

Abstract

At the end of 2000 Lisa and Janet Miller-Jenkins left their home state of Virginia and traveled to Vermont to enter into a civil union. Their union ended a few years later. Although their separation resulted in a bitter legal battle in both the Virginia and Vermont court systems neither state addressed whether the initial union was valid. This paper analyzes the civil union using the Second Restatement's choice of law principles. This paper concludes that although the courts have continued to haggle over whether full faith and credit must be given to conflicting visitation orders the choice of law analysis shows that Lisa and Janet never entered into a valid union.

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**Civil Unions and Choice of Law:
A Second Restatement Analysis of Miller-
Jenkins v. Miller-Jenkins**

The U.S. is composed of a number of territorial sister states each having a unique and independent system of laws. Americans regularly move across state lines which means that legal issues can arise which have connections to more than one jurisdiction.¹ When this happens the question is often which state's law should apply to the case. This question can arise in any of the affairs of modern life, but perhaps is most intrusive when it determines the legality of our most intimate relationships. In 1948 Justice Jackson wrote, "If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom."² However, over fifty years later many people still fall victim to conflict of law snares which can result in their marriage not being valid or not being recognized by a sister state.

Many couples are not aware that through the act of marriage they are surrendering themselves to the quagmire of choice of law. The couple may believe that because their union is recognized in one state it must be recognized in all states, but this is far from the truth. The forum state's choice of law rules will determine which law, its own or a sister state's, should apply to a given fact scenario to determine the rights, duties and responsibilities of the parties when the case involves more than one state or jurisdiction.³ The general rule under the Second Restatement of Conflict of Laws (hereafter Second Restatement) is that if a marriage is valid and recognized in the state in which it is entered it is valid in all states.⁴ However, there are several exceptions to this rule as well

¹ RESTATEMENT (Second) OF CONFLICT OF LAWS § 1 (1971).

² *Estin v. Estin* 334 U.S. 541, 553 (1948).

³ RESTATEMENT (Second) OF CONFLICT OF LAWS § 2 cmt. (a)(3) (1971).

⁴ *Id.* § 283(2) (1971).

as a hard to predict public policy exception.⁵ The public policy exception is particularly relevant when dealing with same-sex marriages or civil unions.

Hawai'i started the push to recognize same-sex marriages in 1993 with the case *Baehr v. Lewin*.⁶ In *Baehr* a few same-sex couples challenged a Hawai'i statute prohibiting same-sex couples to marry.⁷ The couples requested the right to marry and eventually appealed to the Hawai'i Supreme Court.⁸ The Hawai'i Supreme Court held that the ban against same-sex marriage was contrary to the Hawaiian constitutional prohibition against sex discrimination and thus unconstitutional unless the State could show, on remand, that the statute was narrowly tailored to suit a compelling state interest.⁹ In response to the Hawai'i ruling states across the country scrambled to amend their laws and constitutions so that they could avoid having to recognize same-sex marriages which might be performed in Hawai'i.¹⁰ As of 2005, forty states had laws on the books declaring that they would not recognize same-sex marriages and that such marriages are against their public policy.¹¹ This has resulted in many same-sex couples being uncertain as to whether their marriage will be recognized outside the state in which it was entered. The question may be further complicated if states distinguish between prohibitions against same-sex marriage versus civil unions. This uncertainty is aptly demonstrated by the *Miller-Jenkins v. Miller-Jenkins* case which is currently working its way through both the Vermont and the Virginia court systems.

⁵ *Id.* See also § 132.

⁶ See generally *Baehr v. Lewin* 853 P.2d 44 (1993).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 68.

¹⁰ Andrew Koppelman, *Same Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIPIAC L. REV. 105 (1996).

¹¹ Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2149 (2005).

At the end of 2000 Lisa and Janet Miller-Jenkins left their home state of Virginia and traveled to Vermont to enter into a civil union.¹² Their union was short lived however, and eventually resulted in a prolonged legal battle in the states of Vermont and Virginia with both states issuing contrary rulings.¹³ Neither the Vermont nor the Virginia court addressed the initial validity of the marriage through a choice of law analysis and focused instead on full faith and credit and the Parental Kidnapping and Prevention Act. This paper will analyze the validity of the *Miller-Jenkins* marriage using the Second Restatement's choice of law principles. Although the courts have continued to haggle over whether full faith and credit must be given to conflicting visitation orders the choice of law analysis shows that Lisa and Janet never entered into a valid union.

