

SAME-SEX UNIONS AND CONFLICTS OF LAW:  
WHEN “I DO” MAY BE INTERPRETED AS “NO, YOU DIDN’T”!

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**Introduction**

For years, marriage was a union between a male and a female.<sup>2</sup> No controversy existed about the definition of marriage, and no one tried to change the definition to include same-sex couples. Recently, however, in many states in the United States and in many foreign countries, there has been substantial momentum to include same-sex couples in the institution of marriage.<sup>3</sup>

In several countries this momentum has resulted in a change in the law. In the Netherlands, in other Northern European countries, and in Vermont and Massachusetts in the United States, the law has been changed either to include same-sex unions in marriage or to provide an alternative law to give same-sex couples the same benefits as marriage.<sup>4</sup>

In Canada, an Ontario court recently held that the definition of marriage that restricts the union to a man and a woman violates the country’s Charter of Rights and Freedoms. Immediately after the ruling, the city of Toronto issued full marriage licenses to same-sex

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<sup>2</sup> In *Baker v. Nelson*, 291 Minn. 310, 312, 191 NW2d 185, 186, *appeal dismissed* 409 US 810, 93 S Ct 37, 34 L Ed 2d 65 (1972), the court states that “The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.”

<sup>3</sup> See *Baker v. Nelson supra* note2; see also Comment, *Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARVARD L. REV. 2004 (May 2003). This article chronicles recent developments in the move to recognize same-sex unions as marriages.

<sup>4</sup> See MERIN, YUVAL, *EQUALITY FOR SAME-SEX COUPLES, THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES*, The University of Chicago Press, 2002. The recent case of *Goodridge v. Department of Public Health*, \_\_\_Mass.\_\_\_, \_\_\_NE2d\_\_\_, 2003 WL 22701313 (November 18, 2003), held the marriage law that restricts marriage to a man and a woman violates the state constitution.

couples that applied.<sup>5</sup> Then the Canadian Cabinet approved a policy to open marriage to same-sex couples.

The definition of marriage is changing to give same-sex couples the protection afforded by marriage laws to heterosexual couples. Whether that protection means expansion of the definition of marriage or affording the same-sex couple the same protection but through a different means varies from jurisdiction to jurisdiction. In some cases, the change may be occurring through incremental changes in the law to allow same-sex couples insurance benefits, death benefits and other kinds of protection normally reserved to spouses.<sup>6</sup> The jurisdiction may be providing the benefits of marriage but without giving official approval to the relationship.

Given the variation in the approaches taken for this change, conflicts in the law are inevitable. For instance, if one state in the United States recognizes same-sex marriage or a domestic partnership and another state does not, a conflict-of-laws arises

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<sup>5</sup> See [www.boston.com/dailyglobe2/162/nation/Ontario](http://www.boston.com/dailyglobe2/162/nation/Ontario) (June 11, 2003.) The Globe reported: If the ruling is not appealed to Canada's Supreme Court—and the government of Prime Minister Jean Chretien seemed disinclined yesterday to mount a legal challenge—Ontario will become the first province or state in North America to legalize gay marriage, and all of Canada could follow suit as early as next year. Vermont and Quebec allow civil unions, a legal registration, rather than marriage. Advocates of same-sex marriages say that civil unions have second-class legal status. But the Vermont law provides members of a civil union “the same benefits, protections, and responsibilities under Vermont law...as are granted to spouses in a marriage,” and according to the Vermont secretary of state's office. Supporters said the Ontario ruling would have implications elsewhere. “The Ontario ruling is hugely significant because it could spur similar civil rights advances in the United States,” said Evan Wolfson, executive director of Freedom to Marry, a New York-based group that supports gay and lesbian marriage. “The Canadians aren't settling for lesser steps, such as civil union, but demanding the real deal. Americans will look north to Canada and see that the sky isn't falling when gays and lesbian couples wed.” The OREGONIAN reported on Wednesday, June 18, 2003, that Canada has joined the ranks of Belgium and the Netherlands as the only countries to allow same-sex unions. The OREGONIAN, June 18, 2003, p. 1. See also *Halpern v. Toronto City*, 2003 WL 34950 (Ont. C.A.)

<sup>6</sup> See Comment, *supra* note 3. The author comments: In other ways, too, American courts have demonstrated a willingness to recognize same-sex relationships tacitly, without granting them official approval. With growing frequency, courts in many jurisdictions have embraced a functional definition of family that looks to the roles individuals have assumed rather than to whether those individuals conform to strict legal definitions of ‘spouse’ or ‘family member.’ Such decisions recognize the marriage-like qualities of same-sex relationships in all but name, and, in many cases, arise not just out of a pragmatic recognition that times have changed and that society's moral strictures—~~one~~ universally intolerant of sexual difference—have relaxed. (Citations omitted.)

when a couple whose union has been affirmed in one state moves to a state that does not recognize same-sex unions. The same kind of conflict arises in situations where same-sex couples travel from countries that recognize such unions to countries that do not. For example, a couple who marries in the Netherlands and travels to the United States or to another European country may ask a court to affirm the same-sex union to provide one or both of the partners the benefit of the law. How that conflict is resolved in either Europe or the United States is a significant question.

The purpose of this paper is to examine the conflicts issues raised by the differences in law regarding recognition of same sex unions. Part I of the paper describes the different ways that the law has developed. Part II considers the conflicts issues that arise in the United States. It considers the nature of the conflict and how it is likely to be resolved, and it includes discussion of the Full Faith and Credit Clause and the Defense of Marriage Act, federal laws that impact the conflicts issue.<sup>7</sup> Section III describes the international conflicts. The section examines these conflicts from the perspective of a European state as well as an American state and focuses primarily on Europe and the United States. Part IV offers a conclusion about the issues presented.

### **Part I: History of the Development of Laws Recognizing Same-sex Relationships**

There are three different approaches that jurisdictions have taken to providing legal protection for same-sex couples. One approach is to redefine marriage to include same-sex couples as well as heterosexual couples. A second approach is to provide a parallel partnership track to same-sex couples that offers the same kind of benefits as

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<sup>7</sup> The Full Faith and Credit Clause is found in the U.S. Const. art. IV, § 1. The Defense of Marriage Act is found at Pub.L.No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C).

marriage, but does not put the parties in the same position as they would be had they married. The final approach is to adopt incremental legal changes that afford the same-sex couple some of the economic and other benefits of marriage but do not fully sanction the relationship.

### **A. Recognition of same-sex relationship as marriage**

The Netherlands is the first country to give same-sex partners the right to marry. The Dutch Parliament enacted a statute that gives same-sex couples protection equivalent to heterosexual couples.<sup>8</sup> It earlier had accorded same-sex couples registration and partnership rights similar to those available in a number of states and countries today.

Then, in deciding to move from the partnership model to the marriage model, it decided, “same-sex couples can only be afforded equal treatment if they are allowed to enter into civil marriages.”<sup>9</sup> The bill that eventually became law amends Article 30, Book 1 of the Netherlands Civil Code to read as follows:

1. A marriage can be contracted by two persons of different sex or of the same sex.
2. The law only considers marriage in its civil relations.<sup>10</sup>

Two problems concerned the Parliamentary committee that recommended this sea change. One concerned the presumption of parentage of children born during marriage and whether or not that presumption should apply to same-sex couples. The legislation does not include that presumption for same-sex couples. The other issue concerned the

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<sup>8</sup> Act of 21 December 2000 amending Book 1 of the Civil Code, concerning the opening up of marriage for persons of the same sex (Act on the Opening up of Marriage), *Staatsblad van het Koninkrijk der Nederlanden* 2002, nr. 9 (11 January) (Official Journal of the Kingdom of the Netherlands).

<sup>9</sup> Kortmann Committee: Unanimous when It Comes to Protecting Children, Divided over Legal Form for Couples, October 28, 1997, [http://www.minjust.nl:8080/c\\_actual/persber/pb0176.htm](http://www.minjust.nl:8080/c_actual/persber/pb0176.htm).

<sup>10</sup> *Kamerstukken II*, 1998/99, 26 672.

international recognition of Dutch marriages in other countries. Parliament limited marriage to Dutch citizens.<sup>11</sup> Belgium became the second country to legalize same-sex marriage, but unlike the Netherlands, it does not allow gay and lesbian couples to adopt children.<sup>12</sup>

Recently, in Canada, the Ontario Appeal Court issued a decision that declares prohibitions against homosexual marriage unconstitutional.<sup>13</sup> In making its decision, the court ruled that the “existing common law definition of marriage violates equality rights on the basis of sexual orientation under the 1982 Charter of Rights and Freedoms, part of the Canadian Constitution.”<sup>14</sup> A court in British Columbia has ordered the federal Parliament to revise the definition of marriage by July 2004 or the court will change the definition to include same-sex couples.<sup>15</sup> Recent newspaper reports indicate that the government has decided not to appeal the case and will instead draft and send to Parliament the necessary legislation to modify the marriage laws to include same-sex unions.

Several states in the United States have considered the question of the constitutionality of restricting marriage to heterosexual unions. Courts in Hawaii and

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<sup>11</sup> Maxwell, Nancy, *Opening Civil Marriage to Same-Gender Couples: A Netherlands—United States Comparison*, 4.3 EJCL November 2000.

<sup>12</sup> See [www.religiooustolerance.org/hom\\_mar10.htm](http://www.religiooustolerance.org/hom_mar10.htm).

<sup>13</sup> See [http://www.boston.com/dailyglobe2/162/nation/Ontario\\_court](http://www.boston.com/dailyglobe2/162/nation/Ontario_court). The article, written by Colin Nickerson, of the Boston Globe staff, states “The ruling in Ontario, Canada’s most populous province, puts pressure on Chretien’s Liberal Party government to either revise Canada’s marriage law or simply let stand recent court rulings declaring that the present legal definition of marriage is unconstitutional. If it does not challenge the rulings, gay and lesbian marriage will become legal by default, as happened with abortion in Canada. The Appeal Court ruling added muscle to decisions this year by courts in British Columbia and Quebec that also challenged the law defining marriage. However, Ontario went far beyond the other courts with the unequivocal order to allow immediate gay and lesbian marriages. The court also ordered Ontario to retroactively recognize the January 2001 marriage of Joe Varnell and Kevin Bourassa, a gay couple wed in a Toronto church ceremony despite the refusal of the city to grant them a license.” *Halpern v. Toronto City*, 2003 WL 34950 (Ont. C.A.).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

Alaska held that the restriction of marriage to heterosexual unions is unconstitutional, but subsequent state constitutional amendments made the decisions moot.<sup>16</sup>

A state superior court decision in Massachusetts held that the right to marry is one that is deeply rooted in our history and tradition. It may be restricted to heterosexual marriage as it has been throughout our history. There is no constitutional requirement to include homosexual marriage within the tradition of marriage.<sup>17</sup> The court says the appropriate means of redress is through the Legislature, not through the courts.<sup>18</sup>

Recently, the Massachusetts Supreme Court struck down the lower court decision.<sup>19</sup> In holding that the marriage laws violate the Massachusetts State Constitution, the Court stated:

We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts law. We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution. We vacate the summary judgment for the Department. We remand this case to the Superior Court for entry of judgment consistent with this opinion. Entry of judgment shall be stayed for 180 days to permit the Legislature to take such action as it may deem appropriate in light of this opinion.<sup>20</sup>

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<sup>16</sup> See *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. 1998); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *reh'g granted in part*, 875 P.2d 225 (Haw. 1993), *remanded to Baehr v. Miike*, Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997); see Alaska Const. art I, § 25 (adopted 1998); Haw. Const. art. I, § 23 (adopted 1998).

<sup>17</sup> See *Goodridge et al. v. Department of Public Health*, 2002 WL 1299135 (Mass. Super.) In denying the petitioner's request, the court says: Thus, based on the history discussed above and actions of the people's elected representatives, this court cannot conclude that "a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institution. Neither...is a right to same-sex marriage...implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed." (Citations omitted.) While this court understands the reasons for the plaintiffs' request to reverse the Commonwealth's centuries-old legal tradition of restricting marriage to opposite-sex couples, their request should be directed to the Legislature, not the courts.

<sup>18</sup> *Id.*

<sup>19</sup> See *Goodridge v. Department of Public Health*, *supra* note 4.

<sup>20</sup> See Decision, p. 14.

In a recent addition to the opinion as requested by the state Legislature, the court clarified its previous decision and stated that the new law must give same-sex couples the right to marry, not an equivalent right to enter into a civil union, as the Legislature in Vermont created for its same-sex couples.<sup>21</sup>

### **B. Recognition of Same-Sex Relationship as a Partnership**

A number of jurisdictions, both foreign and one within the United States, opted to create a partnership track parallel to marriage that offers the same-sex couple much, if not all, the protection available to a married couple.

Several Northern European countries, including Norway, Sweden, Finland and Denmark have provided protection to same-sex couples for a number of years.<sup>22</sup> Generally, the same-sex partnerships have the same rights and responsibilities accorded to married partners. There are some restrictions, including qualifying for adoption and for registration of a partnership.<sup>23</sup> The option is generally available only to those who are residents in the country.<sup>24</sup> There is typically a reciprocal recognition provision that provides for recognition of the partnerships in other Northern European countries.<sup>25</sup>

Traditionally, in the United States the regulation of marriage and family is a matter that has been left to the states. The U.S. Constitution and the protection it accords to its citizens restrict the states in their regulation.<sup>26</sup> But the states decide what the

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<sup>21</sup> Goodridge, *supra* note 4, states that the solution of creating a civil union for gay and lesbian couples similar to what was created in Vermont is not consistent with the Court's holding. Gay and lesbian couples are entitled to marry according to what the court says.

