

IS TEXAS MISDEMEANOR DOMESTIC VIOLENCE
A CRIME INVOLVING MORAL TURPITUDE?

Richard S. Fischer
Fischer & Fischer, Attorneys at Law
114 South Pecan Street
Nacogdoches, Texas 75961

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I.

SCOPE OF THIS TOPIC

This paper addresses the question of whether the common misdemeanor domestic violence offense under Texas law constitutes a crime involving moral turpitude (CIMT). It will not address felony domestic violence (whether by the enhancement provisions of the misdemeanor statute, or by the separate aggravated assault statute), as those offenses require analysis separate from and beyond the scope of this presentation.

II.

THE STATUTE

The Texas misdemeanor assault statute reads in pertinent part as follows:

Sec. 22.01. Assault.

- (a) A person commits an offense if the person:
 - (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;
 - (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or
 - (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.
- (b) An offense under Subsection (a)(1) is a Class A misdemeanor
- (c) An offense under Subsection (a)(2) or (3) is a Class C misdemeanor

III.

THE PRIOR INTERPRETATION

For at least twenty years, and almost without exception since Matters of Fualaau, 21 I&N Dec. 475, 478 (BIA 1996) (assault can be a CIMT if committed against a family member, which is an "aggravating dimension"), most immigration lawyers and judges have concluded that when the "including the person's spouse" is what happened in the commission of a § 22.01(a) offense, then the assault conviction is a CIMT for immigration purposes. The path to this conclusion follows the idea that the assault statute is "divisible, and therefore the "including the person's spouse" component can be an element of the offense. The statute being divisible, according to the conventional wisdom, meant that the "modified categorical approach" could be employed to determine whether the assault offense included domestic violence and therefore was a CIMT. The "modified categorical approach" allows a court to look beyond the statute of conviction to the record of conviction, including the complaint, information, plea documents and judgment, to determine under which portion of the statute the defendant was convicted. If application of the modified categorical approach to a divisible statute produces the conclusion that the defendant's conduct was turpitudinous, then he is guilty of a CIMT.

The "categorical approach," as compared to the "modified categorical approach," looks only to the statute of conviction; if that statute embraces only conduct equivalent to or less than the generic definition of the offense, then the offense is a CIMT. Otherwise, according to the categorical approach, if the statute under examination covers conduct beyond the conduct embraced by the generic definition of the crime in question, then the offense is categorically not a CIMT and that is all there is to it.

IV.

THE LAW DEVELOPS

When the modified categorical approach, as opposed to the categorical approach, should be applied, and just what application of the modified categorical approach allows a court to do, have been the subject of much litigation over the years. See, e.g., Young v. Holder, 697 F.3d 976 (9th Cir. 2012) (and cases discussed therein). Reading those cases, one could reasonably conclude that the categorical approach versus modified categorical approach inquiry was one the law was unable to answer in any meaningful way. However, in a series of recent decisions, the Supreme Court and the Fifth Circuit appear to have answered the question, at least in the context of the Texas misdemeanor assault statute.

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