

No. 44575

IN THE ESTATE OF	§	IN THE 329 th DISTRICT COURT
THOMAS TREVINO ARAGUZ, III,	§	OF
DECEASED	§	WHARTON COUNTY, TEXAS

ADMINISTRATOR'S MOTION FOR SUMMARY JUDGMENT

COMES NOW, Simona Longoria, as Administrator of the Estate of Thomas Trevino Araguz III, referred to as Petitioner herein, and files this her Motion for Summary Judgment, and in support thereof would show unto the Court as follows:

I.

PROCEDURAL HISTORY

1. Captain Thomas Trevino Araguz, III died heroically on July 3rd, 2010 while battling a fire for the Wharton Fire Department in Boling, Texas leaving behind two children and a purported wife (Nikki Araguz). Thomas died intestate. On July 12, 2010, Simona Longoria, the mother of Captain Thomas Araguz, III filed an Application for Letters Of Administration, Application for Determination Of Heirship, Petition to Declare Marriage Void, Application for Temporary Restraining Orders and Motion For Transfer To District Court in the County Court of Wharton County, Texas. The Wharton County Court then transferred the matter to 329th Judicial District Court of Wharton County, Texas.

2. On July 13, 2010, Thomas Araguz's ex-wife and the mother of his two children intervened in the heirship matter also seeking to have the marriage between Thomas Araguz and Nikki Araguz declared void.

3. Nikki Araguz (hereafter Respondent) was served with this suit on July 12, 2010 and filed an answer on August 2, 2010.

On August 16, 2010, by agreement of the parties, Simona Longoria was appointed as the dependent administrator of the Estate of Thomas Araguz III.

4. As a reasonable amount of time sufficient for discovery has passed, the administrator brings this motion for summary judgment seeking to have the marriage between Thomas Araguz and Nikki Araguz declared void

II.

GROUNDS FOR PETITIONER'S MOTION FOR SUMMARY JUDGMENT

5. Petitioner brings this motion for summary judgment on three grounds:

6. First, the administrator contends she is entitled to summary judgment on the issue of the marriage between Thomas Araguz III and Nikki Araguz being void. At the time the parties were married, both Thomas Araguz III and Nikki Araguz were males. As such, the marriage is void.

7. Additionally, Petitioner contends that she is entitled to summary judgment on Respondent's claim that a common law marriage existed after Respondent had sexual reassignment surgery on October 7, 2008. No such marriage could exist as any purported common law marriage would be void. A marriage between a man and a transsexual born as a man, but surgically and chemically altered to have the physical characteristics of a woman was not valid. Littleton v. Prange, 9 S.W.3d 223 at 230 (Tex. App. San Antonio, 1999). As such, the petitioner is entitled to summary judgment on the issue of a common law marriage as any such marriage would be void.

8. Finally, Petitioner contends that she is entitled to summary judgment on the issue of the marriage being void between Thomas Araguz and Nikki Araguz under the doctrine of judicial estoppel. Nikki Araguz previously claimed that he was a male in a separate court proceeding and as such should be prohibited from now claiming that he is female.

III.

SUMMARY JUDGMENT EVIDENCE

9. Defendant relies on the following summary judgment evidence which is attached hereto, incorporated herein for all purposes and marked for identification as follows:

- Exhibit A: Certificate of Live Birth of Justin Graham Purdue on June 18, 1975
- Exhibit B: Verified Pleading of Justin Graham Purdue in Cause No., 96-07867, In the 245th District court of Harris County, Texas
- Exhibit C: Order Granting Name Change in Cause No. 96-07867, In the 245th District court of Harris County, Texas
- Exhibit D: Amended Certificate of Live Birth of Justin Graham Purdue dated August 21, 1996
- Exhibit E: Memorandum of Points and Authorities in Support of Petition for Change of Gender with Order
- Exhibit F: Transcript of the hearing on Nikki Araguz Petition for Change of Gender dated July 20, 2010
- Exhibit G: Certificate of Live Birth of Nikki Paige Purdue
- Exhibit H: Marriage License of Thomas T Araguz III and Nikki P Purdue
- Exhibit I: Houston Independent School District Records of Justin Graham Purdue
- Exhibit J: Cypress-Fairbanks Independent School District Records of Justin Graham Purdue

- Exhibit K: Aldine Independent School District Records of Justin Graham Purdue
- Exhibit L: Medical Records of Justin Graham Purdue aka Nikki Paige Purdue aka Nikki Araguz aka Nikki Mata from Gulf Coast Medical Center
- Exhibit M: Medical Records of Justin Graham Purdue aka Nikki Paige Purdue aka Nikki Araguz aka Nikki Mata from Dr. Juan Garza, Dr. Esther Perez, Houston Area Community Services
- Exhibit N: Medical Records of Justin Graham Purdue aka Nikki Paige Purdue aka Nikki Araguz aka Nikki Mata from Dr. Marci Bowers
- Exhibit O: Medical Records of Justin Graham Purdue aka Nikki Paige Purdue aka Nikki Araguz aka Nikki Mata from Mount Saint Rafael Hospital
- Exhibit P: Respondent Nikki Araguz's responses to Petitioner Simona Rodriguez's Requests for Admissions
- Exhibit Q: Respondent Nikki Araguz's responses to Petitioner Simona Rodriguez's Written Interrogatories
- Exhibit R: Deposition Excerpts of Nikki Araguz in Cause No 44,575 in the 329th Judicial District Court of Wharton County Texas
- Exhibit S: Deposition Excerpts of Nikki Araguz in Cause No. 42,122 in the 329th Judicial District Court of Wharton County Texas
- Exhibit T: Deposition Excerpts of Thomas Araguz in Cause No. 42,122 in the 329th Judicial District Court of Wharton County Texas
- Exhibit U: Certificate of Live Birth for Thomas Araguz