<sup>22</sup> Merin, Yuval, *supra*, note 4.

<sup>23</sup> *Id.* at pp 61-110.

<sup>24</sup> *Id.* at 238-239.

<sup>25</sup> *Id.*

<sup>26</sup> See Mark Strasser, *Same-Sex Marriages and Civil Unions: On Meaning, Free Exercise, and Constitutional Guarantees*, 33 LOYOLA UNIVERSITY OF CHICAGO LAW JOURNAL 597 (Spring 2002). In this

requirements for marriage, for divorce, for adoption, and for other family matters should be, including decisions about the regulation of same-sex unions.

In the United States, Vermont adopted our nation's first civil union law that extends to same-sex couples virtually all of the rights and responsibilities of marriage. In *Baker v. State*, the Vermont Supreme Court held it a violation of the Common Benefits Clause in its state constitution not to accord same-sex couples the same kind of protection accorded to heterosexual couples through the marriage law.<sup>27</sup> The court admonished the Legislature to make these benefits and responsibilities available to same-sex couples. The Legislature responded by enacting the Civil Union Law. In this law, the manner of recognition and the benefits conferred are the same as for marriage.<sup>28</sup> The law provides for a civil or religious ceremony to create the union and also provides that the procedure for dissolution of the union is identical to the procedure for marriage.<sup>29</sup> In all other respects, the union is like a marriage in that the partners have rights to support, have rights to inherit from the other spouse and may not be married or in another civil union while a part of this civil union.<sup>30</sup> The law also makes it clear that a couple may travel from another jurisdiction and celebrate a civil union ceremony in Vermont.<sup>31</sup>

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article, the author discusses the Supreme Court case of *Loving v. Virginia*, 388 U.S. 1 (1967), where the U.S. Supreme Court found a Virginia statute that prohibited marriages between parties of different races to be violative of their federal constitutional rights.

<sup>27</sup> *Baker v. State*, 744 A.2d 864 (Vt. 1999); An Act Relating to Civil Unions, 2000 Vt. Acts & Resolves 91 (codified at Vt. Stat. Ann. Tit.15, Sections 1201-1207 (Supp. 2001).

<sup>28</sup> Silverman, Lewis A., *Vermont Civil Unions, Full Faith and Credit, and Marital Status*, 89 KENTUCKY LAW JOURNAL 1075,1079, (2000-2001) (The Legislature, in its response, ultimately created a new creature: the civil union. Although the state's marriage statute was clarified to define marriage as specifically between a male and a female, the Legislature went further. It created a new type of quasi-marriage that granted to same-sex couples entering a civil union all the benefits of marriage granted by state law to any other married Vermont couple.)

<sup>29</sup> *Id.* at 1080-81.

<sup>30</sup> 2000 Vt. Acts & Resolves 91. The Act provides: The family court shall have jurisdiction over all proceedings relating to the dissolution of civil unions. The dissolution of civil unions shall follow the same procedures and be subject to the same substantive rights and obligations that are involved in the dissolution of marriage in accordance with chapter 11 of this title, including any residency requirements. Vt. Stat.

### C. Partial recognition of rights for same-sex couples

Many other jurisdictions in the United States as well as in Europe offer more limited protection to same-sex couples. Though the jurisdiction may not embrace the relationship fully as it has in places like Vermont and the Netherlands, the law provides some protection to same-sex couples.

For instance, Hawaii has enacted a reciprocal beneficiary system that provides certain protections to same-sex couples.<sup>32</sup> A number of other states and municipalities have domestic partnership registries that grant same-sex couples benefits ranging from symbolic recognition to economic rights.<sup>33</sup> Additionally, a number of states have allowed

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Ann. Tit. 15, § 1206 (2000). Section 1204 provides: The law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply to parties to a civil union. The Act also provides: For a civil union to be established in Vermont, it shall be necessary that the parties to a civil union satisfy all of the following criteria: (1) Not be a party to another civil union or marriage. 2) Be of the same sex and therefore excluded from the marriage laws of this state. (3) Meet the criteria and obligations set forth in 18 V.S.A. ch. 106. Vt. Stat. Ann. Tit. 15, § 1202 (Supp. 2000).

<sup>31</sup> Vt. Stat. Ann. Tit. 18, § 5160 (a) (2000) provides: The license shall be issued by the clerk of the town where either party resides or, if neither is a resident of the state, by any town clerk in the state.

<sup>32</sup> Haw. Rev. Stat. Ch. 572C-2 provides that the reciprocal beneficiaries may be covered by health insurance, may have hospital visitation and health care decision-making rights and may have the same rights as a spouse to a partner's estate as well as a right to sue for the wrongful death of a partner.

<sup>33</sup> *Inching Down the Aisle: Differing Paths Toward The Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARVARD L. REV. 2004, 2015. The article points out that states and municipalities have extended health insurance and other financial benefits to same-sex partners of their employees. Several municipalities require their contractors to do the same. *See also* Carrillo-Heian, M.R., *Domestic Partnership in California: Is it a Step Toward Marriage?*, 31 MCGEORGE L. REV. 475, 489 (2000). The author explains how the domestic partnership law does not include the benefits of marriage, but offers some limited protection and benefit to same-sex couples and opposite sex couples 62 and older. The author states: "The requirements for entering into a DP (domestic partnership) under Chapter 588 are similar to the requirements for forming a marriage. However, the rights and obligations that the status of marriage and the status of DP confer are markedly different. The law generally favors married couples, providing them with inheritance rights, property rights, and tax benefits. The rights and obligations that DP registration provides are wholly contained within the DP provisions of Chapter 588. Similarly, the DP provisions in Chapter 588 are the only source of law governing the division of jointly-acquired property after termination of the DP, and the new law creates no new property rights. In contrast, the Family Code contains an entire section detailing the rights and obligations of married couples, and another section governing the division of property upon dissolution. Chapter 588 is silent on the subject of DPs that are registered under the laws of other jurisdictions. An earlier version of the law did recognize such DPs, but this provision was omitted before enactment. Conversely, marriages performed in other jurisdictions are valid in California. If married couples travel or move outside of California, they enjoy substantially the same rights in the target state as they did in California, but if domestic partners travel outside of California, they become legal strangers to each other unless the target state recognizes California DPs as valid. This

gay and lesbian couples to adopt and to have some of the rights and responsibilities of parents and of family despite the fact that they cannot marry.<sup>34</sup> Before Governor Gray Davis left office as California's Governor, he signed a bill into law that takes effect on January 1, 2005. This law expands the rights that Californians have under the Domestic Partnership law to something more like the rights recognized in Vermont's Civil Union Law.<sup>35</sup>

The incremental approach, though not producing the full rights that same-sex couples desire, nevertheless has produced some protection. Eventually, as these small changes occur, over time, they may give way to general acceptance and recognition of same-sex couples as entitled to the same rights as heterosexual couples. This appears to be the direction that California has moved in its recent adoption of the California Domestic Partner Rights and Responsibilities Act.<sup>36</sup>

#### **D. Significance of the Recognition of Same-Sex Unions**

The significance of the recognition of the same-sex union is important for economic as well as for status reasons.

When the Vermont court decided *Baker v. State*, it highlighted some of the benefits of being married:

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phenomenon leads to unpleasant results if one partner is injured outside of California: partners may not be entitled to visitation privileges or have any input concerning health care options. (Citations omitted.)

<sup>34</sup> *See id.* at 116 HARVARD L.REV. 2020-2021.

<sup>35</sup> Chapter 421, A.B. 205, Civil Rights—The California Domestic Partner Rights and Responsibilities Act. The Legislative Counsel's Digest states: This bill would extend the rights and duties of marriage to persons registered as domestic partners on and after January 1, 2005. This bill would provide that the superior courts shall have jurisdiction over all proceedings governing the dissolution of domestic partnerships, nullity of domestic partnerships, and legal separation of partners in domestic partnerships. These proceedings would follow the same procedures as the equivalent proceedings with respect to marriage. The bill would provide that a legal union validly formed in another jurisdiction that is substantially equivalent to a domestic partnership would be recognized as a valid domestic partnership in this state.

<sup>36</sup> *Id.*

While the laws relating to marriage have undergone many changes during the last century, largely toward the goal of equalizing the status of husbands and wives, the benefits of marriage have not diminished in value. On the contrary, the benefits and protections incident to a marriage license under Vermont law have never been greater. They include, for example, the right to receive a portion of the estate of a spouse who dies intestate and protection against disinheritance through elective share provisions; preference in being appointed as the personal representative of a spouse who dies intestate; the right to bring a lawsuit for the wrongful death of a spouse; the right to bring an action for loss of consortium; the right to workers' compensation survivor; the right to spousal benefits statutorily guaranteed to public employees, including health, life, disability, and accident insurance; the opportunity to be covered as a spouse under group life insurance policies issued to an employee; the opportunity to be covered as the insured's spouse under an individual health insurance policy; the right to claim an evidentiary privilege for marital communications; homestead rights and protections; the presumption of joint ownership of property and the concomitant right of survivorship; hospital visitation and other rights incident to the medical treatment of a family member; and the right to receive, and the obligation to provide spousal support, maintenance, and property division in the event of separation or divorce...<sup>37</sup>

Other benefits could be added to this list. Suffice it to say that the economic benefits of marriage are many. None of these benefits are available to same-sex couples unless the law is changed to include these couples within the ambit of the law's protection.

Vermont's Civil Union Law provides the broadest kind of protection to the same sex couple, giving the couple the full economic protection of marriage through the Civil Union Law.

Although many of the benefits of marriage gained by the partners in the Vermont decision are economic, non-economic benefits also become available including the spousal evidentiary privilege and hospital visitation privileges.<sup>38</sup> Rights related to the

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<sup>37</sup> Baker v State, 170 Vt. 194, 220, 744 A.2d 864, 883-884 (Vt. 1999).

<sup>38</sup> Vermont Statutes Ann., Title 15, Ch. 23, § 1204 (e) includes a list of all the benefits accorded to a same-sex partner. Section (e) states: The following is a nonexclusive list of legal benefits, protections and responsibilities of spouses, which shall apply in like manner to parties to a civil union...(4) adoption law and procedure...(6) spouse abuse programs under 3 VSA § 18...(12) family leave benefits...(15) law relating to immunity from compelled testimony and the marital communication privilege...(18) the definition of family farmer under 10 VSA § 272...(19) laws relating to the making, revoking and objecting to anatomical gifts by others under 18 VSA § 5240...(21) application for early voter absentee ballot under

couple's children also may be affected by the new law.<sup>39</sup> Entering into a civil union in Vermont also affects the ability of a partner to enter into other civil unions or marriages; the law restricts the ability of a partner to have more than one partnership or marriage relationship at the same time.<sup>40</sup>

In Vermont same-sex couples are entitled to the entire bundle of rights and responsibilities included in a package equivalent to marriage. Perhaps same-sex couples are content with laws that make the bundle of rights and responsibilities available to them without giving them the status of marriage. In fact, for some, acquiring the rights in a structure outside of marriage is preferable.<sup>41</sup>

What is missing in the Vermont civil union law is recognition of same sex couples as being married. Their status, although equivalent to marriage in terms of economic rights and other marital rights, is not the same as marriage. It is called something different and does not have the same status as marriage. The incremental impact of the lists of rights

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17 VSA § 2532...(22) family landowner rights to fish and hunt under 10 VSA § 4253...(24) affirmance of relationship under 15 VSA § 7.

<sup>39</sup> See Footnote 19, *supra*, 2022. The author points out that American courts have moved to protect the same-sex partners in the context of disputes regarding the custody of children and other issues about children. See Vt. St. Ann., tit. 15, ch. 23, § 1204 that provides a list of the benefits, protections and responsibilities of parties to a civil union including; (d) the law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply to parties to a civil union; (f) the rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage.

<sup>40</sup> Vt. Stat. Ann. tit. 15, ch. 23, § 1202 provides: Requisites of a valid civil union: For a civil union to be established in Vermont, it shall be necessary that the parties to a civil union satisfy all of the following criteria: (1) Not be a party to another civil union or a marriage....

<sup>41</sup> In a presentation at the International Society of Family Law North American Regional Conference, in June 2003 at the University of Oregon School of Law, Professor Nancy Polikoff discussed her thesis criticizing the emphasis on obtaining same-sex marriage and proposing that instead of the legal status of marriage, focus should be on a legal regime that values caregiving and emotional and economic interdependence. See also Harry D. Krause, *Marriage For The New Millennium: Heterosexual, Same Sex—or Not at All?*, 34 FAMILY LAW QUARTERLY 271, 276 (2000). In this essay, Professor Krause questions the function of marriage in today's society. He says, "The conclusion is obvious: Today's sexual and associational lifestyles differ so much that the state should not continue to deal with them as though they were one: the old role-divided, procreative marriage of history. That marriage may not yet be history, but it should be seen for what it has become: one lifestyle choice among many."

bestowed on the partners does not bestow on them the status of marriage. For instance, in *Rosengarten v. Downes*, the court made it clear that the family court had no subject matter jurisdiction to dissolve a same-sex union precisely because the court did not regard the union as a marriage.<sup>42</sup>

While the court said that the policy in Connecticut does not favor recognition of same-sex marriage or same-sex unions, it pointed to other legislation that allows same-sex couple adoptions along with other rights.<sup>43</sup> This is consistent with the law in most states in the United States as well as in European countries, which have recognized some rights for same-sex couples equivalent to the rights of heterosexual couples. These rights have been acquired through incremental changes in the law and do not provide equivalent status or equivalent rights to marriage. The exceptions are the changes that have occurred in such places as Canada and Vermont. But even Vermont has not provided its same-sex couples with marriage.

