



MASSACHUSETTS SCHOOL OF LAW at ANDOVER

GENDER, SEXUAL ORIENTATION, AND THE LAW

FINAL EXAM

Fall 2012

Please write your exam number on each bluebook and number your bluebooks.

You may use your book and class notes for this exam. You may not use a phone or laptop.

You have three hours to complete the exam.

QUESTION 1

Below is Edith Windsor's preliminary statement from her original complaint in the federal district court suing the IRS for recovery of taxes. The United States Supreme Court recently granted certiorari in this case. Take on the role of clerk to Justice Kennedy and write a memo to the Justice on:

- 1) the standard of review the court should use in assessing the case; and
- 2) the arguments for each side on the underlying constitutional question.

PRELIMINARY STATEMENT

1. This is an action seeking a refund of the estate tax levied on a married same-sex couple, which would not have applied to a married straight couple, and which consequently violates the United States Constitution.
2. The plaintiff in this action, Edith Schlain Windsor ("Edie"), met her late spouse, Thea Clara Spyer ("Thea"), nearly a half-century ago at a restaurant in New York City. Edie and Thea went on to spend the rest of Thea's life living together in a loving and committed relationship in New York.
3. After a wedding engagement that lasted more than forty years, and a life together that would be the envy of any couple, Thea and Edie were finally legally married in Toronto, Canada in 2007. Having spent virtually their entire lives caring for each other in sickness—including Thea's long, brave battle with multiple sclerosis—and in health, Thea and Edie were able to spend the last two years of Thea's life together as married.
4. New York State legally recognizes Edie and Thea's marriage and provided them with the same status, responsibilities, and protections as other married people. However, Edie and Thea were not considered "married" under federal law because of the operation of the statute known (ironically) as the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7.

5. This clearly unequal treatment of Edie and Thea's marriage both demeans their remarkable commitment to one another and has great practical significance for Edie, the sole beneficiary of Thea's estate. Under the Internal Revenue Code, the transfer of money or property from one spouse to another upon death generally does not trigger any estate tax at all. Because of the operation of DOMA, however, the federal government does not consider Edie and Thea to have been married, and, as a result, Edie has been forced to pay more than \$350,000 in federal estate tax that she would otherwise not have had to pay if Edie and Thea's marriage were recognized under federal law.

6. In other words, Edie's inheritance, unlike the inheritance of a widow who had been left everything by her deceased husband, has been significantly reduced by the estate tax. Edie, now 81 years old, faces the rest of her life without Thea, with shrunken retirement savings, and with the added insult of the federal government refusing to recognize the validity of her marriage, not to mention her forty-four-year committed relationship.

7. Throughout the history of this country, whenever the federal government has attached protections or responsibilities to marriage, it has always deferred to the states' determination of whether a couple is validly married. Since 1996, the federal government has deviated from that practice, but only for same-sex couples who marry.

8. Accordingly, Edie Windsor now brings this action to recover the federal estate tax that she was forced to pay in violation of the Constitutional guarantee of equal protection of the law.

Question 2

Wade "Unique" Adams has sought you out as counsel in a case she wants to bring against McKinley High School in Lima, Ohio.

Unique is sixteen years old. Unique has always felt she was born in the wrong body. "I never felt like a boy. I always felt like a girl." She sometimes wears more masculine attire and appears as a teenage boy, Wade. However, even when dressed in masculine attire, she has a high voice and feminine mannerisms.

Unique is more comfortable dressing as a woman. Her feminine attire includes dresses, high heeled shoes, a padded bra and a wig. Unique has been diagnosed by a licensed psychologist with gender dysphoria. Apart from receiving counseling and adopting the dress of her self-identified gender, Unique has not received other medical treatment, such as hormones or surgery, to address her condition. She is also not sure how she would express her sexual orientation.

She tells you that in the past, she tended to present as Wade for most school activities, but she dressed as Unique for her after-school participation in the school's Glee Club. Because members of the Glee Club have been so supportive, she has decided to present as Unique full time at school. Her parents support this decision, but they are concerned about her safety.

Unique decided to audition for the role of "Rizzo" in the high school production of the musical *Grease*. Rizzo is a female role. Unique's audition was rated as the best for the part, and the directors of the show, a student and a former student, cast her in the part.