IV.

FACTUAL SUMMARY

10. Nikki Araguz was born on June 4, 1975 in Carmel, California. The name given to him at birth was Justin Graham Purdue. His birth certificate states he is male (See Exhibit A). Nikki Araguz confirmed this in his deposition: (see the deposition testimony of Nikki Araguz, Exhibit R, page 0008, lines 18-20).

18 Q And what sex is listed on your original birth

19 certificate?

20 A It reads "male."

11. As Respondent was born a male, he did not have any female reproductive organs (See Exhibit P, Nos. 6,7,8,9).

REQUEST FOR ADMISSION NO. 6:

Admit or deny that you were born without a vagina

Response: Admit

REQUEST FOR ADMISSION NO. 7:

Admit or deny that you were born without a cervix.

Response: Admit

REQUEST FOR ADMISSION NO. 8:

Admit or deny that you were born without ovaries

Response: Admit

REQUEST FOR ADMISSION NO. 9:

Admit or deny that you were born without a uterus.

Response: Admit

12. Nikki Araguz did have a penis, a scrotum and testes. (See Exhibit P, Nos. 5,10, 11)

REQUEST FOR ADMISSION NO. 5:

Admit or deny that you born with testes

Response: Admit that the post operative report from Dr. Bowers discusses testes being removed.

REQUEST FOR ADMISSION NO. 10:

Admit or deny that on the day you applied for your marriage license to Thomas Araguz, III, you had a penis.

Response: Admit

REQUEST FOR ADMISSION NO. 11:

Admit or deny that on the day you applied for your marriage license to Thomas Araguz, III, you had testes.

Response: Admit

13. A review of Nikki Araguz's medical records also reveals that prior to his sexual reassignment surgery, he had male reproductive organs. For example, Nikki Araguz's physician Dr. Hunter Hammel conducted a physical exam of Nikki in 2005. Dr. Hammel was, according to Respondent, familiar with transgender issues. See the Deposition of Nikki Araguz, Exhibit R, page 0048, lines 11-20 wherein Respondent states:

0048

11 Q All right. Now, the Houston Area Community
12 Services, how did you first end up going to them as a
13 medical provider?

14 A Well, Dr -- when I moved from Kansas back to

15 Houston, I no longer had private insurance with Dr. Joseph

16 *Gift, and I wanted a doctor who specialized in dealing*

17 *with both HIV and transgender issues*

18 *Q. Okay*

19 *A. And so I chose Hunter Hammel at the Houston Area*

20 *Community Services*

14. Dr. Hammel's records indicate that Nikki had a penis and two testicles. (See Exhibit M, page 00007.) Further, the Gulf Coast Medical Center Records indicate that Nikki Araguz had a penis (See Exhibit L, page 00035 and 00120). The Gulf Coast Medical Center Records also indicate that Nikki Araguz had "male organs." (See Exhibit L, page 00002). Respondent himself indicated that he had "male organs" in a verified pleading in a district court in Harris County. (See Exhibit B).

15. As if the Court needed additional evidence that Respondent had a penis and testes other than the admissions of the Respondent, the previously discussed medical records, and the verified pleadings of the Respondent, it need only look to the medical records of the physician that removed the penis and testes when Respondent underwent sexual reassignment surgery in October of 2008. Dr. Marci Bowers indicated in her records that a physical exam of Respondent's pelvic region showed that it was unremarkable with a penile size in the 30th percentile and a scrotum size in the 40th percentile. (See Exhibit N, page 00012). Further, the sexual reassignment operative report indicates that "each testicle was grasped with towel clamps and elevated." (See Exhibit N, page 00016) The operative report also indicates the presence of a spermatic cord. (See Exhibit N, page 00016)

16. Respondent was raised as a male. Petitioner points again to Exhibit M wherein Dr. Hammel, the physician who Respondent testified was familiar with transgender issues stated that Respondent reported that he grew up “male gender”. (See Exhibit M, page 00010).

17. Respondent’s school records indicate that as a child, Respondent was enrolled in school as a male. (See Exhibit I, Exhibit J and Exhibit K) Further, Respondent testified in deposition regarding his school enrollment and gender. See the Deposition of Nikki Araguz, Exhibit R, page 0010, line 15 through page 11, line 4 and page 0012, lines 2-11, wherein Respondent states:

0010

15 Q. Okay. Willie B High School, K through 5, you

16 were enrolled at that school as male or female?