The *Miller-Jenkins* Case

For several years Lisa and Janet lived together in an intimate and openly lesbian relationship in the state of Virginia.¹⁴ Virginia prohibited same-sex marriages or civil unions at that time and continues to prohibit them today. In December of 2000, while domiciliaries of Virginia, Lisa and Janet traveled to Vermont where they entered into a civil union and then returned to their home in Virginia.¹⁵ The couple later decided that they wanted a child.¹⁶ In 2002 Lisa became pregnant through artificial insemination.¹⁷ Lisa and Janet chose a sperm donor who had physical characteristics resembling Janet's

¹² *Miller-Jenkins v. Miller-Jenkins*, Nos. 2004-443, 2005-030, 2006 WL 2192715 at ¶ 3 (A.2d 2006). See also Appellant Opening Brief, Virginia Court of Appeals at 6, available at http://www.acluva.org/docket/pleadings/miller-jenkins_openingbrief.pdf (last visited Dec 15, 2006).

¹³ *Miller-Jenkins v. Miller-Jenkins*, Nos. 2004-443, 2005-030, 2006 WL 2192715 at ¶ 3 (A.2d 2006).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* See also Appellant Opening Brief, Virginia Court of Appeals at 6, available at http://www.acluva.org/docket/pleadings/miller-jenkins_openingbrief.pdf (last visited Nov. 28, 2006).

¹⁷ *Id.*

with the hopes that the child would resemble both of them.¹⁸ Lisa gave birth to a baby girl, Isabella, in April of 2002 in Virginia.¹⁹ Janet was present in the delivery room during Isabella's birth²⁰ but was not listed as a parent on the Virginia birth certificate.²¹ Lisa and Janet decided to move their family to Vermont in August of 2002 when Isabella was four months old.²² Janet, Lisa and Isabella lived together in Vermont for a little over one year before Janet and Lisa decided to separate in the fall of 2003.²³

In September of 2003, after Janet and Lisa had separated, Janet rented a moving truck and drove Lisa and Isabella back to Virginia and then returned to Vermont alone.²⁴ Janet and Lisa agreed that Lisa would file a *pro se* dissolution proceeding.²⁵ Lisa filed for dissolution of the civil union in Vermont on November 24, 2003 identifying her daughter as a biological or adoptive child of a civil union in the complaint.²⁶ In addition to filing for dissolution of the civil union Lisa completely renounced her lesbian lifestyle.²⁷

On March 15, 2004 the Vermont Rutland Family Court held its first day of hearings on Janet's motion for a temporary order regarding parental rights and responsibilities with regards to Isabella.²⁸ On June 17, 2004 the Vermont court issued a

¹⁸ Appellant Opening Brief, Virginia Court of Appeals, at 6 available at http://www.acluva.org/docket/pleadings/miller-jenkins_openingbrief.pdf (last visited Nov. 28, 2006).

¹⁹ *Miller-Jenkins v. Miller-Jenkins*, Nos. 2004-443, 2005-030, 2006 WL 2192715 at ¶ 3 (A.2d 2006).

²⁰ *Id.*

²¹ *Miller-Jenkins v. Miller-Jenkins*, Supreme Court of Vermont Appellate Brief 2005 WL 1386643 (Vt.) at *1.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ David Wagner, *A Vermont Civil Union And A Child In Virginia: Full Faith And Credit?* 3 AVE MARIA L. REV 657, 658 (2005).

²⁸ *Miller-Jenkins v. Miller-Jenkins*, Supreme Court of Vermont Appellate Brief 2005 WL 1386643 (Vt.) at *2.

temporary order in which they awarded Lisa legal and physical responsibility of Isabella and awarded Janet temporary parent-child contact.²⁹

On July 1, 2004 Lisa filed a “Petition to Establish Parentage and for Declaratory Relief” in the Frederick County Circuit Court of Virginia.³⁰ In her petition Lisa asked that the court declare her Isabella’s sole parent, that she alone had legal and physical custody of Isabella and that Janet had no rights of any kind regarding Isabella.³¹ Upon learning that Lisa had filed a concurrent action to determine parentage in Virginia the Vermont court issued an order on July 19, 2004 stating that the Vermont court would continue to have jurisdiction over the case including all parent-child contact issues.³² On August 24, 2004 the Virginia court ruled that it could exercise proper jurisdiction over the matter.³³