However, the school cheerleading coach, Sue Sylvester, objected to Unique playing Rizzo. At a meeting in the principal's office, Sylvester said Unique is "too masculine" to play the part and that allowing her to play a female role would be "disruptive." She fears that "Wade will be subjected to bullying by other students." The principal agreed with Sylvester's concerns and said the directors must re-cast the role.

Meanwhile, Unique has begun wearing feminine attire during the school day. However, she is still required to use the boys' restrooms and locker room. She says would feel more comfortable using the girls' restrooms and locker room but that the principal will not permit this.

Unique has been subject to bullying at school both when she was dressed in masculine attire as Wade and when she presents as Unique. When dressed as Wade, she has been called names such as "faggot" and "queer." As Unique, she has been called "faggot," "queer," "Fanny tranny" and "she-male." On one occasion, another student splashed a slushy in her face.

In response to these incidents, the principal told Unique's parents that several Glee Club members, both gay and straight, have been called names and "slushied," and that being "slushied" is considered a rite of passage for Glee Club members. The students who slushied Glee Club members have not been punished.

However, the principal has adopted an anti-bullying curriculum that addresses name calling in general. The curriculum does not specifically address bullying related to sexual orientation or gender identity.

Unique feels blessed to have supportive parents and to have found friends in the Glee Club. Still, she says, "I feel like I don't fit in anywhere."

She would like to bring an action against the school for discrimination. Specifically, she wants the school to allow her to play Rizzo, allow her to use the girls' restrooms and locker room, and protect her from bullying. Neither sexual orientation nor gender identity is mentioned in Ohio anti-discrimination laws.

Please analyze Unique's claims against the school.



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QUESTION 1

You are an attorney for the Service Members Legal Defense Network (SLDN), an organization that represents the interests of lesbian and gay service members. Now that Don't Ask Don't Tell has been repealed, lesbian and gay service members are coming out and seeking military benefits for their families. In order for their spouses to receive benefits, including health care and death benefits, service members must enroll them in the Defense Enrollment Eligibility Reporting System (DEERS). You have received numerous calls from service members who have been unable to enroll their same-sex spouses in DEERS.

You have selected two client couples to bring a test case on this issue.

- a. What potential claims can you make on behalf of your clients?
- b. What are the arguments to support the claims? Don't forget to think in terms of policy where it is relevant.
- c. What arguments do you anticipate the potential defendants would make? Don't forget to think in terms of policy where it is relevant.

Plaintiffs Stewart Bornhoft and Stephen McNabb

1. Plaintiff Colonel Stewart Bornhoft, USA (Ret.), is a citizen of the United States. He resides in Bonita, California. He is legally married, pursuant to the laws of the State of California, to his husband, Plaintiff Stephen McNabb.
2. Colonel Bornhoft began his military service when he entered the United States Military Academy in 1965. He served two voluntary tours in Vietnam, commanding both a combat engineer company and an infantry headquarters company, and then at Fort Bragg, North

Carolina, he commanded a construction engineer company. He later commanded two districts in the US Army Corps of Engineers, the Charleston District in South Carolina and the Omaha District, which is one of the largest in the country. He and his husband Stephen met in 1996 and have been together ever since. They were married on September 21, 2008 in San Diego, California.

3. In July of 2009, Colonel Bornhoft's appendix perforated and he was rushed to the Naval Medical Center of San Diego for emergency surgery. During this ordeal, Colonel Bornhoft was afraid that his husband would be denied access to his hospital room.

4. On October 11, 2011, at approximately 1:45 p.m., Colonel Bornhoft went to the Marine Corps Recruit Depot ID Card Processing Center in San Diego, California to obtain benefits for Stephen. Even though Stephen is already enrolled in the DEERS system because of his own military service, Colonel Bornhoft was told that same-sex legal spouses are not entitled to the benefits that he sought.

Plaintiffs Charlie and Karen Morgan

1. Plaintiff Chief Warrant Officer Charlie Morgan, ARNG, is a citizen of the United States. She resides in Rye, New Hampshire. She and her wife, Plaintiff Karen Morgan, are married pursuant to the laws of the State of New Hampshire.

2. Chief Warrant Officer Morgan is currently serving in the New Hampshire National Guard and is stationed at Joint Force Headquarters in Concord, New Hampshire. Chief Warrant Officer Morgan is a full-time member of the Army National Guard in the Active Guard Reserve. Chief Warrant Officer Morgan's military service began in 1982. Since that time, she has served in Kuwait, Qatar and Iraq. She and her wife, Plaintiff Karen Morgan, met in 1997 and have been together since August of that year. They were married in New Hampshire on October 24, 2011.