17 A. Male.

18 Q. Hoffman for the 6th grade, you were enrolled in

19 that school as male or female?

20 A. Male.

21 Q. Gregory Lincoln for the 7th and 8th grade, you

22 were enrolled at that school as male or female?

23 A. Male.

24 Q. Okay.

25 A. I can -- all the schools up until the age of

0011

1 18 --

2 ...

3 A -- were listed as male, so that's an easy

4 answer -- ...

0012

2 Q (BY MR ELLIS) Okay The high school for

3 criminal justice in HISD, you were enrolled as male,

4 correct?

5 A Yes.

6 Q. Eisenhower, 10th grade, you were enrolled as

7 male, correct?

8 A Yes.

9 Q. Jersey Village for the 11th and 12th grade, you

10 were enrolled as male?

11 A. Yes.

18. Somewhere around the age of 18, Respondent began living as a transsexual person. A transsexual is someone “whose sexual self-identity is in conflict with their biological and anatomical sex.” Littleton v. Prange, 9 S.W.3d 223 at 230 (Tex. App. San Antonio, 1999) *cert. denied*, 121 S. Ct. 174 (2000). This is again reflected throughout Respondent’s medical records. Dr. Bowers diagnosed Respondent with gender dysphoria and male-to-female *transsexualism* prior to Respondent’s sexual reassignment surgery. (See exhibit O, page 00007). It is also noteworthy that this same physician diagnosed Respondent with the gender dysphoria and male-to-female *transsexualism* after sexual reassignment surgery. (See Exhibit O at 00007).

19. On February 9, 1996, Respondent filed a petition for a name change in the 245th Judicial District Court of Harris County, Texas. (See Exhibit B). This petition sought to change

Respondent's name from Justin Graham Purdue to Nikki Paige Purdue. The petition was verified by Respondent. Respondent identifies himself in Exhibit B as a male in his verified petition. Later, in that same Petition, he admits that he has male anatomy. (See Exhibit B) Respondent testified that at the time the petition was drafted, Respondent had male anatomy. See the Deposition of Nikki Araguz, Exhibit R, page 0018 lines 12-15 wherein Respondent admits:

0018

12 Q At the time you filled this out, you had male

13 anatomy?

14 A. I had a -- what could have -- was at birth

15 described as male anatomy, yes

20. The judge of the 245th Judicial District Court of Harris County, Texas signed the order changing Respondent's name to Nikki Paige Purdue on February 9, 1996 (See Exhibit C). Respondent admits that this document did not change his sex. See the Deposition of Nikki Araguz, Exhibit R, page 19, lines 7-12 wherein Respondent admits:

0019

7 Q. Okay And this is where you changed your name

8 from Justin to Nikki, right? This is the document --

9 A. That's correct

10 Q. It says nothing in this document about changing

11 your sex, correct?

12 A. Not that I see, no.

21. Subsequent to the name change, Respondent amended his birth certificate in California to reflect his new name. (See Exhibit D). In this amended document, Respondent, as he did when seeking a name change, again identifies himself as male. In deposition testimony, Respondent admits that his gender was not changed by the amended birth certificate. See the Deposition of Nikki Araguz, Exhibit R, page 0020, line 12 through 0022, page 0021 line 1 through 25, and page 0022, page 1 through 3 wherein Respondent states:

0020

12 Q (BY MR. ELLIS) You amended your birth

13 certificate in 1996 --

14 A Yes.

15 Q -- to reflect your name change. Is that right?

16 A That is correct.

17 Q Okay. And what I've handed you in Araguz Depo

18 No. 4 is the amendment of the original -- the first

19 amendment of the original birth certificate Is that

20 right?

21 A That is correct.

22 Q Okay Page 1 of that appears to be the original

23 birth certificate; and if we turn to Page 2, this appears

24 to be the amended part. Is that correct?

25 A That is correct.

0021

1 Q Okay So -- and this was signed on --

2 A 8/21 '96.

3 Q *April the 27th, 1996. Is that right?*

4 A *There you go.*

5 Q *Okay. In Box 1A, "Justin Graham Purdue," that*
6 *was your original name*

7 *And then in Box 2, what sex did you identify*
8 *yourself as when you filled this out?*

9 A *Male. It's a legal document I was following --*

10 Q *It's a legal document You were following what*
11 *your legal sex was Is that what you're saying?*

12 A *No, that's not what I was saying.*

13 Q *Then what was --*

14 A *I was following instructions by my doctors and --*
15 *that were guiding me through this process*

16 Q *Okay They told you to put "male" on there?*

17 A *They advised me to answer without perjuring or*
18 *lying on a court document*

19 Q *Okay. And so in order to answer without*
20 *perjuring or lying on a court document, you had to answer*
21 *male Is that right?*

22 A *With respect to the document, the first page,*
23 *yes, it had to follow. They had to match in order for the*
24 *name change to be appropriate and follow through the court*

25 system.

