Fourth Court of Appeals
San Antonio, Texas

DISSENTING OPINION

No. 04-15-00244-CV

IN RE Sandra **SANDOVAL**,

Original Proceeding[1]

DISSENT FROM DENIAL OF MOTION FOR EN BANC RECONSIDERATION

Dissenting Opinion by: Rebeca C. Martinez, Justice

Sitting en banc: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Marialyn Barnard, Justice
Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Jason Pulliam, Justice

Delivered and Filed: January 27, 2016

I dissent from the court's order denying the real party in interest's motion for reconsideration en banc.

Contested custody cases are among the most difficult to adjudge impartially. Each party faces challenges posed by gender stereotyping. Fathers are frequently judged by the availability of child-care provided by another, while mothers are judged by their own personal ability to care for the child and their decision to work outside the home assessed against what is deemed "acceptable" time away from her child. We have advanced, I hope, from suffering a predisposition

[1] This proceeding arises out of Cause No. 2015-CI-04420, styled *In the Interest of N.I.V.S. and M.C.V.S., Minor Children*, pending in the 224th Judicial District Court, Bexar County, Texas, the Honorable Gloria Saldaña presiding.

that often divides women and men into the respective gender roles of "nurturer" and "provider." We know that men can and often do perform the role of "nurturer," a role that is not reserved to one who is born anatomically a female. For sure, women must balance both roles today. Custody issues in the present world must enlarge a court's understanding of both "woman" and "man" to include those whose gender identity does not align with their anatomical sex.

This is particularly important in Texas, and specifically in this case. What has been overlooked is that in 1985, the Texas Legislature enacted the Code Construction Act ("CCA"), which applies to "each code," not excluding the Family Code, to aid in construing the state's statutes and codes. *See* TEX. GOV'T CODE ANN. § 311.002 (West 2013). The CCA provides, "[w]ords of one gender include the other genders." *Id.* § 311.012(c) (West 2013). The Legislature's clear intent to apply its provisions gender-neutrally is the context within which our court should construe "each rule adopted under a code." *Id.* § 311.002(4).[2] Further, the Texas Legislature had also previously adopted an understanding of gender that is broader than one's anatomy at birth by granting legal recognition as a "man" to a person born anatomically female. A court of law ordered legal recognition to Dino's identity as a man regardless of his anatomical sex, without exclusion to its applicability. That he was born female is now altogether secondary. A majority of this court determines this case by addressing and viewing gender as inextricable from anatomy, by disregarding Dino's legally-recognized gender identity as male, and by forcing a narrow definition of being a "man" without specific and evident direction from the Legislature. Dino asked for equal dignity in the eyes of the law, and both the Constitution and the trial court granted him that right. There is no reasonable explanation to deny his identity under every

[2] The Uniform Parentage Act, which utilizes gendered terms, further contains a provision stating that the requirements for establishing paternity also apply to a determination of maternity. TEX. FAM. CODE. ANN. § 160.106 (West 2014).

provision of the law and, in particular, the Family Code. The statute does not impose biological sex as the fixed marker of gender identity, nor should it be interpreted to use it as a mechanism for discrimination. That Dino lacks standing stems solely from the fact that he is transgender.

Questions regarding the retroactive effect of *Obergefell*[3] remain to be decided. For example, whether an informal same-sex marriage can exist retroactive to a time when an informal same-sex marriage was not allowed. Clearly, however, the United States Supreme Court, both in *Windsor*[4] and *Obergefell*, struck down laws which discriminated against same-sex couples, in part, because of the harm to their children, i.e., that by denying the recognition of marriage for their parents, these laws were telling the children that their parents were not really married and, further, that one of them is not really their parent. The Supreme Court saw no reasonable explanation for that. This should suggest to us that the Court's analysis would extend to cases not simply involving marriage, but also to eligibility for adoption and custody. For our en banc court to read the statute to not encompass marriage and standing to bring suit to adjudicate parentage is thus problematic.

There is also a well-recognized line of federal fundamental rights and equal protection cases that may be relevant here. *See, e.g.*, *Zobel v. Williams*, 457 U.S. 55 (1982); *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250 (1974); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969). I am reminded of these "right to travel" cases, and the idea that any classification that infringed on a fundamental right was unconstitutional because of the infringement. While there is no direct challenge to a same-sex marriage in the case before us, the position this court has taken undermines the ability of an individual man, Dino Sandoval, to exercise his right to appear in court and assert a right of parentage. What good is the right to same-

[3] *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

[4] *United States v. Windsor*, 133 S.Ct. 2675 (2013).

sex marriage if it does not include a right to be a parent to your children? Or, at a minimum, the right as a man to stand in court and ask to continue parenting the children who call him "Dad"? This case is, in my opinion, a case involving the right of *access* to the courts. This court, in denying a man standing to file a suit to adjudicate parentage on the sole basis of his anatomical sex, falls backward to that time when the imposition of court fees, filing fees, and transcript fees violated the fundamental rights and equal protection due to all. Dino has established the necessary elements of standing as a man in this case. The substantive theory under which he asks the court to grant relief may be problematic for him, but at this stage of an interlocutory appeal from the denial of a plea to the jurisdiction, I believe it is error for this court not to recognize that Dino is a male, and not simply for purposes of applying for a marriage license.

If we were to apply the federalized test for standing, Dino could certainly generate a particularized harm, traceable to government action, and an effective remedy. *See, e.g*, *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (discussing Article III standing requirements). What the en banc court has indicated, dangerously in my opinion, is that an individual who the law recognizes as male is not a man because of his anatomical sex unless and until he seeks to unite in matrimony with a female or male. The court fails to consider the effect of its rationale on the plethora of unique circumstances involving transgendered individuals in custody disputes. I dissent for all the reasons articulated by the United States Supreme Court in every fundamental rights and equal protection case that mandates against any classification that unconstitutionally infringes on a fundamental right. While I recognize that the Supreme Court has yet to apply heightened scrutiny to cases involving sexual orientation and gender identity, I anticipate that those cases addressing sex education curriculum in public schools will bring the issue before it.

There is no prohibition against applying Dino's legal identity as male to every other provision of the law, and this court is without license to limit the consideration of one's gender identity exclusively for purposes of marriage. This court cannot create a separate entrance to the courthouse for Dino, nor close the door to him as I believe the court's opinion does. It disappoints me that we would sanction treating an individual differently than how the law allows, and I therefore encourage further review of this decision. Dino is a male as a matter of law. Whether he can meet his burden to prove his *allegation* of paternity which *is to be adjudicated* is not yet before us to review.

For the above reasons, I dissent.

Rebeca C. Martinez, Justice