3. In 2008, Chief Warrant Officer Morgan was diagnosed with breast cancer, and has undergone chemotherapy, radiation treatment and a double mastectomy. On September 1, 2011, Chief Warrant Officer Morgan was diagnosed with recurring cancer. Plaintiffs are especially concerned with obtaining all the death benefits and burial rights that opposite-sex couples receive.

4. In late July of 2011, Chief Warrant Officer Morgan received an application to participate in the mandatory Yellow Ribbon Reintegration Event. During that time, Chief Warrant Officer Morgan and Karen were in a legally-recognized civil union. Families are strongly encouraged to attend this event, and the application requested information about Chief Warrant Officer Morgan's spouse. Because Karen is not a DEERS dependent, she is not permitted to attend this event. After contacting United States Senator Jeanne Shaheen about this problem, Charlie received a letter, addressed to Senator Shaheen, from Major General William N. Reddel, III of the New Hampshire National Guard. That letter, dated September 26, 2011 stated that "[p]articipation at a Yellow Ribbon Event is a military benefit limited to Service members and their families as recognized by the Defense Enrollment Eligibility Reporting System (DEERS). Specifically, the Defense of Marriage Act (DOMA) prohibits the extension of many benefits to same sex couples I am sorry that we could not provide a better solution to this issue." Ultimately, due to Senator Shaheen's intervention, the military granted a one-time exception.

5. On October 25, 2011 at approximately 2:00 p.m., Plaintiffs entered the ID Card section located at Pease Air Force Base in Portsmouth, New Hampshire to obtain benefits for Karen. Sue Williams, the customer service representative, attempted to process Karen into the RAPIDS system in order to register her for DEERS. After entering Karen's information, Ms. Williams encountered an error message stating "sponsor and spouse cannot have the same gender" in red letters in the notes section of the screen.

QUESTION 2

Read the article below about Brianna Freeman.

You are the judge who is hearing Freeman's lawsuit against Denny's under the Maine Human Rights Act. Denny's has filed a motion to dismiss Freeman's claim for failure to state a claim. Please write your decision granting or dismissing Denny's motion. Your decision should include each side's arguments as well as the reasoning that supports your decision.

The Maine Human Rights Act reads as follows:

To protect the public health, safety and welfare, it is declared to be the policy of this State ... to prevent discrimination in employment, housing or access to public accommodations on account ...of sex, sexual orientation, physical or mental disability. [2005, c. 10, §1 (AMD).]

9-C. Sexual orientation. "Sexual orientation" means a person's actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression.

[2005, c. 10, §3 (NEW) .]

Woman suing Denny's says she only wants to be accepted as female

By Christopher Williams, Staff Writer, Sun Journal

Published on Monday, Jun 14, 2010

Five days after Brianna Freeman had used the women's restroom at Denny's restaurant in Auburn, she was beckoned by the manager. He asked to speak to her privately.

He told her that a customer had complained that she, a male, had used the restroom. He had talked to his supervisor, who talked to the company's vice president.

Because Freeman hadn't had a transsexual operation and wasn't considered a biological female, she had to use the men's room, they told her.

Freeman told him the restaurant was breaking the law by not allowing her, a transgendered person, to use the restroom at the public place.

When she met with a Sun Journal reporter at a different local restaurant this week, Freeman, 45, was dressed in a black tank top with spaghetti straps. Her dyed auburn hair fell below her shoulders and was pulled back by sunglasses. She wore silver earrings and a thin blue necklace. Before exiting, she slung a denim pocketbook over her shoulder.

What baffles Freeman, she said, is the restaurant's apparent change in policy.

She had frequented the same Denny's for about a year, dressed as a woman, and used the women's restroom without objection. She had met with the restaurant manager to explain her situation. There was no problem.

Then the restaurant changed managers. That's when the problem started.

Freeman said she never saw the woman who used the bathroom at the same time she did the night of the complaint. That woman couldn't have seen Freeman's face. So how did she determine that Freeman wasn't female?

She offered to discuss the issue with the manager, to provide documentation of her transition and make her counselor available.

They declined, having already decided, she said.