0022

1 Q Right. Nowhere on this document does it change

2 your sex with the --

3 A It does not change my gender, no, it does not.

22. Respondent, together with Thomas Araguz III applied for a marriage license in Wharton County, Texas on August 19th, 2008. (See Exhibit H) Respondent represented himself as female. However, on this date, Respondent had a penis and testes. Further, Respondent did not have vagina, a cervix or ovaries. See Respondent's Responses to Petitioner's Requests for Admission, Exhibit P, nos. 10, 11,12,13 and 14 wherein Respondent admitted as follows:

REQUEST FOR ADMISSION NO. 10:

Admit or deny that on the day you applied for your marriage license to Thomas Araguz, III, you had a penis.

Response: Admit

REQUEST FOR ADMISSION NO. 11:

Admit or deny that on the day you applied for your marriage license to Thomas Araguz, III, you had testes.

Response: Admit

REQUEST FOR ADMISSION NO. 12:

Admit or deny that on the day you applied for your marriage license to Thomas Araguz, III, you did not have a vagina.

Response: Admit

REQUEST FOR ADMISSION NO. 13:

Admit or deny that on the day you applied for your marriage license to Thomas Araguz, III, you did not have a cervix.

Response: Admit

REQUEST FOR ADMISSION NO. 14:

Admit or deny that on the day you applied for your marriage license to Thomas Araguz, III, you did not have ovaries.

Response: Admit

23. Respondent's body did not change between this date and the date Respondent married Thomas Araguz III. See the Deposition of Nikki Araguz, Exhibit R, page 0053, lines 10-12 wherein Respondent states:

10 Q. Your body hadn't changed from the date when you

11 applied for the marriage license, though, right?

12 A. Or the date that I met Thomas

24. Thomas Araguz III and Nikki Araguz were married on August 23rd, 2008 in Needville, Texas. (See Exhibit H) See also the Deposition of Nikki Araguz, Exhibit R, page 0051, lines 9-12 wherein Respondent states:

0051

9 Q. (BY MR. ELLIS) Okay. And when did you get

10 married?

11 A. We got married October 23rd, 2008. I'm sorry.

12 August 23rd, 2008.

25. Prior to the marriage, Respondent's ex-husband Emilio Mata informed the church where the wedding was to take place that Respondent was biologically male. Subsequently, the

church requested medical proof that Respondent was female. (See Exhibit M, pages 00168 and 00169). Respondent asked his physician, Dr. Juan Garza, to draft a letter informing the church that he had examined Respondent and that Respondent appeared female. Dr. Garza informed Respondent that this could not be done. (See Exhibit M, page 00169) In response to the church's request, Respondent met with the head of the church and "expressed her unwillingness to prove who she is . . ." (Exhibit M, page 00170). The church relinquished its request and performed the ceremony.

26. On April 28, 2010, Respondent testified via deposition in a custody proceeding in Cause No 42,122 styled In the Interest of Trevor Thomas Araguz and Tyler Michael Araguz, children, in the 329th Judicial District Court of Wharton County, Texas. Sometime in the Spring of 2010, Intervenor Heather Delgado filed a petition to modify the custody provisions of the divorce decree governing Intervenor and Decedent's divorce. In this deposition testimony, Respondent testified that his original birth certificate was never discussed with Thomas Araguz III. (See the Deposition testimony of Nikki Araguz, Exhibit S, page 15, lines 15-24 wherein Respondent testified that:

15

15 *Q. All right. But that's your original birth*

16 *certificate; is that correct?*

17 *A. Yes, it is.*

18 *Q. And what is the name stated on that birth*

19 *certificate?*

20 *A. As I stated before, Justin Graham Purdue*

21 *Q. Okay. When did you first tell your husband*

22 *about the fact that you had that prior name?*

23 *A I don't recall. I don't recall ever*

24 *discussing that with him, to be honest with you*

27. Likewise, Thomas Araguz III testified via deposition on April 28, 2010 in the custody modification proceeding. In his deposition, Thomas testified repeatedly under oath that he had no knowledge of Respondent's male gender or sexual reassignment surgery. See Exhibit I, page 44, lines 5-14; page 51 line 25 to 52, line 5; and page 75, lines 3-22 wherein the Decedent Thomas Araguz III stated that:

0044

5 *Q. Do you know that your wife was formerly a*
6 *male?*

7 *A. No*

8 *Q. You have no knowledge of that?*

9 *A. I have no knowledge*

10 *Q. All right. Has your wife gone through any*
11 *medical procedures in the last nine months?*

12 *A. No*

13 *Q. Has she ever had any type of gender surgery?*

14 *A. No.*

0051

25 *Q. Okay. When you married Nikki, did she*

0052

1 *represent herself as female or a male to you?*

2 A A female.

3 Q Okay Has she been to any doctor to change
4 any of her private anatomy since you've known her?

5 A No

0075

3 Q Okay I would like to hand you an exhibit
4 that we're going to mark as P2.

5 (Exhibit No. P2 marked.

