

RECEIVED

By Opinion Committee at 9:04 am, Sep 16, 2024

RQ-0563-KP

TEXAS DEPARTMENT OF PUBLIC SAFETY

5805 N LAMAR BLVD • BOX 4087 • AUSTIN, TEXAS 78773-0001

512/424-2000

www.dps.texas.gov



STEVEN C. McCRAW
DIRECTOR
WALT GOODSON
FREEMAN F. MARTIN
JASON C. TAYLOR
DEPUTY DIRECTORS



STEVEN P. MACH, CHAIRMAN
NELDA L. BLAIR
DAN HORD III
LARRY B. LONG
STEVEN H. STODGHILL

September 13, 2024

The Honorable Ken Paxton
Office of the Attorney General
Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548
opinion.committee@oag.texas.gov

Dear Attorney General Paxton:

Pursuant to Government Code Section 402.042(a)(2), I request an Attorney General Opinion on the following matters:

1. Do Texas courts have the authority to render judgments in uncontested proceedings that order a non-party change a person's "sex" designation on government documents?
2. What constitutes satisfactory proof of an inaccurate or incomplete "sex" designation on government documents, like driver's licenses and personal identification cards?
3. Do government agencies like DPS have authority to correct "sex" designations that were previously changed to reflect perceived gender identity or medical intervention, including when that action is taken in response to court orders?

DPS has become aware of court orders purporting to change the sex designation on government documents, like driver's licenses. For example, Travis County provides on its website a fill-in-the-blank "Petition to Change the Sex/Gender Identifier of an Adult" (TC-FM-GI1-100), along with an accompanying fill-in-the-blank "Final Order to Change the Sex/Gender Identifier of an Adult" (TC-FM-GI1-200) declaring changes to a person's sex. *See* Travis County Law Library, Gender Marker Kit (rev. June 2019), <https://lawlibrary.traviscountytexas.gov/images/pdf/Gender/tc-fm-gi1-kit-adult-gender-identifier-change-9-2023.pdf>.

In the fill-in-the-blank petition, the petitioner may request that “[m]y birth certificate and other identifying information should conform with my true gender/sex.” TC-FM-G11-100 at 1. In the order, the court purports to require non-parties to change the petitioner’s “gender and sex identifier,” stating:

This order shall act as the official order for schools, universities, agencies, and departments within this court’s jurisdiction to correct and amend the gender and sex identifiers on any and all licenses, certificates, or other official documents under the agency’s control and issuance. This includes, but is not limited to, the Texas Department of Public Safety. . . . The Court orders that upon application to the Vital Statistics Unit the Petitioner’s Texas birth certificate shall be corrected pursuant to Texas Health and Safety Code 192.011 to reflect Petitioner’s sex/gender

TC-FM-G11-200 at 2-3.

Two intermediate courts have previously concluded that Texas courts lack authority to render orders that purport to change a person’s sex or gender identifier. The Dallas Court of Appeals has held that “there is no statutory scheme expressly authorizing sex change orders or establishing procedures for obtaining such an order,” in contrast with express statutory provisions that authorize courts to adjudicate things like name changes. *In re McReynolds*, 502 S.W.2d 884, 887-88 (Tex. App.—Dallas 2016, no pet.) (rejecting effort to change sex on birth certificate). Similarly, the Houston Court of Appeals has held that state law “does not itself authorize or provide any procedures or rules for Texas courts to issue such [sex change] orders” and that, in any event, “a mere request for a change in gender designation is not evidence” that the petitioner’s “current gender designation is inaccurate.” *In re Rocher*, No. 14-15-00462-CV, 2016 WL 4131626, at *1-2 (Tex. App.—Houston [14th Dist.] Aug. 2, 2016, no pet.) (rejecting effort to change sex on driver’s license). No precedential opinion of which DPS is aware of has ever reached the opposite conclusion. Do Texas courts have authority to entertain such “Petitions to Change the Sex/Gender Identifier,” which are nowhere provided for in state law?

Even if district courts may entertain such petitions, they appear to be issued in uncontested proceedings. The fill-in-the-blank Travis County forms, for example, are both captioned “**In Re: [Petitioner]**,” a legal phrase “often used in case citations” to denote “uncontested proceedings” or judicial proceedings “not formally including adverse parties.” BLACK’S LAW DICTIONARY, *In Re* (12th ed. 2024). Although the Travis County orders purport to direct “the Texas Department of Public Safety”—along with the “Vital Statistics Unit” of the Department of State Health Services (DSHS) and any other “schools, universities, agencies, and departments within th[e] court’s jurisdiction”—DPS is not provided notice of those proceedings, is not named as a party-defendant to those proceedings, and has not participated in them in any way. *Cf. In re McReynolds*, 502 S.W.3d at 885 n.2 (observing the petitioner “did not sue an opposing party . . . nor did he identify any existing dispute or controversy with another person that might support a declaratory judgment action”). In Texas, the “judicial power” consists in issuing coercive orders that bind *parties* and their privies. *Morrow v. Corbin*, 62 S.W.2d 641, 644 (Tex. 1933); *see, e.g., Matter of Trust A & Trust C*, 690 S.W.3d 80, 88 (Tex. 2024) (“Because Weston and Lane were not parties to the suit, the probate court could not require them to transfer the shares back to Glenna’s Trust or to the Sub-Trusts.”). Issuing orders that purport to bind non-participants—and certainly any effort to enforce such orders against non-parties on pain of contempt—may run up against state and federal due

process guarantees. *See* TEX. CONST. art. I, § 19; U.S. CONST. amend. XIV. Do Texas courts have authority, in uncontested proceedings, to issue and enforce orders against non-parties?