Freeman is in what she calls phase two of a three-phase process. First, about a decade ago, she discovered her true gender identity. Next, she assumed the role and lifestyle of a woman. Phase three is the surgical procedure to complete the process. It costs about \$100,000, prohibitive for her to pay privately. No health insurance covers such a procedure, she said, though legislators in California are considering it.

The 13-day hospital stay would be followed by surgical recuperation, rehabilitation and the physical adjustment, she said. The mental adjustment would be minor by comparison, she said.

Freeman hasn't had similar problems at any of the other eight restaurants she visits regularly, she said.

"I am accepted and acknowledged as a female. It's really all I'm asking people to try to do." In a couple of cases, she has talked to management or wait staff to explain before using the restroom, she said. The rest of the time, she doesn't feel the need to.

She has been undergoing hormone therapy for two-and-a-half years, aimed at boosting her estrogen levels and blocking her testosterone.

"This is something that people are born with," she said. It's in her genetic makeup, in her brain.

...

"I've always felt different," she said. "I've always felt like I did not belong with what I was given biologically. I thought it was just growing pains."

But she learned it was nothing of the kind.

"That's a lie ... it's a fallacy."

Now that she is living as a woman, she can't and won't revert back to her life as a man, she said.

“I do not regress, digress to anything that's male as I present myself.” That includes using the men's room.

“I know there are some people out there who can't get beyond themselves to see that this is my choice,” she said. “It has nothing to do with you. I just want to live my life as completely as I can.”

Gender, Sexual Orientation, and the Law

Fall 2010

Final Exam

Instructions

This exam is due Monday, Dec. 6, at midnight.

Please email your exam answer to Arvi Schott at arvi@msslw.edu. She will send you an email to confirm receipt of your exam on Tuesday. You may also turn in a print copy of your exam at the reserve desk.

Your exam should have your exam identification number at the top. Do not include your name on your exam answer.

Please include page numbers on your exam answer.

You may use your book and any materials I passed out in class to complete the exam. You should not do any outside research.

You do not need to cite cases in the exam, though referring to specific cases by name may be helpful in answering the questions.

Please read the attached memo from the El Paso District Attorney to the Attorney General of Texas (AG). Answer the following questions:

1. How should the AG respond to the Questions Presented? Remember that the AG must also consider Texas' mini-DOMA in responding to the questions.
2. Assume that Hill is denied a marriage license and wishes to bring a challenge to the denial under the United States Constitution. You are the federal judge who received Hill's complaint. Please draft an opinion accepting or rejecting her claims.
 - a. First, state Hill's potential claims.
 - b. State the standard of review and the rationale for the standard of review for each potential claim.
 - c. Address the arguments pro and con on each claim.
 - d. Give your holding and reasoning on each claim.

RECEIVED
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OPINION COMMITTEE



JO ANNE BERNAL
EL PASO COUNTY ATTORNEY
500 EAST SAN ANTONIO
ROOM 503, COUNTY COURTHOUSE
EL PASO, TEXAS 79901

(915) 546-2050
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April 19, 2010

RD-0882-GA

RECEIVED
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OPEN RECORDS DIVISION

FILE # ML-46443-10
I.D. # 46443

The Honorable Greg Abbott
Attorney General of Texas
Attn: Opinion Committee
P. O. Box 12548
Austin, Texas 78711-2548

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
NO. 7009 1680 0001 9160 0857

Re: REQUEST FOR AN OPINION REGARDING MARRIAGE LICENSE
REQUIREMENTS
(CA File #OP-10-075)

Dear General Abbott:

I am seeking your opinion regarding the authority of the El Paso County Clerk to issue a marriage license in the following circumstance.

I. Background

Virgil Eugene Hill, Jr. was born in Oceanside, New York; his birth certificate identifies his sex as male. He subsequently underwent sex change surgery, and on July 2, 1991, Judge Richard B. White, of the District Court of the State of Washington and for the County of Spokane, issued an Order, changing the name of Virgil Eugene Hill, Jr. to Sabrina Jeanne Hill (hereafter "Hill") for all intents and purposes. In February of this year, Sabrina J. Hill sought a marriage license from the County Clerk of the County of El Paso, Texas, presenting as identification the New York birth certificate; the Washington State court order; and an Arizona driver's license, which also identified her as a female (the second applicant for the marriage license presented a Texas drivers license identifying her as a female).