6 Q (By Mr. Mann) And will you please identify this
7 document? What is the title of this document?

8 A The title is, "Certification of Live Birth,
9 State of California "

10 Q Okay And whose birth certificate does that
11 appear to be, whose name is at the top?

12 A The name is Justin Graham Purdue.

13 Q Okay Do you know that also to be your wife,
14 Nikki?

15 A No

16 Q Okay Who is Justin Graham Purdue?

17 A I do not know.

18 Q Okay And is that an accurate birth
19 certificate of your wife, Nikki?

20 A No

21 Q. Did you know that Nikki changed her name?

22 A. No.

28. On October 7, 2008, after Thomas and Nikki were married, Respondent underwent sexual reassignment surgery whereby Respondent's testes and scrotum were removed, and Respondent had his penis surgically altered to resemble a vagina. (See Exhibit M). Respondent had been taking hormones since the age of 18 to alter his appearance and appear more like a female. (See Exhibit N).

29. On July 3rd, 2010 Thomas Araguz III was killed in the line of duty while serving as a Wharton Volunteer firefighter.

30. Respondent was served with notice of the suit to declare the marriage void on July 12, 2010. On July 13, 2010, after the death of Thomas Araguz III, Respondent filed a Petition for Change of Gender in the Superior Court of the State of California, County of San Francisco. (See Exhibit E). On July 15, 2010, the Superior Court of California, County of San Francisco issued a notice of hearing on the change of gender. Respondent gave no notice to the Court in California that he was involved in litigation in Texas whereby a marriage was being challenged based on gender. See the deposition testimony of Nikki Araguz, Exhibit R, page 23 line 21 to page 24, line 18; page 25 lines 9-17, 20-22; page 26, lines 12-17 wherein Respondent testified:

0023

21 Q. And you then went to California and had a hearing

22 to effectuate a change of gender. Is that right?

23 A. A reissuance of my birth certificate, that's

24 right, with the change of gender.

25 Q. Okay. At the time that you had that hearing,

0024

1 *this litigation was ongoing, correct?*

2 *A. It had just -- it had just begun two days --*

3 *Q You were aware that there was a lawsuit pending*
4 *that was questioning your gender as far as the State of*
5 *Texas was concerned.*

6 *A. Certainly. But I was already on my way to get*
7 *this taken care of prior to that, anyway*

12 *Q (BY MR. ELLIS) I'm going to hand you Araguz Depo*
13 *No 6, which is a copy of the transcript from the hearing*
14 *you had --*

15 *A. Right.*

16 *Q -- wherein you, again, changed your birth*
17 *certificate*

18 *A. Again --*

0025

9 *Q (BY MR. ELLIS) When -- Nikki, turn back to*
10 *Araguz Depo Exhibit No. 5 Nowhere in this document did*
11 *you let a court in California know that the issue of your*
12 *gender was pending before a court in Texas. Is that*
13 *right?*

14 *A It wasn't relevant in this case, in my opinion;*
15 *or it wasn't asked.*

16 Q Okay

17 A So, no.

20 Q (BY MR. ELLIS) And if you turn to the
21 transcript --

22 A My husband had died two weeks before

0026

12 Q Nowhere in the record did you let the Court know
13 at the hearing that there was litigation pending in Texas
14 about your gender. Is that right?

15 A The litigation, from my understanding, in Texas
16 at that point was not about my gender but about my
17 marriage, so, no, I did not think that that was an issue.

31. The court in California approved the application for a new birth certificate as it was without objection (See Exhibit F), and issued a new birth certificate (See Exhibit G)

V.

ARGUMENT AND AUTHORITIES

Standard of Review/Questions of Law:

32. When a movant files a motion for summary judgment based on the summary judgment evidence, the court can grant the motion only when the movant's evidence, as a matter of law, either proves all the elements of the movant's claim or defense or disproves the facts of at least one element of the nonmovant's claim or defense. Park Place Hosp. v. Estate of Milo, 909 Administrator Simona Longoria's Motion for Summary Judgment, Page 20 of 33

S.W.2d 508, 511 (Tex.1985). When evaluating a motion for summary judgment based on summary judgment proof, the trial court must assume the nonmovant's proof is true, indulge every reasonable inference in favor of the nonmovant, and resolve all doubts about the existence of a genuine issue of material fact against the nonmovant. Limestone Prods. Distrib. v. McNamara, 71 S.W.3d 308-311 (Tex.2002); M.D. Anderson Hosp. v. Willrich, 28 S.W.3d 22, 23 (Tex.2000); Nixon v. Prop. Mgmt. Co., 690 S.W.2d 546, 548-49 (Tex.1985).