On the other hand, the decision recently handed down in Massachusetts may offer greater protection to same-sex couples. The court, in holding that the marriage statute violates state constitutional rights of same-sex couples who wish to marry, states: “(W)e construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others. This reformulation redresses the plaintiffs’ constitutional injury and furthers the aim of marriage to promote stable, exclusive relationships.”<sup>44</sup>

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<sup>42</sup> *Rosengarten v. Downes*, 71 Conn App 372, 378, 802 A2d 170, 175 (\_\_\_\_). The court states that the issue regarding jurisdiction of a civil union did not raise issues of marriage because “this civil union is not a marriage” as defined in Connecticut or in Vermont. On the basis of that, the court found that it lacked subject matter jurisdiction to adjudicate the dissolution of the relationship.

<sup>43</sup> *Id.*

<sup>44</sup> Decision p. 14.

In reaching this holding, the court considered the goals that the state presented in three legislative rationales for prohibiting same-sex couples from marrying: 1) providing a good setting for procreation; 2) ensuring a good setting for child rearing; 3) preserving scarce State and private financial resources. And the court rejects in turn all of these justifications for drawing the distinction between same-sex partnerships and heterosexual partnerships.<sup>45</sup> In the end, the Court may be paving the way for same-sex partnerships to marry in the same way that heterosexual couples marry. The court gives the Legislature 180 days to “take such action as it may deem appropriate in light of this opinion.” If the Legislature does not, then the impact of this decision takes effect to hold that same-sex partners have rights to be recognized under the state marriage laws. The Vermont decision did not go quite so far, although it left open the possibility of having the petitioners come back to court if the Legislature was unable to remedy the problem that made the marriage laws constitutionally defective. Although it is possible that the Legislature in Massachusetts will create the same remedy as the Vermont Legislature created, it is possible that the marriage statute will be amended to include same-sex couples as qualified for marriage.

In many respects, the difference in the two approaches may seem more academic than practical. However, part of the reason for seeking to marry includes not only the legal rights of marriage, but also the recognition of those rights in the form of the status of marriage. The Massachusetts remedy has the potential for providing a broader protection for same-sex unions than the Vermont decision did, although the Legislature in Massachusetts may fashion a remedy that is similar to the Civil Union Law enacted in Vermont.

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<sup>45</sup> Decision 9-12.

## **Part II: Interstate Conflict-of-Law Issues**

Given the different positions the states have taken on recognition of same-sex unions, conflict-of-law issues between the states will inevitably arise. Given the economic and other issues at stake, it is apparent why the issues are so important to same-sex couples.

Given that Canada and two countries in Europe have legalized same-sex marriage, and given that Massachusetts has declared that its marriage law violates the constitutional rights of same-sex couples, it is likely that at some point, a state court will be called upon to recognize the marriage union of a same-sex couple. Conflicts between states' marriage laws and between state and foreign countries' marriage laws are undoubtedly going to arise.

Since Vermont adopted the Civil Union Law, sister courts have already been called upon to accept the status of a partner joined by a civil union in Vermont.

The following highlights some of the issues courts will have to consider in deciding the cases:

Conflicts in laws may arise when a couple who lives in a state that does not recognize same-sex unions goes to a state that does to marry or to create a civil union or obtain other protection offered by that state. For instance, a couple domiciled in New York may travel to Vermont to register their relationship as a civil union. They may then return to New York and at some point ask a New York court to recognize the legality of their relationship created pursuant to Vermont law. Or the couple may be domiciled in the state that offers the protection but may leave that state and move to another state that does not recognize same-sex unions or does not recognize the protection available in the state

where the couple had lived. A couple domiciled in Vermont and registered in Vermont as a civil union under the Civil Union Law may move to Arizona and live in Arizona for a number of years. At some point while they are domiciled in Arizona, they may ask a court in Arizona to recognize their union.

The conflict may arise in different factual circumstances. For instance, a couple that entered into a Civil Union may desire to divorce in a different jurisdiction. The couple may ask the court to take jurisdiction of the matter as it would a divorce of a heterosexual couple. Or, a partner may ask a court to provide the protection at a partner's death. For instance, if a couple had entered into a Civil Union pursuant to the option provided in Vermont law, and one of the partners had died, the other member of the couple might want to pursue a wrongful death action or some other kind of tort action.

#### **A. Full Faith and Credit Clause and the Defense of Marriage Act**

The issue of recognition of a same-sex marriage in a sister state brings the Full Faith and Credit Clause and the Defense of Marriage Act into play. The Full Faith and Credit Clause and the Defense of Marriage Act provide guidance to the states on how a sister state is to treat another state's law or judgment. The Full Faith and Credit Clause provides: "Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State."<sup>46</sup> The Clause has been interpreted to require that sister states give recognition to judgments entered in other states. If, for example, a state court in a state that has legalized same-sex marriage has entered a judgment to dissolve the marriage, according to the Clause, a sister state's court is obligated to enforce the judgment in its court. On the other hand, the sister court may not

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<sup>46</sup> See U.S. Const. art. IV, § 1.

be obligated to recognize the law of the state that legalized same-sex marriage if a party initiates the divorce proceeding in her court. In that divorce proceeding, the court might apply its own law.<sup>47</sup>

The Defense of Marriage Act (DOMA) adds another layer of federal law to be considered. When Congress enacted DOMA, it interpreted the Full Faith and Credit Clause to mean that states are not obligated to give effect to acts or records of judicial proceedings of another state that treat relationships between persons of the same sex as marriage.<sup>48</sup> DOMA is a specific provision that excuses states from giving full faith and credit to sister state laws and judgments that treat same-sex relationships as equivalent to marriage.

Under DOMA, a state court could refuse to enforce either the law or the judgment of the sister court.<sup>49</sup> To the extent that DOMA is construed in a way that gives state courts the option of not enforcing sister-state money judgments, the law is an exception to the generally held principles of Full Faith and Credit that the sister-state courts have traditionally followed and may be unconstitutional.<sup>50</sup> To the extent that the DOMA

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<sup>47</sup> Borchers, Patrick, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L.REV. 147, 164 (1998). The author states: As things stand now, therefore, there is a wide divergence in the way in which the Court applies the Full Faith and Credit Clause to judgments and to laws. Judgments—assuming that they meet the Court’s exacting definition—are essentially unassailable if presented to another court, unless entered without personal or subject matter jurisdiction. Sister-state laws, however, are by no means entitled to automatic application. Rather, courts are permitted to apply their own law and refuse the application of a sister-state’s law in almost all cases. Under the Hague-Wortman line of cases, a state court is prohibited from applying its own law only if that state has no significant contacts with the parties or the transaction and the application of forum law cannot be justified under traditional choice-of-law principles.

<sup>48</sup> Defense of Marriage Act, Pub.L.No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. V 1999) and 28 U.S.C. § 1738C (Supp. IV 1998) that provides: No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship. *See also*, Silverman, Lewis, *Vermont Civil Unions, Full Faith and Credit, and Marital Status*, 89 KENTUCKY L.J. 1075 (2000-2001).

<sup>49</sup> *See* Borchers, *supra*, note 24 at 180-182.

<sup>50</sup> Borchers, *supra* note 24, at 182-183.

instructs a sister court that it is not obligated to follow the law of another state, DOMA is not a departure from generally held views about recognition of state law by a sister state.

These issues have been covered in great detail in many other articles and will not be considered at great length.<sup>51</sup> Discussion in recent case law and academic writing raises questions about the constitutionality of DOMA.<sup>52</sup>

## **B. State Statutes Prohibiting Recognition of Same-sex Unions**

Many states have enacted state laws that prohibit recognition of same-sex unions whether contracted in the state or outside. Some states have accomplished this by clarifying the concept of marriage, making it clear that marriage is a union of a male and a female.<sup>53</sup> Other states have enacted statutes stating that same-sex marriages recognized by another state or another country will not be recognized in that state.<sup>54</sup> Still other states have enacted statutes that include express prohibition of same-sex marriages, making it clear that the public policy of the state is to retain the heterosexual model of marriage as

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<sup>51</sup> For further discussion of the constitutionality of DOMA, see Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1970 (1997); Strasser, Mark, *Baker and Some Recipes for Disaster: on DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 BROOKLYN L. REV. 307 (1998).

<sup>52</sup> *Langan v. St. Vincent's Hospital of N.Y.*, 2003 WL 21294889 (N.Y. Sup.) The court says: "It is unclear by what authority the Congress may suspend or limit the full faith and credit clause of the Constitution, and the constitutionality of DOMA has been put in doubt (see, e.g. Mark Strasser, *Baker and Some Recipes for Disaster: on DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 BROOKLYN L.REV. 307)." Decision, p. 4.

<sup>53</sup> Cal. Fam. Code § 300 provides: "Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary. Consent alone does not constitute marriage." Other statutes provide the same kind of specific language that restricts marriage to a male and a female. See Michael T. Morley et al, *Developments in Law and Policy: Emerging Issues in Family Law*, 21 YALE LAW & POL. REV. 169, 188 (2003)

<sup>54</sup> *Id.* at 189. The author points out several states that have adopted this approach including Alaska, Idaho, Kentucky, Michigan and North Carolina.

the only one acceptable.<sup>55</sup> And some states have created a hybrid statute that combines the policies of the above statutes.<sup>56</sup>

To the extent that these statutes define the concept of marriage in the state, it seems clear that the state legislature has the authority to define the concept of marriage within the state.<sup>57</sup> Of course, one might make the argument that the restriction in a marriage statute violates federal constitutional law; if it does, the law will be struck down.<sup>58</sup> But otherwise, a state has authority to regulate marriage as it sees fit.

To the extent that these statutes attempt to regulate marriages entered into out of the state, the statutes are like mini-DOMA laws that express a state policy against recognition of out-of-state marriages between same-sex partners.<sup>59</sup> The statutes may be interpreted to mean that citizens domiciled in the state who marry outside the state will not have same-sex marriages recognized in the state. Or the statute may mean that no out-of-state marriages, whether entered into by state domiciliaries or others will be recognized in-state. To the extent that the statute makes it clear that the enforcement of an out-of-state judgment is not appropriate, a state should not enforce the other state's judgment regarding a same-sex marriage.

The Alaska statute provides that, "A marriage entered into by persons of the same sex, either under common law or under statute, that is recognized by another state or

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> See *Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374 (1978).

<sup>58</sup> See *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978).

<sup>59</sup> See Elaine M. DeFranco, *Choice of Law: Will a Wisconsin Court Recognize a Vermont Civil Union?*, 8 MARQUETTE L. REV. 251 (2001). The author states that "Since 1995, with the advent of the Defense of Marriage Act as well as the developments in Hawaii and Alaska, the majority of states have revised their marriage statutes to either explicitly prohibit same-sex marriage or specifically define marriage as the union between a man and woman, or male and female." P. 259. See also David Orgon Coolidge, William C. Duncan, *Definition or Discrimination? State Marriage Recognition Statutes in the Same-Sex Marriage Debate*, 32 CREIGHTON L. REV. 3 (1998);

foreign jurisdiction is void in this state, and contractual rights granted by virtue of the marriage, including its termination, are unenforceable in this state.”<sup>60</sup> The terms of the statute indicate that the state does not sanction same-sex marriages, either in-state or out-of-state. The statute applies to those who are domiciled in the state who go outside the state to marry and also appears to apply to those who may seek recognition of an out-of-state union in Alaska. The language states that the contract rights are unenforceable in the state. To the extent that one regards the terms of the money judgment for support as a contract right emanating from the marriage, the statute suggests that enforcement of a judgment based on contract rights would also be unenforceable in Alaska. Whether or not a statute that limits the rights of parties who legally married in a different jurisdiction from recognition of those rights in the home jurisdiction may involve constitutional questions.<sup>61</sup> A statute that restricts the enforceability of an out-of-state judgment in its state courts does involve issues of constitutional proportion.<sup>62</sup>

Whether a civil union is included in the prohibition of a state statute that prohibits same-sex marriage depends upon the specific language of the statute and how a court construes the statute. For instance, the Alaska statute that states that, “A marriage entered into by persons of the same sex, ...that is recognized by another state or foreign jurisdiction is void in this state....” The statute goes on to state, “A same-sex relationship

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<sup>60</sup> Alaska Stat. § 25.05.013 (Michie 2002).

<sup>61</sup> Mark Strasser, *Baker and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 BROOKLYN LAW REV. 307 (1998). The author states: “The Court has explained that there are minimal constitutional limits on which state’s laws are applicable to a particular occurrence or transaction. For example, ‘if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional.’ However, the Court has failed to make sufficiently clear how minimal those contacts must be, having recognized that ‘it is frequently the case under the Full Faith and Credit Clause that a court can lawfully apply either the law of one State or the contrary law of another.’ Some commentators have concluded that, as a general matter, the forum state can apply its own law without much fear of being overturned on constitutional grounds.” Pp. 328-329.