In evaluating the various proofs of identity offered by Hill, the County Clerk was unsure as to the eligibility of the applicants for a marriage license. Upon further discussion, it was agreed to submit the question of their eligibility to your office for an opinion. At issue is whether or not, under Texas law, the county clerk may issue them a marriage license based on Hill's birth certificate.

II. Legal Arguments and Authorities

Pursuant to Texas Family Code section 2.005¹, in order to obtain a marriage license, the county clerk shall require proof of identity and age of each applicant for a marriage license; nineteen documents that will each satisfy the proof requirement are listed. Included among the nineteen listed documents are an original or certified copy of a birth certificate issued by a bureau of vital statistics for a state or foreign government²; an original or certified copy of a court order relating to the applicant's name change or sex change³; and a current driver's license or identification card issued by this state or another state.⁴

A. Texas Case Law and Defense of Marriage Act

1). *Littleton v. Prange*

The question of whether a transsexual is male or female, and therefore capable of entering into a valid marriage with a member of the opposite sex, was first raised in Texas in *Littleton v. Prange*, 9 S.W.3rd 223 (Tex. App.—San Antonio 1999, pet. denied). Lee Cavazos, born a male, underwent a four-year program, including psychological and psychiatric treatment at the University of Texas Health Science Center, and legal name change to Christie Lee Cavazos prior to sex reassignment surgeries. Christie Lee became Christie Lee Littleton when she married Jonathan Mark Littleton. They were married for seven years, until Jonathan's death. Christie Lee Littleton filed a medical malpractice suit under the wrongful death statute as a surviving spouse against a doctor who then filed for summary judgment, alleging that Christie Lee Littleton was a male, therefore could not be the surviving spouse of a male, and therefore could not be a wrongful death beneficiary. In response, Littleton provided an amended birth certificate, obtained after the sex reassignment surgery, which indicated her sex as female.

¹ All references are to the Texas Family Code unless otherwise indicated.

² § 2.005(b) (6).

³ § 2.005(b) (8).

⁴ § 2.005(b)(1).

In its analysis, the appellate court indicated that it would have preferred to defer to the Legislature.

“In our system of government, it is for the legislature, should it choose to do so, to determine what guidelines should govern the recognition of marriages involving transsexuals. The need for legislative guidelines is particularly important in this case where the claim being asserted is statutorily-based.

“It would be intellectually possible for this court to write a protocol for when transsexuals would be recognized as having successfully changed their sex. ...But this court has no authority to fashion a new law on transsexuals, or anything else. We cannot make law when no law exists; we can only interpret the written word of our sister branch of government, the legislature.

Littleton, 9 S.W.3d 223, 230.

Lacking legislative guidance, the court decided that the solution was to stand on Littleton’s original Texas birth certificate, and reject the amended birth certificate. The court held that, as a matter of law, Littleton was immutably a male.⁵

Subsequently, in what was perhaps an unintended consequence of *Littleton*, the Bexar County Clerk’s office issued a marriage license to at least two couples in which both parties were apparently women, because one of each couple was able to produce a birth certificate showing she was born a man.⁶

2) *The Federal Defense of Marriage Act and Texas Family Code section 6.204 and Texas Constitution, Article I, Section 32*

In 1996, the United States Congress passed the Defense of Marriage Act, 28 U.S.C.A. §1738C (2010) (DOMA). DOMA defined marriage for federal purposes as a legal union between one man and one woman, and provided that no state shall be required to give any effect to any public act, record, or judicial proceeding of any other

⁵ The amended certificate had been obtained pursuant to Texas Health & Safety Code section 191.028, which permitted amendment of the birth certificate if the record was “incomplete or proved by satisfactory evidence to be inaccurate.” The appellate court found that the trial court had misconstrued the statutory term “inaccurate”; its role had been a ministerial one only, and its decision was based neither on fact findings or the result of policy considerations. Instead, the appellate court interpreted the term “inaccurate” to mean inaccurate as of the time the certificate was recorded; that is, at the time of birth, which the original birth certificate was not. *Littleton*, 9 S.W.3d 223, 231.

⁶ Gutierrez-Mier, John, San Antonio Express-News, *2 More Women Obtain County Marriage License*, published 09/20/2000, available at <http://www.christielee.net/same15.htm> (accessed March 2, 2010)

state respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state or a right or claim arising from such relationship. DOMA permitted states to adopt laws which exempted them from recognizing same sex marriages even if they were lawful and permitted in another state.