On Oct 15, 2004 the Virginia court ruled that Lisa alone was a parent to Isabella and that Janet had no parental rights.³⁴ On November 17, 2004 the Vermont court entered an order declaring Janet to be one of Isabella’s parents.³⁵ The court stated that “where a legally connected couple utilizes artificial insemination to have a family, parental rights and obligations are determined by facts showing intent to bring a child into the world and raise the child as one’s own as part of a family unit, not by biology.”³⁶ The Vermont court also stated that Virginia had inappropriately exercised jurisdiction over the parentage issue and had acted in violation of the Uniform Child Custody

²⁹ *Id.*

³⁰ *Miller-Jenkins v. Miller-Jenkins*, Appellant Opening Brief, Virginia Court of Appeals at 2, available at http://www.acluva.org/docket/pleadings/miller-jenkins_openingbrief.pdf (last visited Nov. 28, 2006).

³¹ *Id.* at 8.

³² *Id.*

³³ *Id.* at 9.

³⁴ *Id.*

³⁵ *Miller-Jenkins v. Miller-Jenkins*, Supreme Court of Vermont Appellate Brief 2005 WL 1386643 (Vt.) at *3

³⁶ *Id.* citing Printed Case at 19.

Jurisdiction and Enforcement Act and the Parental Kidnapping Prevention Act as codified by Virginia.³⁷ Appeals were made both to the Virginia and the Vermont supreme courts.³⁸

POINTS OF CONFLICT: WAS THIS MARRIAGE VALID?

Although the Vermont Court assumed that Janet and Lisa's civil union was valid and therefore proceeded to adjudicate the incidents of the union, a Second Restatement conflict of law analysis points to the union not being valid at the time it was entered into in Vermont, not being valid during the time Janet and Lisa lived in Virginia, and not being valid when the union was adjudicated in Vermont in 2004.

Civil Union Not Valid in 2000

Since the early part of the twentieth century Vermont has stated that a marriage entered in the state of Vermont by a person residing, and intending to continue to reside, in *another* state will be null and void in Vermont if the marriage would be void in the couple's home state.³⁹ This general rule against validating evasive marriages which take place in Vermont makes sense. Home states have the right to govern the rights, responsibilities and status of their own residents.⁴⁰ Vermont's state interest is in its own citizens and not in the citizens of sister states. Vermont has a particular interest in the familial status of its residents because of the rights and responsibilities which flow from that status such as parental rights and rights of inheritance.

Vermont doesn't have any state interest in regulating the rights and responsibilities of her sister states' citizens. In 1999 the Vermont Supreme Court

³⁷ *Miller-Jenkins v. Miller-Jenkins*, Appellant Opening Brief, Virginia Court of Appeals at 10, available at http://www.acluva.org/docket/pleadings/miller-jenkins_openingbrief.pdf (last visited Nov. 28, 2006).

³⁸ See Appendix A for a timeline of the Vermont and Virginia litigation.

³⁹ 15 Vt. Stat. Ann. § 6.

⁴⁰ *Supra* note 11 at 2153.

decided the case *Baker v. State* stating that a prohibition against same-sex marriages violated the Vermont's state constitution and ordered the state legislature to rectify the problem.⁴¹ In response the legislature created a right to civil unions for same-sex couples in Vermont. The Vermont civil union statute does not explicitly state a prohibition against evasive civil unions. However, the statute does state that the law of domestic relations shall apply to civil unions.⁴² This seems to suggest that Vermont's long standing policy against recognizing evasive marriages in Vermont might apply with equal force to evasive civil unions taking place in Vermont. The policy reasons for such a rule remain the same as Vermont's state interest remains with its own citizens even in the civil union context. If this is the case then Janet and Lisa never entered into a valid civil union which should be recognized by Vermont under the Vermont statutes.

Similarly, since 1975 Virginia law has stated that same-sex marriages are prohibited in Virginia.⁴³ Virginia law also has a prohibition against evasive same-sex marriages stating that a same-sex marriage entered into in another state shall be void in Virginia and unenforceable.⁴⁴ Although the Virginia statute at the time of Lisa and Janet's union only mentioned same-sex marriages it is likely to have applied to civil unions as well. Thus, both Virginia and Vermont had laws prohibiting the validation of evasive same-sex marriages and civil unions at the time Lisa and Janet entered their union which means that their union was likely void in both states at the time it was entered.