<sup>62</sup> *Id.* at 318-319.

may not be recognized by the state as being entitled to the benefits of marriage.”<sup>63</sup> The language makes it fairly obvious that the prohibition relates to relationships other than marriage. California’s new Domestic Partner Act does not purport to create marriage rights for same-sex partners, but does give same-sex partners many of the same rights that married partners enjoy in California. The Act further provides that domestic partnerships formed in other states will be recognized as valid in California.<sup>64</sup> This approach is the opposite of the states that make it clear that out-of-state unions will not be recognized.

The statutes enacted by the states raise constitutional issues about the authority that a state has to determine the effect of an out-of-state law or an out-of-state judgment. But most importantly, the statutes also raise conflict-of-law issues between the applicable law of a sister state that allowed parties to enter into a same-sex union, while the law of another sister state prohibits recognition of that very same union.

### **C. Conflict-of-Law Issues**

Conflict-of-law issues arise when same-sex partners have married or created a union in a jurisdiction that recognizes the relationship and then move or return to a jurisdiction that does not recognize such a union. A state court may be called upon to recognize or validate the relationship not authorized by the law in that state.

To resolve the conflict, one must first determine the basis for it. If local law allows marriage and the other state does not, the conflict may be regarded as one between

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<sup>63</sup> See Alaska Stat. § 25.05.013 (Michie 2002).

<sup>64</sup> Section 299.2 of the Act provides: A legal union of two persons of the same sex, other than a marriage, that was validly formed in another jurisdiction, and that is substantially equivalent to a domestic partnership as defined in this part, shall be recognized as a valid domestic partnership in this state regardless of whether it bears the name domestic partnership.

marriage statutes. Generally, marriages valid where performed are recognized in other states.<sup>65</sup> The Second Restatement of the Conflict of Laws provides that “A marriage which satisfies the requirements of the State where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another State which has the most significant relationship to the spouses and the marriage at the time of the marriage.”<sup>66</sup> In determining which state has the most significant relationship, Section 6 of the Restatement provides that the courts should follow any statutory directives on the issue, “the needs of the interstate and international systems, the relevant policies of the forum, the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, the protection of the parties’ justified expectations, certainty, predictability and uniformity of result, and ease in the determination and application of the law to be applied.”<sup>67</sup>

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<sup>65</sup> Scoles and Hay, CONFLICTS OF LAW, § 13.5 at 548 provides: “The usual statement of the traditional doctrine in the United States on the validity of a marriage is that a marriage is valid everywhere if valid under the law of the state where the marriage takes place, except in rare instances. The most prominent exceptions are those marriages involving polygamy and incest, i.e., the enjoyment of the incidents that are positively prohibited by the local law.”

<sup>66</sup> RESTATEMENT (SECOND) CONFLICT OF LAWS, § 283 (1971). The reporter for the Second Restatement states:

This formulation reflects the three underlying values of (a) State interest, (b) protection of the expectations of the parties and (c) the general policy favouring the validation of marriages. Subsection (2) calls, as a general rule, for the application of the law of the State of celebration provided that the marriage would be valid under that law.

The formulation further makes clear that a marriage good under the law of the State of celebration should not be overthrown unless this is required by the ‘strong public policy’ of the State of most significant relationship.

...In making this determination, the forum should first inquire whether the courts of the State of most significant relationship would have invalidated the marriage if the question had come before them. The fact that these courts would not have done so provides, of course, conclusive evidence that no strong policy of this State is involved. If, on the other hand, these courts would have invalidated the marriage...the forum would have good reason to do likewise. It would in all probability invalidate the marriage...if the parties were still domiciled in the State which was that of most significant relationship at the time of the marriage. The situation would be somewhat different, however, if by the time the action arose the parties had moved to a different State...(A) state will naturally have less interest in having its invalidating rule applied in a case where the parties to the marriage have moved away than it would if they have remained its local domiciliaries.

<sup>67</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS, section 6 (1971). UNIFORM MARRIAGE AND DIVORCE ACT section 210, 9 U.L.A. 176 (1987) provides an even more liberal approach to

If parties were married in a state that is also their domicile, it is very unlikely that a court in another state will invalidate their marriage as the domiciliary state appropriately applied its own law to the marriage. All relevant policies point to recognition because no other state has an interest in the validity of the marriage similar to the interest of the state where parties are domiciled. Invalidating the marriage would happen only in rare cases where the state has a very strong public policy against recognition.

More difficult conflict questions arise when the parties domiciled in a state that prohibits the marriage travel to a state that allows the marriage, marry, and return to their home state shortly after marrying. *In Re May's Estate*<sup>68</sup> considers the public policy interests at stake when domiciliaries of the state travel to another state to marry in violation of the local state's marriage law. An uncle and niece married in Rhode Island where their marriage was legal. They returned to New York and lived for 32 years before the wife died, at which time their children questioned the validity of the marriage in a probate proceeding. New York did not allow a marriage between an uncle and a niece. The court concluded that "such marriage, solemnized, as it was, in accord with the ritual of the Jewish faith in a State whose legislative body has declared such a marriage to be 'good and valid in law,' was not offensive to the public sense of morality to a degree regarded generally with abhorrence and thus was not within the inhibitions of natural law."<sup>69</sup>

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recognition of marriages contracted out of the forum state. Section 210 provides: "All Marriages contracted within this state prior to January 1, 1975, or outside this state that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by the domicile of the parties are valid in this state." On the other hand the Uniform Marriage Evasion Act limits recognition of marriages contracted in another state when the parties left the state to avoid the marriage laws of the domicile state. See, for example, VT.STAT.ANN tit.15, § 5 (1993).

<sup>68</sup> 305 N.Y. 486, 114 N.E.2d 4 (1953).

<sup>69</sup> Decision,

Many courts faced with similar issues regarding recognition of an out-of-state marriage of a couple domiciled in the state have followed the reasoning of the court in *In Re May's Estate* when dealing with incest restrictions, age restrictions and restrictions on remarriage following divorce.<sup>70</sup>

The reasons for a court's willingness to validate a marriage that is in conflict with its local law are illustrated in *In Re May's Estate*. The parties were not questioning the validity of their marriage. One of the parties died, and the children were seeking to have the marriage declared void so that a daughter could be named as her mother's representative. If the court voids the marriage, it will not give effect to the intention of the two parties to remain married. After the death of one of the parties, whether or not the marriage violated local law becomes less important because the parties lived together for 32 years and had four children. Given the policies mentioned by the Restatement, the court chose protection of the parties' justified expectations as an important value in making its decision. The court also is mindful of the fact that state policy in New York is less threatened by validating this marriage than Rhode Island law would be if the court did not validate the marriage. Predictability and reliability of legal out-of-state marriages is an important value.

If the court had been called upon to recognize the status of the parties as married while they are married, perhaps it would have had more significant policy reasons for invalidating the union. In that case, its court is being called upon to validate the status of a relationship that the local law considers unlawful. But after one of the parties is deceased, it seems less harmful to local state policies to recognize the union that the state considers unlawful.

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<sup>70</sup> See Hays and Scoles, *supra* footnote 42, at 555-565.

Another way to view the legal conflicts issue created in a same-sex union case is as a contract dispute. The Legislature in Vermont, in its Civil Union law, created a contract-form different from marriage. The arrangement could be viewed as more a contract than a marriage. If a dispute arises concerning a contract, the Restatement has a different rule for determining applicable law. Where the parties have not provided for the choice of law, the Restatement Second of Conflicts states that the “rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in section 6.”<sup>71</sup> (Section 6 refers to the general principles and policies that should be taken into account in resolving conflicts.) If the parties have provided for their resolution of this issue, that state law will govern their contract rights.<sup>72</sup>

Parties entering into a civil union in Vermont obviously expect that the law of Vermont will govern their relationship. If they live in Vermont, it is obvious that the nexus of the relationship is in Vermont and no other state has as great an interest in the

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<sup>71</sup> RESTATEMENT SECOND OF CONFLICTS, § 188. The section also provides: 2) In the absence of an effective choice of law by the parties (*see* § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- a) The place of contracting,
- b) The place of negotiation of the contract,
- c) The place of performance,
- d) The location of the subject matter of the contract, and
- e) The domicile, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue. 3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-199 and 203.

<sup>72</sup> *Id.* at § 187. The section contains a caveat that (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

contract and its terms. If parties from a different state travel to Vermont to enter into a civil union, but then return to their home state, another state in addition to Vermont has an interest in the contract. If the parties have not expressly designated Vermont law to control their contract, it may be that the law of the other state will control because the parties are domiciled in that other state. That other state, by virtue of being the domicile of the parties, has a significant relationship to the contract. One might expect that the issues about recognition of the contract will be resolved similarly to the way the marriage cases are resolved. The longer the contract has been in effect, and depending on the circumstances for the dispute, the more likely it is that a court would validate the contract entered into by the parties.

Although Vermont and now Massachusetts are the only states that sanction same-sex unions as equivalent to marriage, some states recognize and enforce cohabitation contracts between unmarried partners.<sup>73</sup> If one of the partners raised the validity of the contract in another state, a conflicts issue is raised that would be solved by focusing on the conflict in contracts law rather than marriage law. The focus of this article is on the conflict issues in marriage law and does not deal with the contract conflicts issue. It is no doubt important to keep in mind that a contract approach may be preferable in some cases even though a contract analysis may not provide a party the benefits of marriage.

The following are several different hypothetical problems that create conflict-of-law issues. How these conflicts would be resolved is discussed.

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<sup>73</sup> See Carol S. Bruch, *Cohabitation in the Common Law Countries a Decade After Marvin: Settled In or Moving Ahead?*, 22 U.C. DAVIS L. REV. 717 (1989). The article discusses the recognition gay couples have received as unmarried cohabitants.

## 1. Conflict regarding dissolution of same-sex union

### PROBLEM:

John and Joseph are residents of New York. When Vermont passed its Civil Union Law, they immediately traveled to Vermont and registered as a civil union in Vermont. They have lived together for several years and now are separated. John has met someone new and would like to end the civil union. He would like to file for dissolution in New York. Since neither of the parties to the union currently resides in Vermont, it makes more sense to dissolve the union in New York. What will a New York court do in this case? Will it take jurisdiction and dissolve the relationship?

*Rosengarten v. Downes*<sup>74</sup> is a case very similar to the fact pattern presented above.

Plaintiff and defendant were joined in a civil union in Vermont. Plaintiff sought to have the civil union dissolved as it had broken down irretrievably. Plaintiff had established residency in Connecticut before filing the dissolution complaint. The court holds that it is without jurisdiction to consider the dissolution because the court may only consider “family relations matters,” and a civil union is not a family relations matter as set forth in the statutes.<sup>75</sup>

In deciding that the court did not have subject matter jurisdiction, the court found that the state public policy is against recognition of same-sex unions. In making this determination, the court relied on the history of recent legislation allowing same-sex partners to adopt and legislative history concerning the state’s decision not to adopt the

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<sup>74</sup> *Rosengarten v. Downes*, 71 Conn.App.372, 802 A.2d 170 (2002). An appeal of this case to the Supreme Court of Connecticut was filed and the petition for certification for appeal was granted. 261 Conn. 936, 806 A.2d 1066. It was dismissed on December 21, 2002 as moot.

<sup>75</sup> *Id.* at 71 Conn.App. 379, 802 A.2d 175.

Defense of Marriage Act.<sup>76</sup> The court uses the legislative history to show that the public policy of Connecticut is not to recognize same-sex unions, but to follow a path different from the one followed in Vermont. The court decided that a civil union is not a family relations matter and therefore not within the subject matter jurisdiction of the court because the public policy of Connecticut is not supportive of recognition of same-sex unions.

Another recent case from Georgia failed to give recognition to a same-sex union in the context of a custody dispute. In *Burns v. Burns*<sup>77</sup> the question before the court concerned interpretation of a consent decree between two divorcing parties that restricted visitation of children when the party being visited cohabited with any adult to whom the party was not legally married.<sup>78</sup> Mother Susan subsequently went to Vermont and entered into a civil union with a female companion. When her former husband complained that she violated the consent decree by cohabiting with her partner during visitation with her children, she countered that the parties had been joined together in a legally recognized union in Vermont and that she had not violated the terms of the

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<sup>76</sup> In enacting the adoption law contained in General Statutes § 45a-727a the court said: “It becomes clear from a careful reading of the floor debate on this legislation in both houses, that a number of legislators were opposed to adoption of this legislation if it were to be used later in any way as a wedge by appellate or trial courts to require recognition of civil unions in Connecticut in the manner they ascribed to the Vermont Supreme Court in *Baker v. State*, 170 Vt. 194, 744 A.2d 864 (1999).” Members of the General Assembly in their floor debate in each house did not make explicit mention of *Baker*. It is clear, however, that several legislators were concerned, as a result of the Vermont experience, that in overriding the ruling in the *In re Baby Z* case by permitting adoption of a child who already had a natural or adoptive parent by another person of the same sex who was not lawfully married to that parent, they did not allow an appellate court to use that legislative enactment as a wedge to bring down the laws of Connecticut concerning who may marry. See, e.g., 43 S. Proc., *supra*, p. 2451-52. In addition, the court mentions that, “contrary to the plaintiff’s assertions, the legislative history reveals that the legislature failed to enact its own version of the Defense of Marriage Act not because it intended to evince a willingness to recognize civil unions but because it thought such an enactment unnecessary.”

<sup>77</sup> 253 Ga.App 600, 560 S.E.2d 47 (2002).