Collateral Attack of the Marriage as Void:

33. As stated above, Petitioner seeks summary judgment on the issue of the validity of the marriage between Thomas Araguz III and Nikki Araguz and asks that the marriage be declared void. The validity of the marriage before this Court revolves around a central issue. Is Nikki Araguz a male? This is a question of law for the Court to decide. In Littleton v. Prange, 9 S.W.3d 223 (Tex. App. San Antonio, 1999), the Court was faced with an almost identical situation as the one we face here. In *Littleton*, a marriage was being collaterally attacked on the basis that a transsexual who had undergone sexual reassignment surgery was still a male and as a result, the marriage was void. There, in making the determination of gender, the court held, "We find the case, at this stage, presents a pure question of law and must be decided by this court." Littleton v. Prange, 9 S.W.3d 223 at 230 (Tex. App. San Antonio, 1999)

Ability to Collaterally Attack a Marriage as Void:

34. The Texas Family Code provides in Section 6.307(a) that "Either party to a marriage made void by this chapter may sue to have the marriage declared void, or the court may declare the marriage void in a collateral proceeding." Further, see Davis v. Davis, 52 S.W.2d 603, 605 (Tex. 1975) wherein the Court declared a marriage void in an heirship proceeding.

The August 23, 2008 Marriage is Void:

35. The Texas Constitution provides in Section 32(a) that, "Marriage in this state shall consist only of the union of one man and one woman." Further, the Texas Family Code provides in Section 6.204(b) that "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."

36. On August 23, 2008, the day Thomas Araguz and Nikki Araguz married, Nikki Araguz was undoubtedly a biologic male. His original birth certificate stated as such (See Exhibit A). He had a penis and testes (See Respondent's Responses to Petitioner's Requests for Admissions, Exhibit P, Nos. 10, 11). He did not have any female reproductive organs including a uterus, cervix, ovaries or a vagina (See Respondent's Responses to Petitioner's Requests for Admissions, Exhibit P, nos. 6, 7, 8, 9, 12, 13 and 14). He had been taking hormones to create a feminine appearance since he was 18. (See Exhibit N, page 00004, 00011). Additionally, Respondent's physician Dr. Whitt repeatedly referred to Respondent as genotypically male. (See Exhibit L, pages 00026, 00034). Just days before the marriage ceremony, Respondent's own doctor, Dr. Juan Garza refused to draft a letter on his behalf stating that he was female. (See Exhibit M, page 00169). On August 23, 2008, Respondent's valid birth certificate at the time listed him as male. (See Exhibit D).

37. Respondent initially claimed that the Harris County District Court Order changing his name to Nikki Purdue changed his gender as well. See the Deposition testimony of Nikki Araguz, Exhibit R, page 17, lines 2-5 wherein Respondent made this claim:

2 Q. (BY MR ELLIS) The Paragraph B, it says "Sex,

3 Male " Is that right?

4 A That's correct. This was the last document

5 completing my transition to female.

38. However, as Respondent later admits, this order did not change Respondent's sex from male to female as Respondent. See the Deposition testimony of Nikki Araguz, Exhibit R, page 19, lines 7-12 wherein Respondent admitted:

0019

7 Q. Okay. And this is where you changed your name

8 from Justin to Nikki, right? This is the document --

9 A. That's correct

10 Q. It says nothing in this document about changing

11 your sex, correct?

12 A. Not that I see, no.

39. Likewise, the 1996 amended birth certificate (Exhibit D) did not change Respondent's sex. See The Deposition of Nikki Araguz, Exhibit R, page 0022, lines 1-3)

0022

1 Q. Right. Nowhere on this document does it change

2 your sex with the --

3 A. It does not change my gender, no, it does not

40. As Thomas Trevino Araguz III was a male (See Exhibit U) and Nikki Araguz was a male at the time he married Thomas Araguz, the marriage is contrary to the public policy and is void. No issue of material fact exists. The question of Respondent's gender is a question of law, and summary judgment declaring the marriage void should be granted.

Judicial Estoppel:

41. Despite all evidence to the contrary, Respondent attempts to maintain that on August 23, 2008, he was female. Respondent should as a matter of law be estopped from now

asserting that at the time he married Thomas Araguz, he was female. Petitioner would show the Court that the doctrine of judicial estoppel controls in this case.

42. The Texas Supreme Court has long held that the doctrine of judicial estoppel bars a party who successfully maintains a position in a prior judicial proceeding from afterward adopting an inconsistent position if doing so would result in prejudice to his adversary. Long v. Knox, 291 S.W.2d 292, (Tex. 1956). The purpose of the doctrine of judicial estoppel is to suppress fraud, and to prohibit the deliberate shifting of position to suit exigencies of each particular case that may arise concerning the subject matter in controversy; but at least in so far as this doctrine is applied to statements under oath, its distinctive feature has been said to be the expressed purpose of the court, on broad grounds of public policy, to uphold the sanctity of an oath, and to eliminate the prejudice that would result to the administration of justice if a litigant were to swear one way one time and a different way another time. Yarber v. Pennell, 443 S.W.2d 382, 384 (Tex. Civ. App. -Dallas 1969)

43. The elements required to trigger the estoppel are: (1) the prior inconsistent statement must have been made in a judicial proceeding; (2) the party now sought to be estopped must have successfully maintained the prior position; and (3) the prior inconsistent statement must not have been made inadvertently or by mistake, fraud or duress. Moore v. Neff, 629 S.W.2d 827 (Tex. App. – Houston, 14th Dist., 1982).

44. Respondent filed a verified pleading in 1996 in the 245th Judicial District Court of Harris County seeking a name change (See Exhibit B).