Pursuant to DOMA, in 2003, the Texas 78th Legislature, Regular Session, added Section 6.204 to the Texas Family Code, including section 6.204(b):

(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.

TEX. FAM. CODE ANN. §6.204(b) (Vernon 2009).

At the next legislative session, in 2005, the Texas 79th Legislature, Regular Session, approved H.J.R. No. 6, which proposed a Texas constitutional amendment that the authors believed would "protect" section 6.204 from legal challenge.⁷ The proposed constitutional amendment was approved by the voters on November 8, 2005, and added section 32 to Article I of the Texas Constitution, as follows:

Section 32. (a) Marriage in this state shall consist only of the union of one man and one woman. (b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.

TEX. CONST. art.I §32.

However, DOMA faces numerous legal challenges, including challenges to its constitutionality under the U.S. Constitution, particularly the Due Process, Equal Protection, and Full Faith and Credit provisions, from both conservative and liberal sources.⁸ Although marriage is traditionally regulated by state law, it is a fundamental right under the U.S. Constitution, *Loving v. Virginia*, 388 U.S. 1, 12 (1967). *Loving* struck down as unconstitutional a Virginia law that criminalized marriages between white persons and "colored" persons. Other U.S. Supreme Court cases have established that any government action resting on a distinction between discrete classes must be rationally related to a legitimate government purpose. "If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Romer v. Evans*, 517 U.S. 620, 634 (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973)).

⁷ Author's Sponsor's Statement of Intent, H.J.R. 6, Bill Analysis, Senate Research Center, available at <http://www.legis.state.tx.us/tlodocs/79R/analysis/doc/HJ00006E.doc> (accessed March 2, 2010)

⁸ See, Gardina, *The Tipping Point: Legal Epidemics, Constitutional Doctrine, and the Defense of Marriage Act*, 34 Vt. L.Rev.291 (2009).

3) *Mireles v. Mireles*

Subsequent to DOMA and its Texas counterparts, another case, *Mireles v. Mireles*, 2009 Tex. App. LEXIS 2225 (Tex. App. Houston 1st Dist. Apr. 2 2009—pet. denied) considered the validity of a marriage based on the disputed legal gender of the parties. In *Mireles*, an ex-wife sought, by collateral attack, to have a divorce decree set aside and vacated because her ex-husband was born a female. The appellate court sought to follow the requirements of Section 6.204 and Article I, Section 32 of the Texas Constitution, but neither provided guidelines for determining whether a transsexual is a man or a woman. The *Mireles* court looked to *Littleton* for guidance, and adopted *Littleton*'s holding that a party's gender is immutably determined by a true and accurate original birth certificate, regardless of subsequent facts. On that basis, the appellate court found that both parties were of the same gender and the marriage between them was void as a matter of law under Tex. Const. art. I section 32; and Tex. Family Code section 6.204(b).

4) *Under Texas law, Hill is a male*

In the instant case, Hill's "true and accurate birth certificate" identifies him as a male. Based on *Mireles*, Hill is immutably and irrevocably a male, and, under Texas law, can marry a female. His application for a marriage license to marry a female and their marriage would not be in violation of Tex. Const. art. I §32, or Tex. Family Code §6.204(b).

B. 2009 Changes to the Family Code

Prior to 2009, Section 2.005(b) provided that the marriage license applicant must provide proof of identity and age 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. But in 2009, the Legislature amended section 2.005(b) to expand the acceptable list of documents to prove identity and age.⁹ In so doing, the 81st Legislature, perhaps in response to the request for guidance in *Littleton*¹⁰, implicitly rejected both *Littleton* and *Mireles*. The amendments to 2.005(b) list a wide variety of acceptable documents, including two rejected by the *Littleton* court: Section 2.005(b)(6) permits the use of an original or certified copy of a birth certificate issued by a state; and Section 2.005(b)(8) specifically permits the use of an original or certified copy of a court order relating to the applicant's name change or sex change to provide proof of identity

⁹For example, Section 2.005(b) includes (1) driver's license; (5) unexpired military identification card for active duty, reserve or retired personnel; (9) school records from a secondary school or institution of higher learning; (11) motor vehicle certificate of title; (12) military records; (15) voter registration certificate.

¹⁰*Littleton*, 9 S.W.223, 230.

and age. The new state law permits an applicant for a marriage license to prove identity with a court order regarding a sex change, nullifying the "true and accurate birth certificate" test as the immutable determinant of gender.