<sup>78</sup> *Id.* at 253 Ga.App. 600. The consent order stated: “[t]here shall be no visitation nor residence by the children with either party during any time where such party cohabits with or has overnight stays with any adult to which such party is not legally married or to whom party is not related within the second degree.”

decree. The court agreed with her husband because Georgia law defines marriage as a relationship between a man and a woman and prohibits the recognition of same-sex unions recognized in other states.<sup>79</sup>

Since the statutes make it clear that Georgia has public policy that opposes same-sex marriage or recognition of the unions, the result is not at all surprising.

Another recent case recognizes the same-sex union entered into in Vermont by two New York domiciliaries. In *Langan v. St. Vincent's Hospital of New York*,<sup>80</sup> the parties had entered into a Vermont civil union when shortly afterwards one of the partners, Neal Spicehandler, was struck by a car and later died at the hospital. His partner, John Langan sued for wrongful death. To qualify as a person who may sue under the wrongful death statute, the person must qualify as a surviving spouse.<sup>81</sup>

Before the court defined the term spouse, it examined the conflicts rule for recognition of out-of-state unions. New York recognizes out-of-state marriages if valid where they are made unless the marriage is against the strong public policy of the state. The court noted that common law marriages and other marriages that may not be created in New York have been upheld in New York.<sup>82</sup> The court goes on to look at its public

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<sup>79</sup> OCGA § 19-3.3.1(b) provides: “[n]o marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage. Any marriage entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state. Any contractual rights granted by virtue of such license shall be unenforceable in the courts of this state and the courts of this state shall have no jurisdiction whatsoever under any circumstances to grant a divorce or separate maintenance with respect to such marriage or otherwise to consider or rule on any of the parties’ respective rights arising as a result of or in connection with such marriage. Moreover, Georgia is not required to give full faith and credit to same-sex marriages of other states.”

<sup>80</sup> 2003 WL 21294889 (N.Y.Sup.) (2003).

<sup>81</sup> The wrongful death statute defines classes of people who may recover for wrongful death including distributees who include a “spouse, issue, parents, grandparents or their issue.” *Id.* at 8.

<sup>82</sup> *See*, for instance, *Matter of Mays Estate*, 305 N.Y. 486, 114 N.E.2d 4 ( ); *Ferraro v. Ferraro*, 192 Misc. 484, 77 N.Y.S.2d 246, *aff’d sub nom.* *Fernandes v. Fernandes*, 275 App.Div. 777, 87 N.Y.S.2d 707.

policy and determines that its public policy “does not preclude recognition of a same-sex union entered into in a sister state.”<sup>83</sup> The court says:

Under principles of full faith and credit and comity, and following authority which advances the concept that citizens ought to be able to move from one state to another without concern for the validity or recognition of their marital status, New York will recognize a marriage sanctioned and contracted in a sister state and there appears to be no valid legal basis to distinguish one between a same-sex couple. And, unlike a non ceremonial common law marriage contracted in a sister state which may be dissolved at will, yet is recognized in New York, the Vermont civil union requires a sanctioned civil ceremony, a license, and, significantly, a divorce to end the union.<sup>84</sup>

Once the court agrees that recognition of the relationship is compatible with the public policy of New York, the court makes the logical move to construe spouse in the wrongful death statute to include a same-sex marital partner. It recognizes that the term undoubtedly did not mean same-sex partner when it was written, but the concept of spouse has evolved over time and now does include same-sex partner.

Where the state has a statute that expressly declares same-sex marriage prohibited and void in the state, it is difficult to argue that a same-sex union is compatible with state public policy. On the other hand, where the jurisdiction has not enacted such a statute, public policy may be more difficult to determine. In Connecticut, the court relied on legislative history to point to policy that is not supportive of same-sex unions while New York pointed to cases and other statutes that supported same-sex unions in its jurisdiction.

When John and Joseph entered into a civil union in Vermont, they entered into a union equivalent to marriage in all respects. Section 1206 of the Civil Union law provides that, “The dissolution of civil unions shall follow the same procedures and be

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<sup>83</sup> 2003 WL 21294889, 5 (N.Y. Sup.).

<sup>84</sup> *Id.* at 7.

subject to the same substantive rights and obligations that are involved in the dissolution of marriage....”<sup>85</sup>

In order for John to end the union, he is required to file for dissolution according to the Vermont law. When John files for dissolution in a family court in New York to dissolve his civil union, the first question faced by the court is whether it will recognize the civil union. If the court is unwilling to recognize the union, it will certainly not consider dissolving it.

A New York court is likely not obligated by the Full Faith and Credit Clause to enforce the Vermont civil union law in New York. Restatement Second of Conflicts states that if a marriage satisfies the requirements of the state where it was contracted, it should be recognized as valid in other states unless it violates the strong public policy of that other state which had the “most significant relationship to the spouses and the marriage” when the parties married.<sup>86</sup> Because both parties resided in New York when they entered into the civil union and because John is asking a New York court to dissolve the union, New York is the state that had the most significant relationship to the spouses at the time of their marriage and also the most significant relationship to the spouses at the time of their divorce.

Although it is not entirely clear that New York would use the Restatement Second rationale for resolution of this conflicts issue, this analysis follows that approach.

To determine whether New York should invalidate the marriage, it must first look to whether or not any state statutes would invalidate this out-of-state marriage of local domiciliaries. New York has not enacted legislation as many states have that explicitly

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<sup>85</sup> Vt.Stat. Ann. tit. 15, ch. 23, § 1206.

<sup>86</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 283 (2).

states that same-sex marriage will not be recognized within the state. If it had, the answer would be clear that the statute states the policy and makes it clear that the marriage would not be recognized.

New York's conflicts law is consistent with recognition of out-of-state unions so long as the marriage does not violate a strong public policy of the state.<sup>87</sup> The conflicts rule does not preclude recognition of this out-of-state union.

New York will then have to determine whether there is a sufficiently strong public policy at stake to warrant invalidation of the rule. New York clearly does not have an established state policy or state law that makes a same-sex union illegal. To the contrary, recent cases and established law in New York suggest that the established policy may be receptive to same-sex relationships.<sup>88</sup> In a recent New York case the court concluded that New York is receptive to same-sex relationships and pointed to laws providing same-sex couples employment benefits, rent control protection, adoption rights, and most recently protection for same-sex partners aggrieved by the tragic loss of life on September 11, 2001 in New York City.<sup>89</sup> Given what this court had to say about the public policy of the law in New York, it is very possible that a New York court would accept the validity of the civil union and would consider the issues presented by a partner seeking dissolution of the union.<sup>90</sup>

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<sup>87</sup> See *Langan v. St. Vincent's Hospital of N.Y.*, 2003 WL 21294889 (N.Y.Sup.) that states New York's conflict rule that "New York adheres to the general rule that 'marriage contracts, valid where made, are valid everywhere, unless contrary to natural laws or statutes.'" Citations omitted. P. 3.

<sup>88</sup> See *Langan v. St. Vincent's Hospital of N.Y.*, 2003 WL 21294889 (N.Y.Sup.) that outlines the New York position on this issue: "The presumption of legitimacy, when extended to a same-sex couple, together with the obligations of support and requirement for a divorce, indicate that the civil union is indistinguishable from marriage, notwithstanding that the Vermont legislature withheld the title of marriage from application to the union." Decision, p.7.

<sup>89</sup> See *Langan v. St. Vincent's Hospital of N.Y.*, *id.*, at 4-5.

<sup>90</sup> Most other jurisdictions would probably not agree with New York's analysis of this. For states that have enacted a mini-DOMA, the state law makes it clear that a state court should not recognize the Vermont law

If the court accepts the validity of a civil union, it agrees to accept the validity of a civil union contracted in Vermont. It follows that it also accepts the status of the parties as a couple bound by the laws of Vermont in a civil union. Although the court may accept the validity of the civil union, it does not follow that the court will agree to accept jurisdiction of its dissolution.

Whether the fact that the court is considering the dissolution of a civil union would change the court's view of application of local law is an issue to be considered. When the parties entered into their civil union, they registered with the state and participated in a proceeding not unlike a marriage ceremony.<sup>91</sup> They intended to enter into a partnership that provided them with the rights and responsibilities of marriage.<sup>92</sup> They intended to enter into a contract with one another and the state of Vermont that provided they would need to divorce if they wished to end their relationship.<sup>93</sup>

Given that the parties entered into an agreement that they expected would be regarded as a marriage and would require the same kind of dissolution process as a marriage, the court in New York could apply its own dissolution law without frustrating the intent of the parties. On the other hand, a court in New York might decide that the dissolution of a civil union should be handled in Vermont since Vermont has enacted legislation to

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and give effect to a civil union and thereby consider the dissolution of the union. Connecticut apparently shares this view given the decision in *Rosengarten v. Downes*, 71 Conn.App.372, 802 A.2d 170 (2002).

<sup>91</sup> Vt.Stat. Ann. tit. 15, § 1207 provides: "The commissioner shall provide civil union license and certificate forms to all town and county clerks. The commissioner shall keep a record of all civil unions."

<sup>92</sup> Vt.Stat. Ann. tit. 15, § 1204 provides: "Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage. A party to a civil union shall be included in any definition or use of the terms 'spouse,' 'family,' 'immediate family,' 'dependent,' 'next of kin,' and other terms that denote the spousal relationship, as those terms are used throughout the law."

<sup>93</sup> Vt. Stat. Ann. tit. 15, § 1206 provides: "The family court shall have jurisdiction over all proceedings relating to the dissolution of civil unions. The dissolution of civil unions shall follow the same procedures and be subject to the same substantive rights and obligations that are involved in the dissolution of marriage in accordance with chapters of this title, including any residency requirements."

provide for the dissolution of the unions and has created a system to administer its new law. This is how the Connecticut court handled the issue, although the court also found that the union violated the strong public policy of the state.<sup>94</sup> A court in New York might conclude that although the policy favors same-sex unions for many purposes, its family law court is not set up to process the dissolution of these unions.

The other issue concerns the substantive law that applies to the dissolution proceeding. In a typical dissolution proceeding, the state that hears the dissolution applies its own law to the proceeding. If the court has the jurisdictional authority to adjudicate the case, it follows that it has the authority to apply its own substantive law to the dissolution proceeding.<sup>95</sup> This is the tradition in divorce jurisprudence followed by the U.S. Supreme Court in *Williams I* and *Williams II*, two famous cases from divorce law jurisprudence.<sup>96</sup>

Given the unique nature of the civil union, it is also possible that a court would accept jurisdiction of the dissolution proceeding but choose to apply the dissolution law of Vermont to the substantive issues presented.

Another way to view the arrangement is as a contract rather than a marriage. The parties might claim that the terms, though identical to a marriage contract in Vermont including an obligation to pay support and to provide for other marriage-like benefits, in fact create a contract rather than a marriage. A marriage is a contract sanctioned by the state and entered into by the parties to the marriage.

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<sup>94</sup> See *Rosengarten v. Downes*, 71 Conn.App 372, 802 A.2d 170 (2002).

<sup>95</sup> Katherine Spaht and Symeon Symeonides, *Covenant Marriage and the Law of Conflicts of Laws*, 32 CREIGHTON LAW REV. 1085 (1999). In this article, the authors make the case for application of Louisiana state law in a different state's proceedings to dissolve a covenant marriage entered into in Louisiana. The authors make the point that Louisiana has an interest in having its divorce law applied when its law creates heightened responsibilities and heightened burdens for those who marry under the covenant marriage laws.

<sup>96</sup> See *Williams v. North Carolina*, 317 U.S. 287 (1942) (*Williams I*) and *Williams v North Carolina*, 325 U.S. 226 (1945) (*Williams II*).

Even if a state court is unwilling to sanction the same-sex union as a marriage, the court may nevertheless be willing to recognize the validity of the contract that has been created between the two parties. The contracting party John wants the terms of his civil contract in Vermont honored in New York. Those terms include a term that requires the couple to dissolve the civil union before entering another one. They also agreed to dissolve the union in the same way that marriage is dissolved in Vermont. If the New York court considers this a contract dispute, it may enforce the contract like it would any other contract between unmarried cohabitants.<sup>97</sup> If New York courts enforce contracts between unmarried gay and lesbian couples, a court would likely enforce the terms of this couple's contract as it would any other couple's contract. The fact that the contract is tantamount to marriage in Vermont does not detract from the agreement's inherent contractual character.

## **2. Enforcement of a foreign judgment from Vermont**

### **PROBLEM:**

Assume in this problem that instead of John moving to New York after the parties separated, but before their union was dissolved, he moved to New York after a court in Vermont dissolved their union. The court ordered support paid by John to Joseph of \$1000 per month. John leaves, moves to New York, and falls behind in his payments. Joseph seeks to enforce the judgments for past due support in a New York court. Will the New York court enforce the judgments against John?

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<sup>97</sup> For a discussion of the recognition of same-sex couples as entitled to the contract remedies available to opposite sex couples, see Carol S. Bruch, *Cohabitation in the Common Law Countries a Decade after Marvin: Settled In or Moving Ahead?*, 22 U.C. DAVIS L. REV. 717 (1989).

Once the Vermont union has been dissolved by a Vermont court and the support obligation has been reduced to final judgment, it will be more difficult for a sister-state's court to refuse to enforce the judgment on the basis of the judgment violating a public policy of that state. Enforcement of judgments across state lines is the obligation of a sister state pursuant to the Full Faith and Credit Clause. Sister states have enacted uniform legislation, the Uniform Interstate Family Support Act,<sup>98</sup> to harness this enforcement power among the states. The language in the Act speaks of an obligee as "an individual to whom a duty of support is or is alleged to be owed or in whose favor a support order has been issued or a judgment determining parentage has been rendered."<sup>99</sup> The Act does not restrict its jurisdiction to married couples or to same-sex couples although the family law in many states makes that distinction. But in the context of this case, the court in New York will be bound to follow the substantive law of Vermont. Since Vermont recognizes the obligation to pay support for same-sex couples, the court should enforce the support order under the uniform law regardless of the substantive law of Vermont.