45. Respondent admits in paragraph 1-B of Exhibit B that he is Male. Further, Respondent admits in paragraph 3 of the same pleading that he has male anatomy. He also states that he is working toward a sex change (a concept that is legally unrecognized in Texas).

46. Respondent's admission that he is male in the Verified Petition for a Name Change was made without mistake, fraud or duress. Shortly after obtaining his name change, Respondent amended his birth certificate in California to reflect the name change. As evidence of the absence of mistake, fraud or duress, Petitioner points to Respondent's deposition testimony that he had to put "male" on the 1996 amendment to the birth certificate because to do otherwise would be perjury. See the deposition testimony of Nikki Araguz, Exhibit R at page 0021, lines 14-25 wherein he states:

14 *A I was following instructions by my doctors and --*

15 *that were guiding me through this process.*

16 *Q. Okay. They told you to put "male" on there?*

17 *A. They advised me to answer without perjuring or*

18 *lying on a court document.*

19 *Q. Okay. And so in order to answer without*

20 *perjuring or lying on a court document, you had to answer*

21 *male. Is that right?*

22 *A. With respect to the document, the first page,*

23 *yes, it had to follow. They had to match in order for the*

24 *name change to be appropriate and follow through the court*

25 *system.*

47. The 1996 Petition for a Name Change constitutes an admission that Nikki Araguz, is in fact a male. A pleading filed by party or his authorized attorney in another case which contains statements inconsistent with the position a party is taking in suit at bar are admissible against such party as being an admission. Wilson v. Armer Oil Co. (Civ.App. 1973) 496 S.W.2d
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702. An admission in pleading cannot be contradicted by evidence until pleading is withdrawn by amendment. Thornell v. Equitable Life Assur. Soc. of U. S. (Civ App. 1964) 385 S.W.2d 716.

48. Here, each and every element required for judicial estoppel is met in this case. Allowing Respondent to maintain that at the time he married Thomas Araguz, he was female would result in prejudice to the Administrator's and Intervenor's position in this case. Should Respondent be judicially stopped from declaring that he is female, no issue of material fact remains, and summary judgment declaring the marriage void should be granted.

An informal marriage could not have existed between Thomas Araguz and Nikki Araguz :

49. Respondent argues that if the Court does find that he was a male at the time of the ceremonial marriage and declares the marriage void, then his marriage to Thomas Araguz III became valid following his sexual reassignment surgery in October 2008. This position, however, is contrary to Texas law. Respondent was born a male. He remains a male. A person cannot legally change their sex in this state by chemical and surgical means. Respondent was born a male. (See Exhibit A). The facts contained in his original birth certificate were true and correct. No effort was made to change those facts until after sexual reassignment surgery. In fact, when Respondent did amend his birth certificate in 1996, he still listed himself as male. This is a controlling factor in determining gender.

50. In Littleton v. Prange, 9 S.W.3d 223 at 230 (Tex. App. San Antonio, 1999), the Court dealt with an almost identical situation. In *Littleton*, Christine Littleton brought a medical malpractice case under the Wrongful Death and Survivor statute. The Defendant collaterally attacked the marriage between Christine Littleton and her husband as being void due to the fact that Christine Littleton was a transsexual who was born male but underwent sexual reassignment

surgery. The trial Court in Littleton granted summary judgment declaring the marriage void and the ruling was upheld by the appellate Court.

51. The similarities between the case before this Court and the *Littleton* case are striking.

Araguz: Respondent was born with male genitalia. (See Exhibit M, page 00007; see Exhibit L, page 00002,

Littleton: “At birth, Christie had the normal male genitalia: penis, scrotum and testicles ” (*Id at 224*)

Araguz: Respondent developed issues with sexual identity at an early age.

Littleton: “Problems with her sexual identity developed early though.” (*Id at 224*)

Araguz: Respondent considers himself to be female from birth.

Littleton: *Christie testified that she considered herself female from the time she was three or four years old, the contrary physical evidence notwithstanding. (Id At 224)*

Araguz: Respondent sought to be excused from physical education in school.

Littleton: *Christie sought successfully to be excused from sports and physical education because of her embarrassment over changing clothes in front of the other boys (Id at 224)*

Araguz: Respondent was diagnosed with gender dysphoria and transexualism. (See Exhibit O, page 00007)

Littleton: *completion of Christie's participation in UTHSC's gender dysphoria program (Id at 225) Christie Littleton is a transsexual. (Id at 230)*

Araguz: Changed his name prior to sexual reassignment surgery. (See Exhibits B and C)

Littleton: *On August 31, 1977, Christie's name was legally changed to Christie Lee Cavazos. (Id at 224)*

Araguz: Respondent obtained a new birth certificate after the death of Thomas Araguz III and during the pending litigation to reflect her sex as female (See Exhibits E, F and G)

Littleton: *During the pendency of this suit, Christie amended the original birth certificate to change the sex and name. (Id at 231)*

52. After a thorough discussion, the Court in *Littleton* reached the following conclusions:

(1) Medical science recognizes that there are individuals whose sexual self-identity is in conflict with their biological and anatomical sex. Such people are termed transsexuals.