That interpretation is further supported by the fact that the documents acceptable to establish proof of identity and age in Section 2.005(b) are not ranked by probative value or otherwise distinguished. If the circumstances mirror the fact situations in *Littleton* and *Mireles*, conflicting information may arise not from fraud or mistake, but by deliberate action of the party, allowing the applicants themselves to identify their gender.

It may be that the Legislature recognized the difficulty of a simple definition of gender, and has chosen to accept court orders as determinative. Previous cases, law review articles, and other reference works have all struggled with the proper analysis. As the case of first impression in Texas, *Littleton* reviewed an English case, *Corbett v. Corbett*, 2 All E.R. 33 (P.1970), which they identified as the first case to consider the issue. *Littleton* considered *Corbett's* four criteria for assessing the sexual identity of the individual: chromosomal factors, gonadal factors, genital factors, and psychological factors. Chromosomal factors are particularly tricky, as there exist chromosomal disorders and hormonal disorders in which the chromosomal sex does not match the outward, physical appearance; in fact, a person may be unaware of the mismatch until a rude awakening after genetic testing. Such is the case in a hormonal disorder called Androgen Insensitivity Disorder (AIS), in which, for example, a person may appear to be female in all respects, but whose chromosomal pattern is one typical of males (XY) and not that of females (XX); people who have this condition are often called "intersexuals."¹¹

1) *Court Order Relating To The Applicant's Name Change as Proof of Identity:
Hill is a Female*

The 2009 changes to the Texas Family Code include section 2.005(b)(8), which provides that proof and identity and age of an applicant for a marriage license can be provided by an original or certified copy of a court order relating to the applicant's name change or sex change. In this case, Hill produced a copy of an Order Changing Name issued by Judge Richard B. White, District Court of the State of Washington in and for the County of Spokane, In the Matter of the Petition of Virgil Eugene Hill, Jr., A/K/A Sabrina Jeanne Hill for Change of Name, No. 910005. If the Order Changing Name is used as proof of identity and age, Hill is a female, and is not eligible to obtain a marriage license in Texas to marry another female, *see* Tex. Const. art. I §32; Tex. Family Code Ann §6.204(b).

¹¹ 52 Baylor L. Rev. 727, NOTE: *Littleton v Prange: How Voiding Transsexual Marriage Affects the Fundamental Right of Marriage*, Summer, 2000, 727-736.

2) Driver's License as Proof of Identity: Hill is a Female

The 2009 changes to the Texas Family Code also include 2.005(b)(1), which provides that proof and identity and age of an applicant for a marriage license can be provided by a current driver's license or identification card issued by another state. In this case, Hill produced a current Arizona driver's license, which identifies Sabrina J. Hill as a female. If the driver's license is used as proof of identity and age, Hill is a female, and is not eligible to obtain a marriage license in Texas to marry another female. See, Tex. Const. art. I §32, and Tex. Family Code §6.204(b).

III. Questions presented.

1. Is Hill's birth certificate determinative as to gender for the purpose of proof of identity required for a marriage license under the Family Code?
2. How does the 2009 amendment to Texas Family Code section 2.005(b) affect the *Littleton* and *Mireles* precedents regarding determination of a person's gender for purposes of a marriage license?
3. Do the documents listed in Texas Family Code section 2.005(b) as proof of identity and age have equal value in making the determination of a person's gender?
4. If a person has several documents listed in Texas Family Code section 2.005(b), may the person choose which document to provide, and not disclose the others?

- [REDACTED]
- [REDACTED]
- [REDACTED]
6. May the El Paso County Clerk issue a marriage license based on Hill's providing proof of identity as a male by his birth certificate?

IV. Conclusion

In 2009, the Legislature enacted new laws under the Texas Family Code to expand the list of documents acceptable to establish proof of identity and age for purposes of obtaining a marriage license.

¹² "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."

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We believe that the 2009 changes to the Family Code provide, for the purposes of a marriage license application, that the identity of a person as a man or woman may be established by any one of the nineteen documents listed in section 2.005(b); and the County Clerk is bound to accept whichever document the applicant submits under section 2.005(b) as proper proof of identity and age.

I respectfully request your opinion regarding these issues.

Sincerely,



Jo Anne Bernal
El Paso County Attorney