment shall be attached to and become a part of the legal record of the birth, death, or fetal death if the amendment is accepted for filing, except as provided by Section 192.011(b) .

(c) Not later than the 30th business day after the date the department receives an amending certificate, the department shall notify the individual of whether the amendment has been accepted for filing.

History. Amended by Acts 2009, 81st Leg. - Regular Session, ch. 758, Sec. 2, eff. 9/1/2009.

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Title 3. Vital Statistics

Chapter 192. BIRTH RECORDS

Subchapter A. GENERAL REGISTRATION PROVISIONS

Current through the 81st First Called Session

§ 192.011. Amending Birth Certificate

(a) This section applies to an amending birth certificate that is filed under Section 191.028 and that completes or corrects information relating to the person's sex, color, or race.

(b) On the request of the person or the person's legal representative, the state registrar, local registrar, or other person who issues birth certificates shall issue a birth certificate that incorporates the completed or corrected information instead of issuing a copy of the original or supplementary certificate with an amending certificate attached.

(c) The department shall prescribe the form for certificates issued under this section.

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