Arguably, the Defense of Marriage Act provides an exception for issues regarding enforcement of same-sex marriages across state lines, but these are issues of Full Faith and Credit rather than of conflict of laws. The questions include whether DOMA applies to a civil union, not a marriage, and to enforcement of a money judgment against a party

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<sup>98</sup> Congress required all states to enact The Uniform Interstate Family Support Act by January 1, 1998. 42 U.S.C. § 666 (f). Provisions of the Act give the state that issued the original spousal support order "continuing, exclusive jurisdiction over a spousal support order throughout the existence of the support obligation." Once the support order is registered in the responding state, the tribunal of that state is required to recognize and enforce, and not modify the order of the issuing tribunal. *See* Uniform Interstate Family Support Act, 9 ULA 235 (Part 1B).

<sup>99</sup> *Id.* at \_\_\_\_.

who it has already been determined owes the money to the other party.<sup>100</sup> Issues regarding the constitutionality of the Act's restriction of the Full Faith and Credit Clause also remain to be determined. Assuming that DOMA is constitutional, it appears that a state could refuse to enforce a support order entered against a party in a same-sex union.

Another argument against enforcement could be raised in this context: if a state has enacted a mini-DOMA law stating that its public policy is against enforcement of same-sex marriage, that local law presents a conflict with the law of Vermont in this context. A number of jurisdictions have enacted laws stating that "marriage is a contract that may be entered into only between a man and a woman."<sup>101</sup>

Whether or not enforcement of the out-of-state support order presents a conflict involves an interpretation of the state statute. The statute specifically addresses marriage as a contract between a male and a female; the Vermont Civil Union law is different in that it involves a contract that is regarded as different from marriage. Maybe there is no conflict if one interprets that law in that way.

On the other hand, the Vermont law creates all the same rights and responsibilities of marriage in the civil union. Even though we don't call a civil union a marriage, it is for all practical purposes very much like a marriage. A state court might view the mini-DOMA statute as being in conflict with the state uniform enforcement of support law. Given state interests, it might construe the mini-DOMA law as stating public policy that prevents the court from enforcing a support order from a Vermont civil union. The

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<sup>100</sup> See Lewis A. Silverman, *Vermont Civil Unions, Full Faith and Credit, and Marital Status*, 89 KY. L. J. 1075, 1096-1098 (2001). The author discusses the issues raised by the adoption of DOMA.

<sup>101</sup> See Haw. Rev. Stat. Ann. § 572-1 (Michie 1999). That statute provides that, "In order to make valid the marriage contract, which shall be only between a man and a woman..." Wash. Rev. Code Ann. § 26.04.010 (West Supp. 2001) provides "Marriage is a civil contract between a male and a female who have each attained the age of eighteen years, and who are otherwise capable."

counter argument is that the uniform law makes it clear that once an out-of-state support order is presented for enforcement in a responding court, the court does not have discretion to change the terms of the support order or to modify it in any way.<sup>102</sup> If the issuing tribunal has jurisdiction of the matter and has entered a support order, there should be no discretion on the part of the responding court concerning the enforcement of the order. In that respect, it would seem that the responding state's public policy objections to same-sex unions are irrelevant to the proceeding.

## **2a. Enforcement of a foreign judgment brought by a third party**

### **PROBLEM**

Assume a different problem involving enforcement of a judgment across state lines.

Assume that when the parties divorced, the Vermont court ordered that John be responsible for consumer debt incurred by the parties during their union. As a part of the dissolution order, John is ordered to pay several thousands of dollars of debt.

John has moved to New York, and has not repaid the consumer debt. The retail establishment gets a judgment against John and moves to enforce the judgment in New York. Will the New York court enforce the judgment against John for repayment of the consumer debt?

This case presents some of the same issues presented in the previous problem about enforcement of out-of-state judgments. The same analysis mentioned above applies to the analysis of this problem.

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<sup>102</sup> See footnote \_\_\_\_ *supra*. Section 603 that states that the tribunal shall recognize and enforce, but may not modify, a registered order if the issuing tribunal had jurisdiction.

As a matter of Full Faith and Credit, and under the Uniform Enforcement of Foreign Judgments Act, the enforcement may be required by one state court of another's judgment against a debtor now residing in another state.<sup>103</sup> The Uniform Act streamlines a requirement that states enforce sister-state judgments as required by the Full Faith and Credit Clause.<sup>104</sup> The Act implements the requirement of the Constitution; with or without the Act, the states have no choice but to enforce sister-state judgments in their state courts.<sup>105</sup>

The creditor seeking enforcement relied on Vermont law in obtaining a judgment against the debtor. When the court issued the judgment, the judgment creditor was entitled to rely on the effectiveness of that judgment and was entitled to enforce that judgment in another state.<sup>106</sup> If the creditor cannot do that, its debtor may be able to avoid the effectiveness of the judgment by traveling out of Vermont. That does not seem to be a desirable result nor is it consistent with the constitutional and uniform law relevant to this issue.

When a creditor seeks the enforcement on a debt judgment in a proceeding in a sister state, a sister-state's court may not refuse to enforce the judgment against the debtor even if the basis for the debt is contrary to the public policy of the sister state. For instance, if a debt incurred through gambling is created in Nevada, reduced to judgment in Nevada, and enforcement is sought in Alabama, Alabama courts must enforce the judgment even

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<sup>103</sup> The Uniform Enforcement of Foreign Judgments Act requires the states to enforce foreign judgments in the same way that they enforce state judgments. *See* Uniform Enforcement of Foreign Judgments Act, 1964 Revised Act, 13 ULA 155 (2002). Section 2 of the Act provides that "A copy of any foreign judgment authenticated in accordance with the act of Congress or the statutes of this state may be filed in the office of the Clerk of any District Court of any city or county of this state. The Clerk shall treat the foreign judgment in the same manner as a judgment of the District Court of any city or county of this state."

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

though gambling is against the public policy and law of the state.<sup>107</sup> Therefore, even if the court in New York had a strong public policy against recognition of same-sex unions, that public policy should not be raised in the context of an enforcement of foreign judgments proceeding. The public policy issue is moot because it cannot be raised when the judgment has already been determined against the debtor.

In our case involving the judgment debtor of the creditor who is relying on Vermont law to collect a judgment against the debtor now living in New York, New York should enforce the judgment as it would any other judgment. The conflict-of-law issue is not relevant because the public policy of the two states' laws are not at issue in this context; the Full Faith and Credit Clause and the Uniform Enforcement of Judgments Act require one state to enforce judgments from another state.

Imagine that the judgment creditor seeks enforcement of the judgment in a jurisdiction that has enacted a mini-DOMA law that declares state policy to be against recognition of same-sex marriage. If the court is not free to consider the public policy issues in the context of an enforcement action in that state's court, the statute should have no relevance to the proceeding. The court would be required to enforce the action regardless of express state policy against same-sex relationships.

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<sup>107</sup> See *Holiday Casino, Inc. v. Breedwell*, 581 So.2d 474 (Ala. 1991). The Full Faith and Credit Clause compelled enforcement of a valid Nevada judgment against an Alabama resident for gambling debts even though no suit could have been brought and maintained in an Alabama court on a gambling debt since gambling is illegal and against the public policy of Alabama. Other cases have held similarly on this point. See *GNLV Corp. v. Jackson*, 736 SW2d 893 (Tex. App-Waco 1987), *error denied*; *Hargreaves v. Greate Bay Hotel & Casino*, 357 SE2d 305, 182 Ga App 852 (1987); *Smith v. State*, 630 So.2d 1101 (Fla. 1993); *Conquistador Hotel Corp. v. Fortino*, 298 NW2d, 99 Wis. 2d 16 (Wis. App. 1980).

## **2b. Enforcement of a foreign state custody order**

### **PROBLEM:**

Assume that John and Joseph adopted two children during their civil union. At the dissolution of the union, the Vermont court ordered that Joseph be the primary custodial parent for the two children. John is given visitation rights that include an every-other-weekend visit along with regular visits during the week. John is also given a six-week visit time in the summers. John has now moved out of state, and during one summer visit in New York, he refuses to return the children to Joseph's home in Vermont. If Joseph seeks enforcement of the Vermont court custody decree in New York, how will the New York court respond?

Enforcement of foreign custody orders are governed by the Uniform Child Custody Jurisdiction Act or the Uniform Child Custody Jurisdiction and Enforcement Act, uniform laws designed to provide consistency in child custody decisions from state to state. Once a state court determines that it has jurisdiction over the determination of custody, enforcement issues are to be determined by that state court unless that state loses jurisdiction over the custody dispute.<sup>108</sup>

Given that a Vermont court makes a custody decision when the civil union is dissolved that gives custody of the child to one of the partners, the New York court is obligated to give effect to the Vermont decree. By giving that decree effect, the court is

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<sup>108</sup> See Uniform Child Custody Jurisdiction Act and Uniform Child Custody Jurisdiction and Enforcement Act, 9 ULA 261, 9 ULA 649 (Part 1A). The Acts both provide that "courts of this State shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this Act or which was made under factual circumstances meeting the jurisdictional standards of the Act, so long as the decree has not been modified in accordance with jurisdictional standards substantially similar to those of this Act." Section 13 of the UCCJA.

recognizing the legitimacy of the union made in Vermont, and it is also recognizing the authority of the Vermont court to adjudicate custody between the civil union partners.

The command of the law makes it very difficult for the state court to ignore the order entered in Vermont that determined the custody at the end of the civil union. By following the law, the court is tangentially recognizing the civil union and legal recognition given to same-sex partnerships in Vermont. And the court has little choice in the matter.<sup>109</sup>

Once a state has enacted law that recognizes marital rights for same-sex partners, the Uniform Child Custody Jurisdiction and the Uniform Family Support Enforcement Act mandate enforcement of rights stemming from that recognition in other states. To that extent, a state cannot avoid the impact of another state's liberalization of its marriage law to include same-sex couples.

### **3. Recognition of same-sex union in the context of a wrongful death action**

#### **PROBLEM:**

Assume a different fact situation. Doris and Denise reside in Vermont and enter into a civil union in Vermont. Several years later, they move to Oregon and reside in Oregon for several years before Doris is killed in Oregon in an automobile accident. Denise brings a wrongful death action in an Oregon court against the driver who killed her partner. Is it likely that the Oregon court will determine that Denise has standing to bring the wrongful death action?

This fact pattern is different from the previous ones in that the status of the parties' is not the main issue before the court but is incidental to the main issue. In this case, the

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definition of the parties' relationship will impact whether or not Denise can be considered a spouse for purposes of the wrongful death statute.<sup>110</sup> Courts may be more flexible in these kinds of cases.<sup>111</sup> One commentator has observed that, "Marriage has many incidents beyond licit sexual congress—a spousal share of the marital estate upon the death of a spouse, pension rights, health and insurance benefits, to mention a few. Adjudication of these incidents may raise the necessity of resolving the validity of the marriage and, in turn, triggers the application *vel non* of the public policy exception. So long as the adjudication of the incident does not compel the court to bless an odious union, public policy will not be a bar."<sup>112</sup>

If the state has no statutory law that addresses this question, the court will be faced again with an examination of the policy interests of the state and whether recognition of the marriage does violence to those interests. The court may look at it differently than if the court were asked to recognize the status of the parties. The parties are no longer living in a civil union; one of the parties has died. One of the parties is asking the court to treat her as a spouse and allow her to be in the position that she and her partner intended. She has been living in a relationship in which she may have derived her support from her partner; now that her partner is gone, she is in need of support. The wrongful death statute is intended to provide that kind of support.

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<sup>110</sup> Oregon's wrongful death statute provides: "When the death of a person is caused by the wrongful act or omission of another, the personal representative of the decedent, for the benefit of the decedent's surviving spouse,...." OR. REV. STAT. § 30.020 (2001).

<sup>111</sup> Symeon Symeonides et al, CONFLICTS OF LAW: AMERICAN, COMPARATIVE AND INTERNATIONAL, 429, provides: "The Restatement (Second) draws a distinction between questions of 'pure' status, such as the question involved in *Hermanson*, on the one hand, and the 'incidents' or effects of such status on the other hand. One of the rationales or at least consequences of this distinction is to encourage a separate analysis of questions of 'pure' status and questions involving the incidents of status and to allow more flexibility in determining the law applicable to the latter questions."

<sup>112</sup> See L. Lynn Hogue, *State Common-Law Choice-Of Law Doctrine and Same-Sex 'Marriage': How Will States Enforce The Public Policy Exception?*, 32 CREIGHTON L. REV. 29, 41 (1998); see also, Scott Fruehwald, *Choice of Law and Same-Sex Marriage*, 51 FLA. L. REV. 799 (1999).