(3) Christie Littleton is a transsexual

(4) Through surgery and hormones, a transsexual male can be made to look like a woman, including female genitalia and breasts. Transsexual medical treatment, however, does not create the internal sexual organs of a woman (except for the vaginal canal). There is no womb, cervix or ovaries in the post-operative transsexual female.

(5) The male chromosomes do not change with either hormonal treatment or sex reassignment surgery. Biologically a post-operative female transsexual is still a male.

(6) The evidence fully supports that Christie Littleton, born male, wants and believes herself to be a woman. She has made every conceivable effort to make herself a female, including a surgery that would make most males pale and perspire to contemplate.

(7) Some physicians would consider Christie a female; other physicians would consider her still a male. Her female anatomy, however, is all man-made. The body that Christie inhabits is a male body in all aspects other than what the physicians have supplied. (Id. at 231-232)

53. The conclusions in *Littleton* apply equally to Respondent. All female anatomy of Respondent is man-made. The body Respondent inhabits is a male body in all aspects other than what the physicians have supplied. The Court ruled that “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.” Id. *Littleton* is indistinguishable from the present case other than

Respondent was married prior to the sexual reassignment surgery.

54. As noted above, the Court in *Littleton* defined a transsexual as an individual whose sexual self-identity is in conflict with their biological and anatomical sex. The surgeon that performed the sexual reassignment surgery diagnosed Respondent with “transsexualism” and “gender dysphoria” prior to the procedure. This, by itself, is not surprising. However, Dr. Bowers also made a postoperative diagnosis of “transsexualism” and “gender dysphoria” for Respondent. (See Exhibit O, page 0007). That is, Respondent’s own sexual reassignment surgeon diagnosed Respondent as someone whose sexual self-identity is in conflict with their biological and anatomical sex *after the sexual reassignment surgery*. Respondent’s sexual self-identity was that of a woman. His biological and anatomical sex after the surgery remains that of a male according to his own physician.

55. Respondent also claims that he may have been diagnosed with Complete Androgen Insensitivity Syndrome and/or Partial Androgen Insensitivity Syndrome. (See Exhibit Q, no. 5) (See also the Deposition of Nikki Araguz, Exhibit R, page 0111, line 24 to page 0112, line 3). Petitioner claims that this diagnosis was made by Dr. Esther Perez at Houston Area Community Services. However, no such diagnosis exists in the medical records of Dr. Perez or Houston Area Community Services. (See Exhibit M) Further, no such diagnosis exists in the Gulf Coast Medical Center Records (See Exhibit L) or the records of Dr. Bowers (See Exhibit O).

54. Respondent will argue that the birth certificate he received in 2010 following the death of Thomas Araguz III and the beginning of this litigation, is not an amended certificate but a reissued birth certificate that voids the original, and that as such, the original birth certificate cannot be used to prove gender. This position is incorrect. When analyzing whether the new

birth certificate changed gender in *Littleton*, the Court held that, “. . . the trial court’s role in considering the petition was a ministerial one. It involved no fact-finding or consideration of the deeper public policy concerns presented. No one claims the information contained in Christie’s original birth certificate was based on fraud or error.” (Id at 231). Similarly, the Court granting the sex change in Respondent’s case in California performed no fact-finding or consideration of the deeper public policy concerns. (See Exhibit F). Further, Respondent filed his petition for change of gender while this litigation was pending but failed to notify the Court and opposing counsel in this case about the pending petition in California (see paragraph 30 above).

55 As in *Littleton*, no one in the present case makes the argument that the original birth certificate was incorrect as to gender at the time it was issued. It was modified (by Respondent) later to reflect a name change and the gender remained male. Like *Littleton*, the facts contained in Respondent’s original birth certificate were true and accurate, and the words contained in the newly issued certificate are not binding on this court.

56 As no material issue of facts exists in this case, Petitioner is entitled to summary judgment that no common law marriage exists as it would violate Texas Constitution Article 32(a) and the Texas Family Code Section 6.204(b).

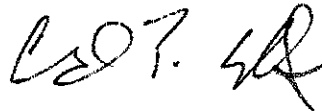
VI. PRAYER

WHEREFORE, PREMISES CONSIDERED, Simona Longoria, as Administrator of the Estate of Thomas Trevino Aragus III, prays that this Court enter an order granting Petitioner’s motion for summary judgment, and for such other and further relief to which Petitioner may be justly entitled.

Respectfully submitted,

ELLIS & IRWIN, LLP

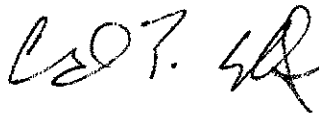
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Attorney for Administrator/Petitioner

CERTIFICATE OF SERVICE

I certify that a true and correct copy of Petitioner, Simona Rodriguez Longoria's Motion for Summary Judgment has been forwarded to all counsel of record via Hand Delivery, Regular Mail and/or Facsimile transmission on this 21st day of April 2011.



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