⁴¹ See generally *Baker v. State* 170 VT 194 (1999).

⁴² 15 Vt. Stat. .Ann. § 1204(d).

⁴³ Va. Code Ann. § 20-45.2.

⁴⁴ *Id.*

Second Restatement Conflict of Law Analysis

The result is the same under a Second Restatement analysis even assuming that the Vermont civil union statute *would* recognize evasive civil unions as valid within the state of Vermont. The Second Restatement states that the validity of a marriage will be determined by the local law of the state which has the most significant relationship to the spouses and the marriage under the principles stated in section six of the restatement.⁴⁵ Section six of the restatement sets out seven factors to consider when determining which state has the most significant relationship with the spouses. These are:

- (a) the needs of the interstate and international systems
- (b) the relevant policies of the forum
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue
- (d) the protection of justified expectations
- (e) the basic policies underlying the particular field of law
- (f) certainty, predictability and uniformity of result
- (g) ease in the determination and application of the law to be applied.⁴⁶

Needs of Interstate and International Systems

Considerations of the needs of the interstate system point to Virginia law controlling the *Miller-Jenkins* dissolution. Perhaps the most important function of these choice of law principles is to ensure the interstate system functions smoothly.⁴⁷ Choice of law principles should seek harmonious relations between the states and facilitate

⁴⁵ RESTATEMENT (Second) OF CONFLICT OF LAWS § 283(1) (1971).

⁴⁶ *Id.* at § 6

⁴⁷ *Id.* at § 6 cmt. (d).

travel and commerce.⁴⁸ Further, such choice of law principles should enhance the certainty, predictability and uniformity of result no matter which forum the matter is adjudicated in.⁴⁹ In this case we can see just how discordant interstate adjudications can become with both Vermont and Virginia reaching opposite conclusions. In addition, applying Vermont law to the dissolution does not further certainty, predictability and uniformity of result. In this case, the union would never have been recognized in Virginia but might pop into existence merely because the parties moved to Vermont. This result would likely have been different if they had moved to a different state and sought a dissolution there. It is not practical for the parties, or for the states, to have a union and all its incidental rights and responsibilities, popping in and out of existence depending on which state the couple happens to be located in. This suggests that the law of the couples' home state at the time they entered their marriage should control. In some cases, where the couple has spent the majority of their married life in a state other than their home state at the time of their union, the second state will have a more significant relationship to the marriage and therefore its law should apply to the marriage. However, this is not the case with the *Miller-Jenkins* facts. In the current case the parties spent the majority of their union in Virginia, they continued to have strong ties to Virginia while living in Vermont, Lisa and Isabella have moved back to Virginia and have continued to live there for the last three years. These continued and intimate contacts with Virginia before, at the inception, during and after the union indicate that Virginia law should apply.

⁴⁸ *Id.*

⁴⁹ *Id.*

Relevant Policies of the Forum

Considerations of Vermont's relevant policies point to Virginia law controlling. Vermont's policies on evasive marriages prohibit Vermont from recognizing such marriages and declares them void within the state of Vermont.⁵⁰ In cases where an evasive marriage takes place in Vermont and is later adjudicated in Vermont, Vermont is likely to look to the couple's home state policies regarding such marriages at the time the marriage took place to determine the couple's rights and responsibilities. The same is likely to be true of evasive civil unions conducted in Vermont and later adjudicated in Vermont. This will be especially true if Vermont's only interest in the case is because it is the forum state. In our case, Vermont does have an interest in the parties, especially Janet because she has continued to be domiciled in Vermont. However, this interest is unlikely to overrule the statutory language of 15 Vt. Stat. Ann. § 6 which states that Vermont will not recognize evasive marriages conducted within Vermont and such marriages are null and void.⁵¹

Relevant Policies of Other Interested States and the Interests of those States in the Determination of the Particular Issue

The only state's interested in this case are Vermont and Virginia. Virginia's relevant policies and interests suggest that Virginia law should apply. The Second Restatement's commentary states that the forum should seek to reach a result that will achieve the best possible accommodation of other interested state's policies.⁵² From the continued litigation we know that Virginia courts have reached the opposite conclusion

⁵⁰ 15 Vt. Stat. Ann. § 6.

⁵¹ *Id.*

⁵² RESTATEMENT (Second) OF CONFLICT OF LAWS § 6 cmt. (f) (1971).

of the Vermont courts holding instead that there was no recognized union in Virginia and that Lisa is Isabella's sole legal parent. Because applying Vermont law will reach a result diametrically opposite to that which Virginia would reach suggests that Vermont should have applied Virginia law under the Second Restatement.