The purpose for the lawsuit may make it easier for the court to construe the public policy in a direction that allows for inclusion of the partner as a spouse. The relationship has ended and the court can focus on the policy of the wrongful death statute. In *Langan v. St. Vincent's Hospital*, the court concluded that the wrongful death statute should be construed broadly to include as a spouse a surviving partner from a Vermont civil union. In doing so, the court considered the policy of the law in New York as favorable to same-sex unions, and from that, decided it is reasonable to expand the definition of spouse.<sup>113</sup>

Although the purpose behind the wrongful death statute is to compensate the surviving partner, not to recognize the status of the partnership as a marriage, a court may nevertheless find that the policy of the state is not supportive of including a same-sex partner within the protection of the wrongful death statute. The state may have a specific statute that makes recognition squarely against state law, or it may be clear that the “degree of moral opprobrium is strong because of the presence of abhorrent conduct.”<sup>114</sup>

#### **4. Inheritance rights of a same-sex partner**

##### **PROBLEM:**

Assume the same facts as above except that Doris dies of natural causes and leaves a large estate. Doris had not written a will. Denise petitions the court in Oregon to be named as a spouse entitled to inherit her estate. Will the Oregon court recognize Denise as a spouse?

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<sup>113</sup> *Langan v. St. Vincent's Hospital of N.Y.*, 2003 WL 21294889 (N.Y.Sup.), at 8.

<sup>114</sup> See Hogue, *supra* footnote 74, at 42. The author goes on to say that where the level of moral repugnance of same-sex unions is strong, “the public policy exception is likely to assure short shrift to applicants for same-sex unions.” For an interesting article on conflicts of law analysis in Oregon, see Beth A. Allen, *Same-Sex Marriage: A Conflict-of-Laws Analysis for Oregon*, 32 WILLAMETTE L. REV. 619 (1996).

The same public policy issues must be resolved as were presented by the wrongful death case. Again, the court is not being asked to recognize the civil union, but to allow Denise to recover as though she was a spouse of her partner who died intestate.

In deciding whether or not to allow Denise standing to recover, one must first identify the conflict between the law of Vermont and that of Oregon. In Vermont, Denise is considered to have the same rights as a spouse at her partner's death.<sup>115</sup> In Oregon, the partner does not qualify as a spouse or surviving relative, and would not be entitled to an intestate portion of the estate.<sup>116</sup>

In order to determine whether or not Denise qualifies as a taker of the intestate estate, a court must first resolve the conflict in the law of the two states. The case of *In Re May's Estate*<sup>117</sup> and the case of *In re Dalip Singh Bir's Estate*<sup>118</sup> are good examples of how this conflicts issue might be resolved. The second case, *Dalip Singh Bir's Estate*, involves a man who at the time of his death in California, was legally married to two women, both of whom lived in India. Both wives petitioned the court to share the estate of the deceased and the court held that it would not violate the public policy of California to allow both wives to be treated as intestate heirs and to share in the decedent's estate. The court said: "The decision of the trial court was influenced by the rule of 'public policy'; but that rule, it would seem, would apply only if the decedent had attempted to

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<sup>115</sup> VT.STAT. ANN. TIT. 15, § 1204. (1999). Section 1204 (e) (1) provides: "The following is a nonexclusive list of legal benefits, protections and responsibilities of spouses, which shall apply in like manner to parties to a civil union: laws relating to title, tenure, descent and distribution, intestate succession, waiver of will, survivorship, or other incidents of the acquisition, ownership, or transfer, inter vivos or at death, of real or personal property, including eligibility to hold real and personal property as tenants by the entirety (parties to a civil union meet the common law unity of person qualification for purposes of a tenancy by the entirety)...."

<sup>116</sup> See ORS 112.015-112.035. The statutes speak of a surviving spouse as the intestate heir of the decedent.

<sup>117</sup> *In re May's Estate*, 114 N.E.2d 4 (1953).

<sup>118</sup> 188 P.2d 499 (Cal. Ct .App. 1948).

cohabit with his two wives in California. Where only the question<sup>119</sup> of descent of property is involved, ‘public’ is not affected....’ ‘Public policy’ would not be affected by dividing the money equally between the two wives, particularly since there is no contest between them and they are the only interested parties.” And so the court proceeded to divide the funds equally between the two surviving spouses.

As a matter of conflict of laws, the court accepted the marriage law of India to the extent that the law accepted the practice of having two wives to inherit property at the death of the husband. The court said that both wives fit into the definition of wife in the intestate statute and the court construed the statute to allow for the inclusion of two wives.

In resolving the conflict in the laws of the two states in this case, there are similar public policy issues at stake as were at stake in the California case. Even though Oregon’s law and public policy does not support same-sex unions as marriages or as civil unions, the court is not being called upon to sanction the relationship. Rather, the court is being asked to recognize at death the right of the partner who has depended on the decedent for support to receive support out of the decedent’s estate. The issue at stake does not require the court to sanction or to accept the same-sex partnership as being equivalent to marriage; it calls on the court to recognize the need the surviving partner has for support and nothing more.

If the same-sex partner prevails in this case, the consequences are that the court accepts the civil union law of Vermont, but construes the language in the Oregon intestate succession law to define spouse as including “same-sex” partner. The court would have to be willing to broadly construe the terms of the statute. Since the parties

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<sup>119</sup> *Id.* at 188 P.2d 499 at 502, 83 Cal.App.2d 256, 261-262.

are Oregon domiciliaries and have made Oregon their home, Oregon's law is applicable to the determination of the rights of a surviving partner. (Had the parties been in Oregon for a short time, or had the parties continued to reside in Vermont, but had been visiting in Oregon, Vermont's law would seem to be the applicable law for determining intestate succession rights.)

To convince a court to do that, one would have to focus on the purpose of the intestate laws. The Oregon intestate succession law provides that the surviving spouse of a decedent inherits all of the decedent's estate unless the decedent leaves issue that are not issue of the surviving spouse.<sup>120</sup> The purpose of the intestate law is to provide for the passing of the decedent's estate when the decedent did not provide for division of the estate in a will. Studies have found that most married people want their estates to pass to their spouses.<sup>121</sup> Because the closest surviving person in this case is Denise, the domestic partner, it seems clear that the decedent wants the property to pass to her partner Denise.

Although it is apparent that the domestic partner desired her property to pass to her partner, whether the court would construe the statute in this way is difficult to say.

Another way to reach this result is to change the statute to include domestic partners within the class of those who can inherit from the decedent.<sup>122</sup>

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<sup>120</sup> OR.REV.STAT. § 112.025 provides: "If the decedent leaves a surviving spouse and issue, the intestate share of the surviving spouse is: (1) If there are surviving issue of the decedent all of whom are issue of the surviving spouse also, the entire net estate. (2) If there are surviving issue of the decedent one or more of whom are not issue of the surviving spouse, one-half of the net intestate estate." Section 112.035 provides: "If the decedent leaves a surviving spouse and no issue, the surviving spouse shall have all of the net intestate estate."

<sup>121</sup> See VOLLMAR ET AL., AN INTRODUCTION TO TRUSTS AND ESTATES, p. 551. The authors state: "Because state statutes of intestate succession are intended to reflect the average property owner's preferences, all statutes provide that a married decedent's spouse will receive some portion of the decedent's property. In fact, the current version of the Uniform Probate Code provides that the surviving spouse will receive the entire estate of a married decedent under certain circumstances."

<sup>122</sup> Effective July 1, 2003, California law treats a surviving registered domestic partner the same as a surviving spouse with respect to an intestate decedent's separate property. Section 6401 of the California

## 5. Surviving same-sex partner and spouse

### PROBLEM:

Sue and Sarah entered into a civil union in Vermont. Several years later, Sarah left Vermont to live in Connecticut. While living in Connecticut, Sarah met Adam and fell in love with him. Adam and Sarah were married in Connecticut. Shortly after their marriage, Sarah was killed in an automobile accident. When Adam brings a wrongful death action in a Connecticut court, Sue intervenes and asks the court to name her as the surviving spouse for purposes of the wrongful death action. What is the court likely to do?

In addition to the other issues raised, this problem raises the issue of how a court will handle the simultaneous marriage and civil union of a decedent who dies leaving both parties as surviving partners.

The Vermont Civil Union Law provides in Section 1202 that, “For a civil union to be established in Vermont, it shall be necessary that the parties to a civil union satisfy all of the following criteria: 1) Not be a party to another civil union or a marriage.”<sup>123</sup> Once Sarah and Sue registered their civil union in Vermont, they fell under Vermont law requiring that their union be dissolved before another union or marriage can be created. Had Sue filed a wrongful death claim in Vermont, the court would honor that claim as it is clear in the law that the wrongful death action is available to Sue to pursue and Vermont would not recognize a later marriage entered into in Connecticut before the civil union was dissolved.

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Probate Code now provides that “the surviving spouse or the surviving domestic partner” is entitled to inherit an intestate share. *See* West’s Ann. Cal. Probate Code, § 6401 (2003).

<sup>123</sup> Vt. Stat. Ann. § 1202. (2002).

Connecticut may view these issues differently. If Connecticut recognizes the out-of-state civil union, it may also recognize the restriction in the law that regards the civil union as a monogamous relationship that must be dissolved before another union or a marriage can replace it. On the other hand, if Connecticut does not recognize the union, the court will not recognize the restriction in the law. The only valid union is the marriage entered into with Adam. Adam will be entitled to make the claim under the wrongful death statute.

If Connecticut does not recognize the civil union entered into in Vermont, it is possible that both Sue and Adam could proceed with wrongful death actions in Vermont and Connecticut. Either or both states could process their action as if the other state did not have the authority its law gives it to adjudicate the wrongful death actions. That result would not work efficiently since there is a finite sum available for the wrongful death action and it should be distributed fairly to those who qualify for the recovery.

One approach might be to treat either partner as though that partner is a putative spouse and entitled to a share of the spouse's share of the wrongful death claim. The putative spouse doctrine is designed to protect the interests of an innocent spouse who believes that he or she is legally married to another, but it later turns out, that the marriage is not valid.<sup>124</sup> This doctrine may not work well in the context of a case like this if either of the partners knows of the other partner and knows that partner has a legal relationship with his or her partner. If a state does not accept the validity of the relationship created by the Vermont civil union law, it is unlikely to follow the putative-spouse doctrine to protect the interests of that partner.

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<sup>124</sup> LESLIE HARRIS AND LEE TEITELBAUM, FAMILY LAW 192, Second Edition (2000). A putative spouse is one whose marriage is legally invalid but who has engaged in (1) a marriage ceremony or a solemnization, on the (2) good faith belief in the validity of the marriage.

If Vermont is the forum that considers the wrongful death claim, it may also balk at applying a doctrine that dilutes the effectiveness of its own law, but the doctrine is designed to provide protection to an innocent spouse who doesn't know of the existence of another spouse or someone who is entitled to a share of the deceased spouse's estate. It might be consistent with Vermont's public policy to provide this kind of protection to a partner, no matter what the gender of the partner.

## **6. Limiting a partner's ability to marry during civil union**

### **PROBLEM:**

Assume the same facts as above, except that when Sue learned that Sarah planned to marry Adam, she filed a lawsuit in Connecticut seeking to enjoin the county from issuing a marriage license to Sarah and Adam since Sarah is in a civil union with Sue that has not been terminated. Is the court in Connecticut likely to enjoin issuance of a marriage license?

In assessing the likelihood that a Connecticut court would enjoin a county from issuing a marriage license, the question is one of whether the court accepts the Vermont law that makes it necessary to dissolve the civil contract before entering into a marriage. The policy interests mentioned earlier in the context of the other problems apply here, but there are other issues to consider as well. If Connecticut takes the position that the marriage can go forward without dissolution of the Vermont civil union, it is sanctioning a relationship that will not be recognized in Vermont. The two states will recognize one relationship, but not the other. This situation undermines the record keeping and

credibility of state-sanctioned relationships. Not only are the two parties affected, but also the state and those who may rely on state records may be affected.

Assume that a creditor in Connecticut relies on the fact that Sarah is married to Adam and loans the couple money to purchase a home based on the incomes of both of them. Subsequent to that time, a creditor from Vermont seeks to levy on property that Sarah owns. During their civil union, Sue and Sarah incurred the debt. Even though the couple no longer lives together, they have not dissolved their civil union and both are responsible for the debt's repayment.

To the extent that a state's failure to recognize the Vermont civil union law impacts the rights of third parties, it threatens to undermine the reliance that creditors and others may have on state marriage laws.

## **7. Effect of civil union on a registered partnership**

### **PROBLEM:**

Assume that when Sarah left Sue, she moved to California where she met Sherri. Sherri and Sarah plan to enter into a registered domestic partnership in California. When Sue finds out about their plan, she files an action in California to enjoin the county from issuing the registration. What is the California court likely to do in that case?

California has adopted a domestic partnership registration law. This law falls short of the protection offered by Vermont's civil union law, but the domestic partnership law

provides some of the protection that marriage provides to those living in a same-sex partnership.<sup>125</sup>

There are significant differences in the laws of the two jurisdictions because Vermont intends its civil union to be as much like marriage as it can even though the civil union is not officially considered a marriage. California's law is not intended to create a marriage; the domestic partnership law offers different protection to the parties. Both laws do share the requirement that a person entering into either a civil union or a domestic partnership must not be either married or in another civil union or domestic partnership.<sup>126</sup>

In resolving the conflict in the laws of Vermont and California, the issue is how will California regard the civil union. It is not a marriage, and it is not a domestic partnership, but it is more like marriage than a domestic partnership. Although California has enacted the domestic partnership law, it has also enacted law that makes it clear that California regards marriage as a relationship that is one between a man and a woman.<sup>127</sup> If a California court recognizes the Vermont civil union and enters an order enjoining the county from registering the domestic partnership in California, is it recognizing an out-of-state marriage between a same-sex couple? Since Vermont law is clear that the civil union is not a marriage, a California court could recognize the out-of-state civil union,

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<sup>125</sup> M.R. Carrillo-Heian, *Domestic Partnership in California: Is it a Step Toward Marriage?*, 31 MCGEORGE L. REV. 475, 484-485 (2000). This article highlights the protection provided in the domestic partnership law recently enacted in California. As the author points out, the "new law...requires that 'both persons agree to be jointly responsible for each other's basic living expenses during the domestic partnership.'" The law also provides health insurance benefits for some domestic partners through some state and local employers and provides hospital visitation privileges. The domestic partners must be living together to obtain the benefits from the law. There are no property rights like community property that may be acquired through the creation of a domestic partnership.