DPS is tasked with recording and correcting information on government documents, but in response to court orders only in specified circumstances: State law contemplates the inclusion of “sex” on a Texas driver’s license, TEX. TRANSP. CODE §§ 521.121(a)(4), (e), 521.142(c)(1); state law authorizes DPS to “correct[.]” a driver’s license upon receiving an application containing “information that has changed with proof satisfactory to the department,” *id.* § 521.146(a)-(b); and state law, despite directing DPS to take certain action in response to other kinds of court orders, make no mention of changes based on court orders concerning “sex,” *id.* §§ 521.341-521.377 (automatic revocation of license for certain criminal convictions). Other state actors appear to be tasked with similar responsibilities. *See, e.g.,* TEX. HEALTH & SAFETY CODE §§ 191.028(a)-(b), 192.011(a) (authorizing DSHS to alter a person’s “sex” on a birth certificate only to “complete” an “incomplete” record or to “correct” a record “proved by satisfactory evidence to be inaccurate”). The ordinary meaning of the term “sex” is a binary and fixed biological fact: It refers to “[o]ne of the two divisions of organisms formed on the distinction of male and female.” WEBSTER’S NEW COLLEGIATE DICTIONARY 775 (1949). “The presence of two *X chromosomes* ... causes a female to be developed; the presence of a *Y chromosome* ... causes a male to be developed.” *Id.* (emphasis original). The orders at issue here, by contrast, appear to concern an individual’s perception (*e.g.,* documents should “conform with *my true gender/sex*”), repeatedly refer to “gender” as distinct from “sex” (*e.g.,* “change my gender *and* my sex identifier”), and contemplate changes in response to medical or surgical treatment that cannot change chromosomal biology (*e.g.,* “My true sex and gender [is] reflected in *my physician’s/therapist’s letters* attached”). TC-FM-GII-100 at 1 (emphases added). Even if courts could issue gender-change orders and even if such orders could otherwise bind a non-party, could such orders ever be “proof” of a bona fide mistake under statutory authority to correct or complete government “sex” designations?

This practice seems to be part of a years-long and state-wide effort to alter government records to reflect gender identity. One news outlet, for example, reports how Texas lawyers have “for years ... quietly” operated a gender-change-by-court-order program to evade court opinions holding the practice unlawful, including by shopping for “friendly” judges in Bexar and Travis Counties with whom those lawyers “had worked with in the past” and “who were more likely to approve their petitions,” and by coaching transgender clients to talk as if they are seeking a “correction [to] gender” rather than a “change.” Lauren Caruba, *Transgender People Who Seek to Amend Birth Certificates and IDs Face an Uncertain Legal Path*, SAN ANTONIO EXPRESS NEWS (Aug. 4, 2021), <https://www.expressnews.com/news/local/article/life-in-transition-part-3-16364119.php>. Reports indicate that judges approving such changes may do so with no scrutiny whatsoever. *See id.* (The lawyer “walked to the front of the courtroom and handed the papers to Judge Norma Gonzales. He quickly returned from the bench, utter surprise written on his face. ‘We’re done,’ he mouthed. ... ‘He just gave her the paper, she signed it and that’s it.’”). Interest groups across the State offer help in procuring such orders, including “county-specific instructions” that identify “friendly” and “hostile” judges by name, while stressing that “we want to draw as little attention to these proceedings as possible.” Texas Name and Gender Marker Change, [http://texasnameandgendermarkerchange.com/index.php?title=Texas Name and Gender Marker Change](http://texasnameandgendermarkerchange.com/index.php?title=Texas+Name+and+Gender+Marker+Change) (last visited Sept. 13, 2024); *see also* Trans Pride Initiative, *Resources*, [https://tpride.org/resources.php#identity Documents](https://tpride.org/resources.php#identity+Documents) (last visited Sept. 13, 2024) (providing court documents for Dallas County).

The Honorable Ken Paxton

Page 4 of 4

Considering the temporal and geographic breadth of this gender-change practice, DPS may have altered many government sex records in mistaken reliance on court orders that either (a) lacked any basis in law or authority to bind DPS or (b) were not relevant proof under statutory authority to correct mistaken records of an individual's sex. On other occasions, when DPS has made an erroneous entry to a person's records, the agency has on its own initiative corrected such a mistake, including by issuing a new driver's license to the person concerned and directing that person to destroy the old license. If DPS's past changes to applicants' "sex" based on gender-change orders were inconsistent with state law, may DPS voluntarily correct its own introduction of inaccurate sex information?

DPS driver's licenses and personal identification cards serve as the primary means of identification for Texans. Identifying individuals consistently and accurately is a core part of the DPS mission and has obvious implications for public safety.

Thank you for your attention to this request. If any additional information is needed, please let me know.

Sincerely,



Steven C. McCraw
Director

cc: Walt Goodson, Deputy Director, Law Enforcement Services
Sheri Gipson, Chief, Driver License Division
D. Phillip Adkins, General Counsel, Office of General Counsel