The second restatement goes on to state that, in general, the state whose interests are most deeply affected should have its own local law applied to the case.⁵³ In this case it appears that Virginia's interests are most deeply affected. Lisa and Janet were domiciliaries of Virginia when they entered the civil union.⁵⁴ By traveling to Vermont to enter into the civil union they purposefully evaded the laws of Virginia, their home state. After entering the union the couple continued to reside within Virginia and eventually gave birth to Isabella within Virginia.⁵⁵ Virginia would not recognize the union as demonstrated by Virginia's court order stating that Janet had no parental rights and by the fact that Virginia listed only Lisa as a parent on Isabella's birth certificate.⁵⁶ Throughout the first three years of the civil union Virginia was the only state with an interest in the couple's domestic status and the incidents from any union. The couple moved to Vermont in 2003 and they resided there as a couple for approximately one year, after which Lisa and Isabella returned to Virginia and have continued to reside there to this day.⁵⁷ Although Janet has continued to reside in Vermont the couple has had more continuous contact with Virginia which suggests that Virginia law should apply.

⁵³ *Id.*

⁵⁴ *See generally Miller-Jenkins v. Miller-Jenkins* 2006 WL 2192715.

⁵⁵ *Id.*

⁵⁶ Supreme Court of Vermont Appellate Brief 2005 WL 1386643 (Vt.) at *1

⁵⁷ *Id.*

Protection of Justified Expectations

Although the justified expectations are difficult to determine it appears that they point to applying Virginia's law. Both Lisa and Janet were domiciled in Virginia during 2000 when they became parties to a civil union.⁵⁸ It is likely that both Lisa and Janet knew that Virginia would not recognize a civil union in 2000 as evidenced by the fact that the couple was forced to avail themselves to the laws of a sister state in order to enter into such a union. In addition Virginia law stated that no same-sex marriages would be recognized within the state of Virginia irregardless of whether the marriage was legal where it was entered if the parties were Virginia domiciliaries at the time of the marriage.⁵⁹ Further, both Lisa and Janet knew that Virginia did not recognize Janet as one of Isabella's parents as evidenced by the fact that the Virginia birth certificate listed only Lisa as a parent⁶⁰ and they never rectified this by having Janet adopt Isabella. There is also the fact that Vermont is likely not to recognize evasive civil unions which take place within its borders. Vermont certainly did not affirmatively state that it would recognize evasive civil unions entered within Vermont and Vermont's statute stating that it would not recognize evasive marriages entered within its border suggests that it would not recognize evasive civil unions.⁶¹ Given all this it seems likely that both Lisa and Janet's justified expectations point to Virginia law controlling. Certainly the parties would not be justified in thinking that a union which was illegal in their home state should pop into existence merely because the couple briefly moved to Vermont just a parties who were legally married in their home state would not be justified in expecting

⁵⁸ See generally *Miller-Jenkins v. Miller-Jenkins*, 2006 WL 2192715.

⁵⁹ Va. Code Ann. §20 45-2

⁶⁰ Supreme Court of Vermont Appellate Brief 2005 WL 1386643 (Vt.) at *1

⁶¹ 15 Vt. Stat. Ann. § 6.

the marriage to become void merely because they briefly moved to a sister state. This suggests that Virginia law controlled when they entered the marriage and the couple's justified expectations point to Virginia law controlling now.

Basic Policies Underlying the Field of Domestic Law

The basic policies underlying the field of family law seem to cancel each other out and not play a big part in the analysis. Basic principles underlying this area of domestic relations could be seen as the general rule of validation which states that a marriage legal where it is performed is legal everywhere.⁶² However, this rule has several recognized exceptions as well as a more amorphous public policy exception⁶³ which the *Miller-Jenkins* case might slip into. In addition there is the equally strong underlying policy that saying that states should have the power to determine the status of their citizens along with any incidental rights and responsibilities of that status.⁶⁴ This policy points to Virginia controlling. Because of the equally strong underlying policy considerations pointing to both Virginia law and Vermont law this indicator is not controlling.