<sup>126</sup> *Id.* See also Vt. St. Ann. tit. 15 § 1202 (2002).

<sup>127</sup> Cal.Fam.Code § 300 (West 1994). The provision states: "Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary."

and at the same time avoid a conflict with the California law that makes clear what California policy is on same-sex marriage.

Another way to look at this issue is to consider what the court would do if it were faced with a California domestic partnership that had not been terminated and now one of the partners was seeking to enter into another partnership before terminating the previous partnership. The California law is clear on this point; a partnership may not be entered into when a partner is already in a domestic partnership that has not yet been terminated. If the California court did not treat the Vermont civil union in the same way that it treated a party who is in a domestic partnership, an argument could be made that the out-of-state partner is being treated differently than the same-sex partnership created in California. The difference in treatment may be very difficult to justify.

California has recently passed a law entitled The California Domestic Partner Rights and Responsibilities Act that extends the rights and responsibilities of marriage to persons registered as domestic partners on or after January 1, 2005.<sup>128</sup> The new law provides that, “(A) legal union of two persons of the same sex, other than a marriage, that was validly formed in another jurisdiction, and that is substantially equivalent to a domestic partnership as defined in this part, shall be recognized as a valid domestic partnership in this state, regardless of whether it bears the name domestic partnership.”<sup>129</sup> This provision specifically gives recognition to same-sex partnerships created and sanctioned in another jurisdiction. The provision stops short of recognition of same-sex

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<sup>128</sup> The California Domestic Partner Rights and Responsibilities Act 2003, Cal. Legis. Serv. Ch. 421 (A.B. 205) (West). Section 297.5(a) provides “Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.”

<sup>129</sup> *Id.* at § 299.2.

marriages, and given the statute that defines marriage as a heterosexual union, it is clear that the law is designed to stop short of recognizing foreign same-sex marriages.

### **Part III: International Conflicts involving Recognition of Same-Sex Unions**

As mentioned at the beginning of this article, several countries have recently legalized same-sex marriage. Canada, The Netherlands and Belgium have changed their laws to permit same-sex marriage. In these countries the law now includes same-sex couples within the marriage statute, so they have been given the same ability to marry as heterosexual couples.

In The Netherlands, there is a restriction in the law regarding who may marry. The right to marry for same-sex couples is restricted to couples that are citizens or residents. Other Northern European countries that provide for registration and a civil-union type of recognition also restrict the availability of the laws to their own citizens and residents. Reciprocal recognition is likely in other countries with similar laws.<sup>130</sup>

Canada's approach to marriage and recognition issues is apparently quite different. Canada's law does not have a residency requirement; it can be expected that numbers of people from outside of Canada will go to Canada to marry.<sup>131</sup> The fact that Canada's law has no residency requirement for marriage creates the likelihood that a number of people from the United States will travel to Canada to marry and then return to the United States to live in a marital relationship. The other part of this scenario is that a number of

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<sup>130</sup> YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES, pp. 238-239.

<sup>131</sup> THE OREGONIAN, June 17, *Canadian Law will recognize gay marriages*, states: "Canada follows in the steps of the Netherlands and Belgium but could be of far greater significance because of its potential impact on the United States. The nations share a long, open border and English as a common language, but Canada has no residency requirement for marriage. Only a few U.S. gay couples have taken advantage of expanded marriage laws in the Netherlands because of its long residency requirement, and Belgium will allow marriages of foreign couples only from countries that allow such unions."

Canadians will marry in Canada and then travel to the U.S. and expect to have their marriages honored in the United States.

The issue of acceptance of the foreign marriages presents very similar issues to those that we have already discussed in the context of interstate conflicts involving state marriage laws. American courts will consider them in the same way that they will consider the issues involving interstate conflicts. In the very few court cases involving foreign polygamous marriages, we can see that courts were willing to accept the validity of the unions to provide benefits and protection to the spouses. Recognition of the status of the parties as being married is a different issue the courts have not addressed. Courts would probably be much less likely to recognize the status of the relationship when it is apparent that the marriage is repugnant to the public policy of a state.

In other words, our state courts will analyze the problems of recognition of a foreign marriage very similarly to the way these problems have been analyzed for interstate conflicts. Americans who travel to Canada to marry can expect to find the same issues awaiting them on their return to the United States. Canadians can expect to encounter those same issues to the extent they seek to litigate issues regarding the validity of their marriages in American courts.

For Europeans and Americans who marry or enter into a same-sex union in Europe and seek recognition of that union in the U.S., it is likely to be even more difficult. Most of the European countries that have enacted same-sex marriage or registered partnerships have restricted who can qualify for marriage and have also limited the effect of the partnerships outside the home jurisdiction. For instance, the Netherlands law states that at least one of the parties must be domiciled or a permanent resident in order to qualify

for marriage.<sup>132</sup> The Parliament made the benefit unavailable to parties who are domiciled in other countries. In part, this may be because the Parliament realized that few other countries will recognize the marriage, so it made it available only to people who will likely be living in the Netherlands. The parliamentary committee recognized that there would be a problem of recognition of gay marriages in other countries, “something the future spouses of the same sex will have to take into account... However, this problem of ‘limping legal relations’ also exists for registered partners, as well as for cohabiting same-sex partners who have not contracted a registered partnership or marriage.”<sup>133</sup>

To some extent this problem of recognition is less significant in Europe than in the United States because European law regarding the validity of marriage begins from a different point: the capacity to marry is determined not by the law of the place of celebration, but rather by the “personal law of the parties, the law of the parties’ domicile or nationality.”<sup>134</sup> In Europe, citizens do not expect to be able to travel to other countries and marry under law that is different from their national law.

The issue of marriage validity for foreign domiciliaries going to a country that accepts same-sex marriage in order to marry under the law of that state will arise less often because the legal culture in Europe accepts that domiciliaries must marry according to the law of the state where they reside. They may not avoid that law by going to a

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<sup>132</sup> Yuval Merin, *supra*, note 85.

<sup>133</sup> Nancy G. Maxwell, *Opening Civil Marriage to Same-Gender Couples: A Netherlands—United States Comparison*, Volume 4.3 EJCL p.10 (2000).

<sup>134</sup> Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEXAS L. REV. 921, 994 (1998). The author states: “The application of the personal law, whether determined by domicile or by nationality or by a combination of both factors, secures a certain stability in the regulation of a person’s capacity to marry and avoids the highly unsatisfactory consequence that this question should depend on the often accidental place of celebration. Evasion of ‘inconvenient’ marriage laws is rendered considerably more difficult, if not impossible.”

different country to marry under that country's more lenient laws. In the rare case where it does happen, a country in Europe will examine its public policy to decide whether or not to recognize the marriage made in a different country.<sup>135</sup>

But issues of validity of Canadian marriages between Americans and between Canadians who move to the United States are certain to arise. The culture in Canada is more like the culture in the United States in that the new law does not include a residency requirement for marrying. In all likelihood, many Americans will journey to Canada to take advantage of this new law.

When they return to the United States to live, the same issues that have been raised in the context of interstate marriage-law conflicts will come up in the context of this international conflict. And when Canadians who married under the Canadian law move to the United States after marrying in Canada, recognition issues will arise when they wish to divorce, when a partner dies, etc.

These issues raise the same problems that are raised by the interstate conflicts cases that we have discussed previously. But since they are cases that arise from out of the country, they don't trigger application of the Full Faith and Credit Clause. For example, although sister-state judgments are entitled to full faith and credit throughout this country, foreign judgments are not entitled to the same recognition across international lines.<sup>136</sup> Nevertheless, foreign judgments will usually be recognized and enforced unless

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<sup>135</sup> *Id.* at 998-999. The author states that in many countries, same-sex marriages would not be accepted. Rather, they would be seen as violating the public policy of their countries. He mentions a survey of family law specialists conducted by FAMILY LAW QUARTERLY that asked students of family law from 16 different countries whether they thought their countries would recognize a same-sex marriage that was legal in another country. The results showed that some thought that same-sex marriage would not be recognized or would be recognized for limited purposes while a few thought that it would be recognized for all purposes.

<sup>136</sup> RESTATEMENT OF THE LAW SECOND, CONFLICT OF LAWS, ch. 1, § 10, p. 40 provides: "Judgments present different problems. Sister State judgments are entitled to full faith and credit throughout this country. This is not true of judgments rendered in foreign nations. As a result, cases may

the original claim is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.<sup>137</sup> One can imagine that a state court might take the position that enforcement of a dissolution judgment for a same-sex couple is repugnant to its fundamental notions of what is decent and just, and the court would balk at enforcing the judgment.

When the issue is one of recognition of a foreign marriage that would not be recognized in the United States, the issue is one of recognition and enforcement of foreign law that makes marriage legal between two people of the same sex. Reasoning through the conflicts resolution issues are no different than reasoning through those issues when the court is faced with an interstate conflict.<sup>138</sup> A state court will consider the same issues it considers when faced with an interstate conflict.

In summary, the conflicts issues will likely be resolved similarly in the international context as they are in the interstate context.

#### **Part IV. Conclusion**

Marriage law is evolving. Part of that evolution involves acceptance of same-sex couples into the institution. At this point, same-sex marriage has been accepted in two western European countries and in Canada. In Vermont and in Western Europe the

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be expected to arise where effect will be denied a foreign nation judgment rendered in circumstances in which a sister State judgment would be entitled to full faith and credit.” (Citation omitted.)

<sup>137</sup> *Id.* at § 117, comment c, p. 340. The comment states: “Judgments rendered in foreign nations are not entitled to the protection of full faith and credit. A State of the United States is therefore free to refuse enforcement to such a judgment on the ground that the original claim on which the judgment is based is contrary to its public policy. A judgment rendered in a foreign nation, however, will, if valid, usually be given the same effect as a sister State judgment. (Citation omitted.) The fact that suit on the original claim could not have been maintained in a State of the United States does not mean that a judgment rendered on the claim in a foreign nation will necessarily be refused enforcement by the courts of that State. In fact, enforcement will usually be accorded the judgment except in situations where the original claim is repugnant to fundamental notions of what is decent and just in the state where enforcement is sought.”

<sup>138</sup> *Id.* at ch. 1, § 10, p. 39.

concept of an enduring same-sex relation has been sanctioned in civil partnership laws that offer most, if not all, of the protection of marriage. It remains to be seen how Massachusetts will fashion its legally recognized equivalent to marriage for same-sex partners. In other American and western European countries, same-sex partners are protected by laws that give the partners many of the rights of marriage.

As this change in family law develops, conflicts between the laws of states and countries undoubtedly will occur.

Interstate conflicts will be resolved following the principles of the Full Faith & Credit Clause. The Defense of Marriage Act (DOMA) and other state law will also be important in deciding the interstate conflicts issues. Many states have enacted mini DOMAs that make it clear that state courts are prohibited from recognizing out-of-state same-sex marriages. A liberal interpretation of these laws may also limit recognition of same-sex partnership laws.

For those states that have not adopted law that restricts recognition of out-of-state same-sex unions, it remains to be seen how these states will resolve the conflicts of law.

How a state resolves this issue depends in great measure on the state's public policy regarding same-sex unions. If the state considers such unions repugnant to its public policy, the state will not recognize the marriages or civil unions. If the public policy is accepting of same-sex unions, it is more likely that the state will recognize the unions.

A relevant factor in making this determination is what kind of issue is presented regarding the same-sex union. If one of the partners is asking the court to adjudicate a divorce, the court may answer the question differently than if one of the partners is seeking to recover under a wrongful death statute. The dissolution case forces the court

to confront the validity of the same-sex marriage head-on while the validity of the marriage is a collateral issue in the wrongful death or intestate succession cases. In the latter cases, a court will be more likely to give recognition to the same-sex union than when it must consider the validity of the marriage as the primary issue.

For those cases that involve conflicts of law across international boundaries, the same principals of recognition and resolution apply. Though United States state courts are not bound by the Full Faith and Credit Clause, the resolution of the international conflicts cases is likely to be similar to the resolution of the interstate cases.

As courts are called on to face these conflicts issues, the existence of the marriages and unions will push the courts in the direction of recognition of out-of-state unions valid where entered into. The reason is that the fabric of our society depends upon the family; where the law of a jurisdiction has sanctioned the creation of a family and that family has lived together for a number of years, the family expects that its relationships will be honored by those called upon to consider issues related to its existence. The expectation of the parties and the need for a law that allows for the creation of predictable and stable relationships will move us in the direction of recognition. Once the door is opened a crack by the sanctioning of the same-sex relationships in some jurisdictions, it signals a broader acceptance of the relationships.

There is no doubt that the door has opened at least a crack and it is very likely that in the next several years we will see many issues involving the conflicts between state laws litigated in state courts.