Certainty, Predictability and Uniformity of Result

Certainty, predictability and uniformity of result point to application of Virginia law. Virginia was the place of domicile when Lisa and Janet entered into their civil union. Their home state of Virginia had the greatest interest in determining the status of the parties at that time and if Virginia had adjudicated the question then it would likely have held that their was no valid civil union. It would not further predictability and

⁶² RESTATEMENT (Second) OF CONFLICT OF LAWS § 6 cmt. (h) (1971).

⁶³ *Id.* at § 283(2).

⁶⁴ *Supra* note 11 at 2153.

uniformity of result to apply Vermont law to the case now. Applying Vermont law to the case will reach a result directly contrary to the result which would have been, and now has been, reached in Virginia resulting in the parties' status as members of a civil union to pop in and out of existence depending on whether they are in Vermont or Virginia. This type of erratic result is exactly what choice of law rules seek to avoid.

Ease in the Determination and Application of the Law

This indicator is not directly implicated by this case and so does not sway the result of the analysis either towards Vermont or Virginia law. No unreasonable administrative hurdles would be set up by requiring Vermont to apply Virginia law.

Thus, a section six Second Restatement analysis points to Virginia as the state with the most significant relationship with the spouses and the union so Virginia law should determine the validity of the union.

Second Restatement Public Policy Analysis

The Second Restatement codifies the general rule of validation stating that a marriage which satisfies the requirements of the state where the marriage was entered will be recognized as valid everywhere unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the union.⁶⁵ Assuming that the rule of validation would apply with equal force to civil unions and assuming that Lisa and Janet *did* meet the legal requirements of Vermont when they entered their civil union the union is still likely to be void under the Second Restatement because it violated the strong public policy of Virginia, the state with the most significant relationship at the time of the union.

⁶⁵ RESTATEMENT (Second) OF CONFLICT OF LAWS § 283(2) (1971).

To date, marriages have been held invalid only when the marriage violated a strong policy of a state where at least one of the spouses was domiciled at the time of the marriage and where both made their home immediately following the marriage.⁶⁶ In the *Miller-Jenkins* case both Lisa and Janet were domiciled in Virginia when they entered their civil union and both made their home in Virginia immediately after entering the union.

In 2000, at the time of Lisa and Janet's union, Virginia explicitly prohibited same-sex marriages but was silent on the validity of civil unions within the state of Virginia.⁶⁷ Lisa and Janet attempted to evade the laws of their home state of Virginia by traveling to Vermont to enter into a civil union and then immediately returning to their home in Virginia. The question is whether Janet and Lisa violated the strong public policy of their home state at the time of their marriage.

Under these circumstances Vermont, the forum state, should have determined whether Virginia's statutory prohibition against same-sex marriages represented a sufficiently strong policy of the state of most significant relationship to warrant invalidation of the civil union.⁶⁸ The Second Restatement says that the most determinative factor the forum state should consider is whether the courts of the state with the most significant relationship would have invalidated the marriage if the question had come before them.⁶⁹ In this case it is clear that Virginia would have ruled that the union was invalid. At the time of the union Virginia statute prohibited same-sex marriage and refused to recognize evasive same-sex marriages by Virginia domiciliaries

⁶⁶ *Id.* § 283 cmt. (2)(j).

⁶⁷ Va. Code Ann. § 20 45-2.

⁶⁸ RESTATEMENT (Second) OF CONFLICT OF LAWS § 283 Cmt. 2(j) (1971).

⁶⁹ *Id.*

as valid in Virginia⁷⁰ which suggests that Virginia would not recognize a civil union either. Virginia did not recognize Janet as a parent when Isabella was born listing only Lisa as a parent on the birth certificate.⁷¹ The Virginia courts have gone on to rule that Janet is not a legal parent to Isabella.⁷² Furthermore, in 2004 Virginia codified its public policy against recognizing civil unions stating that a civil union entered outside the state of Virginia shall be void in all respects within the state of Virginia.⁷³ Given these factors it seems evident that Virginia's public policy against same-sex marriages or civil unions is sufficiently strong to require that Vermont apply the public policy exception when determining the validity of the marriage. Thus, Lisa and Janet's civil union was never valid under the Second Restatement. Although the Second Restatement appears to point to there being no valid union at any time this is certainly not a satisfying answer.

Public Policy Exception Problems Are Nothing New

The public policy exception has long legitimized states' deep rooted hatred and intolerance for certain groups. Historically, marriages held invalid because they violated the strong public policy of the home state were bigamous, incestuous and interracial marriages or marriages that involved paramour statutes.

For example, in 1951 Fred Catalano, a citizen of Connecticut, traveled to Italy where he married his niece.⁷⁴ The marriage was legal and recognized in Italy where it was performed.⁷⁵ Mr. Catalano returned to Connecticut after the nuptials and Mrs.

⁷⁰ Va. Code Ann. § 20-45-2

⁷¹ *Miller-Jenkins v. Miller-Jenkins*, Supreme Court of Vermont Appellate Brief 2005 WL 1386643 (Vt.) at *1.

⁷² *Miller-Jenkins v. Miller-Jenkins*, Appellant Opening Brief, Virginia Court of Appeals at 9, available at http://www.acluva.org/docket/pleadings/miller-jenkins_openingbrief.pdf (last visited Nov. 28, 2006).

⁷³ Va Code Ann. § 20-45.3.

⁷⁴ *Catalano v. Catalano* 148 Conn. 288, 289 (1961).

⁷⁵ *Id.*

Catalano joined him there in 1956 and shortly thereafter she gave birth to a son. The family lived in Hartford until Mr. Catalano's death in 1958 upon which Mrs. Catalano, believing herself to be the surviving spouse of Mr. Catalano, brought an action for support and provisions under Connecticut law.⁷⁶ However, Connecticut refused to grant her support and provisions because it refused to recognize her marriage as valid.⁷⁷ The court stated that although marriages valid where they are celebrated are usually valid everywhere this was not the case for Mrs. Catalano.⁷⁸ Mrs. Catalano's marriage fell into the public policy exception to the general rule of validation.⁷⁹ The Connecticut court stated that the Catalano's union was in direct conflict with Connecticut's policy against marriages between uncles and nieces as evidenced by the fact that such unions had been illegal in Connecticut since 1702 and the punishment for such marriages was imprisonment.⁸⁰

Another example is that of Richard H. Stull and Ada Widdup. Richard and Ada were domiciled in Pennsylvania.⁸¹ Richard's first wife had gotten a divorce based on Richard's infidelity with Ada.⁸² Pennsylvania prohibited a marriage between an adulterer and his paramour during the lifetime of the injured spouse.⁸³ After the divorce was finalized Richard and Ada traveled to Maryland where such marriages were allowed, got married, and then returned to Pennsylvania to live as husband and wife.⁸⁴ Pennsylvania

⁷⁶ *Id.*

⁷⁷ *Id.* at 292.

⁷⁸ *Id.* at 291.

⁷⁹ *Id.* See also RESTATEMENT (Second) OF CONFLICT OF LAWS § 132(b) (1971).

⁸⁰ *Catalano*, 148 Conn. at 291-92.

⁸¹ *In re Stull's Estate*, 183 Pa. 625, 628 (1898).

⁸² *Id.*

⁸³ *Id.* at 629.

⁸⁴ *Id.* at 628.

refused to recognize their marriage and upon Richard's death Ada was unable to inherit Richard's estate.⁸⁵

In *Kennedy v. State* a black man and a white woman domiciled in North Carolina evaded North Carolina's prohibition against interracial marriages and traveled to South Carolina where they were legally married.⁸⁶ After they were married the couple returned to North Carolina to live as husband and wife.⁸⁷ North Carolina held that the marriage was not valid.⁸⁸

Likewise in *Kinney v. Commonwealth* a black man and a white woman both domiciled in Virginia where interracial marriages were prohibited traveled to the District of Columbia and entered into a valid marriage.⁸⁹ In *Kinney* the court held that the marriage celebrated in the District of Columbia, though lawful there, was prohibited and declared void by the statutes of Virginia and invalid in Virginia.⁹⁰

It might be easy to dismiss these cases as archaic vestiges of a less enlightened past. After all, in *Loving v. Virginia* the Supreme Court declared that prohibitions against interracial marriages unconstitutionally violate the Fourteenth Amendment's Equal Protection and Due Process Clauses.⁹¹ However, as *Miller-Jenkins* demonstrates, these problems are still very current. Several state courts have thus far failed to extend the protections of *Loving* to same-sex marriages. In *Morrison v. Sadler* an Indiana court refused to analogize prohibitions against same-sex marriages to prohibitions against interracial marriages stating that "unlike anti-miscegenation laws, restrictions against

⁸⁵ *Id.* at 637.

⁸⁶ *Kennedy v. State*, 76 N.C. 251, 252 (1877).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Kinney v. Commonwealth*, 30 Gratt. 858 at *2 (1878).

⁹⁰ *Id.* at *7.

⁹¹ *Loving v. Virginia* 388 U.S. 1, 2 (1967).

same-sex marriage reinforce, rather than disrupt, the traditional understanding of marriage as a unique relationship between a woman and a man.”⁹² The *Sadler* court went on to state that *Loving* did not hold that the right to marry means the right to marry whomever one wants.⁹³ Likewise, in *Lewis v. Harris* the New Jersey Supreme Court also refused to extend the Fourteenth Amendment protection of interracial marriages to same-sex marriages.⁹⁴

In addition, the Federal Government has sought to strengthen public policy against same-sex marriage by passing the Federal Defense of Marriage Act (DOMA) and, as seen in Virginia, many states have followed suite by codifying their public policy exceptions against civil unions and same-sex marriages. Thus there is a panoply of state laws, some legalizing civil unions, some legalizing gay marriage and many declaring same-sex unions void and against the state’s public policy. All this has resulted in a maelstrom of litigation unfairly denying the validity of many same-sex unions just as the validity of interracial marriages was denied pre *Loving v. Virginia*.

Because the Fourteenth Amendment does not currently protect same-sex unions from the pitfalls of the public policy exception, perhaps a better approach would be to follow the Second Restatement requirement of domicile to grant a divorce in marriage as well. The Second Restatement states that the state of a person’s domicile has the most interest in that person’s marital status and therefore has judicial jurisdiction to grant the person a divorce.⁹⁵ The policy reasons behind requiring domicile to grant a divorce apply

⁹² *Morrison v. Sadler* WL 23119998 at *5 (2003).

⁹³ *Id.*

⁹⁴ *Lewis v. Harris*, 188 N.J. 415, 440 (2006). See also *Anderson v. King County*, 158 Wash.2d 1 (2006), *Hernandez v. Robles* 7 N.Y.3d 338 (2006) *Baker v. State* 170 Vt. 194, 215 (1999) all distinguishing same-sex marriage from interracial marriages protected by the Fourteenth Amendment.

⁹⁵ RESTATEMENT (Second) OF CONFLICT OF LAWS § 285 cmt. (a) (1971).

with equal strength to granting a marriage. Had Vermont required Janet and Lisa to show they were domiciliaries of Vermont before granting them a civil union it would be clear that the marriage was valid and thus eliminating a need for a home state public policy exception.

In conclusion, a Second Restatement analysis of the *Miller-Jenkins* case points to Virginia law controlling with the result that the civil union was not valid at the time it was entered nor at the time it was adjudicated. However, this is not a satisfactory result for the countless couples struggling to obtain state recognition for their union that they need for the vast array of duties and benefits which marriage usually entails.

VT 11-24-2003
Lisa Files for
Dissolution in VT



VT 3-15-2004
Hearing on Janet's
Motion for Temp.
Order RE: parental
right &
responsibilities



VT 6-17-04
Janet receives
visitation rights



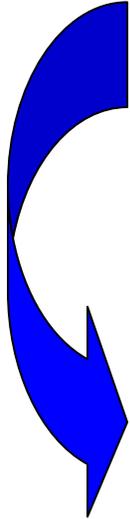
VA 7-29-2004
Janet submits
demurrer to the
VA court stating
VA has no
jurisdiction



VT 7-19-2004
Say it's
Jurisdiction is
continuing and the
6-17 temporary
visitation order
stands



VA 7-1-2004
Lisa Files in VA
for Custody
Proceedings



VA 8-18-2004
VA modifies the
VT temporary
visitation order so
that all visitation
takes place in VA



VA 8-24-2004
VA has a hearing
on whether they
have jurisdiction
over the matter
and rule from the
bench that they do



VT 9-2-2004
Vermont holds
Lisa in contempt
for not adhering to
the VT visitation
order



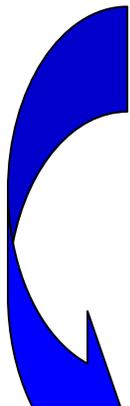
VT 12-24-2004
VT refuses to give
FFC to the VA 10-
15-04 decision
stating that VA
lacked jurisdiction



VT 11-17-2004
VT rules is a legal
parent with all the
rights and
responsibilities of
a parent



VA 10-15-2004
VA rules that Lisa
is the sole parent



VA 11-16-2005
Lisa challenges the
VT custody

