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SAME-SEX DIVORCE IN THE CONFLICT OF LAWS

The First Step on the Road to Divorce is—Marriage¹

INTRODUCTION

SAME-SEX MARRIAGE, long a controversial and uniformly prohibited status, is now legally available in several countries. In the Netherlands,² Belgium,³ the Provinces of Ontario, British Columbia, and Quebec, Canada,⁴ and—as of May 2004,—in the State of Massachusetts, USA,⁵ legal marriage is, or will be, open to gay and lesbian couples. In these jurisdictions, the struggle for full recognition of intimate, committed relationships regardless of sex has been won, at least for the moment.

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1. Slogan on tee-shirt sold in San Francisco, California.
2. See Nancy G. Maxwell, "Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison" (2001) 18 *Arizona Journal of International and Comparative Law* 141, 155 (amending 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.").
3. See *Developments in the Law—The Law of Marriage and Family*, 116 *Harvard Law Review* 1996, 2004 (2003) [hereinafter *Developments*].
4. See *Halpern v Canada (Attorney General)* (2003), 65 OR (3d) 161 (Ct. App.) (holding that prohibition of same-sex marriages violated s 15 of the *Charter of Rights* and ordering the Clerk of the City of Toronto, effective immediately, to issue marriage licenses to plaintiff same-sex couples); *Egale Canada Inc. v Canada (Attorney General)* (2003), 15 BCLR (4th) 226 (Ct. App.) (amending its earlier decision at (2003), 13 BCLR (4th) 1, which had reached the same conclusion earlier but had postponed the effective date of its decision until July 2004 to give the federal Parliament time to decide how to cure the *Charter* violation, to declare that same-sex partners were free to marry immediately). A trial court in the Province of Quebec had also postponed its similar decision until July 2004; its decision was affirmed and the stay was lifted by the Quebec Court of Appeal. See *Hendricks v Quebec (Attorney General)*, (2004) (Ct. App. Quebec, 19 March 2004). These decisions affect the majority of Canadians, since British Columbia, Ontario and Quebec are the country's most populous provinces. See Nicholas Bala, "Controversy Over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships", (2003) 29 *Queen's Law Journal* 41, 72–82 (providing a comprehensive analysis of the same-sex marriage cases).
5. See *Goodridge v Dep't of Public Health*, 798 NE 2d 941 (Mass. 2003). The court stayed entry of judgment for 180 days to permit the legislature "to take such action as it may deem appropriate in light of this opinion." *Id.* at 970.

Elsewhere in the world, however, including my own country and here in Britain, the possibility of legal marriage for same-sex couples remains a deeply contested issue. Instead of marriage, some countries allow a more limited recognition of specific rights and responsibilities akin to the incidents of marriage. Thus, a Civil Partnerships Bill is pending before the House of Lords and several European countries permit same-sex couples to enter registered partnerships.⁶ The experience in the United States has been mixed. While over 30 years ago the United States Supreme Court foreclosed a claim that the denial of a marriage license to a same-sex couple violates the Equal Protection Clause of the Federal Constitution,⁷ in June, 2003, that Court seemingly opened the door to further consideration of the issue.⁸

During the past ten years, four US state courts have found support in their state constitutions for the claims of gay and lesbian couples that they are entitled to enter into same-sex marriages. In two of these states, however, voters subsequently nullified the court's decision. Thus, in 1993, the Supreme Court of Hawaii⁹ held that prohibition of same-sex marriage violated the sex-discrimination component of the state constitution's equal protection clause, but in 1997 voters approved a constitutional amendment¹⁰ that affirmed the legislature's power to reserve marriage to heterosexual couples. A similar chain of events occurred in 1998 in Alaska.¹¹ The judiciary, legislature, and the voters worked together more smoothly in Vermont, where the legislature responded to a 1999 directive of the Vermont Supreme Court to implement its holding that same-sex couples are entitled "to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples"¹² by holding a series of public hearings on the matter.¹³ The outcome of this public consultation was the adoption of a Civil Union provision that grants same-sex couples "all the same benefits, protections and responsibilities under law, . . . as are granted to spouses in a marriage" while reserving the legal status of marriage for opposite sex couples.¹⁴ While the point was originally in dispute, the Justices of the Massachusetts Supreme Judicial Court subsequently confirmed that *Goodridge* did not leave open the Civil Union

6. See H.L. Bill 41 (introduced 9 January 2002); see Barbara J. Cox, "But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate But (Un)Equal" (2000) 25 *Vermont Law Review* 113, 119 (citing Denmark (1989), Norway (1993), Greenland (1994), Sweden (1995), Iceland (1996), the Netherlands (1998), and France (1999)). The Netherlands adopted legal marriage for same-sex couples in 2001. See above n 2.

7. See *Baker v Nelson*, 191 NW 2d 185 (Minn. 1971) (en banc), appeal dismissed, 409 US 810 (1972).

8. See *Lawrence v Texas*, 123 S. Ct. 2472 (2003) (striking down a Texas criminal statute prohibiting consensual sodomy between homosexual, but not heterosexual, adults); see also Cass R. Sunstein, "What Did *Lawrence* Hold? Of Autonomy, Desuetude, Sexuality, and Marriage" (U. Chicago Law & Economics, Olin Working Paper No. 196, 2003) (forthcoming in the Sup. Ct. Rev.) (questioning whether a principled distinction exists between what the Court did in *Lawrence* and what a court would do in striking down a state's failure to recognize same-sex marriage).

9. See *Baehr v Lewin*, 852 P.2d 44 (Haw. 1993).

10. See Haw. Const. art. I, s 23 ("The Legislature shall have the power to reserve marriage to opposite-sex couples."); see also *Developments*, above n 3, at 2016-18 (discussing the Hawaiian experience).

11. See *Developments*, above n 3, at 2018-19; see also Greg Johnson, "Vermont Civil Unions: The New Language of Marriage" (2000) 25 *Vermont Law Review* 15, 22-24 (describing the plaintiffs in the Alaska case).

12. See *Baker v State*, 744 A.2d 864, 886 (Vt. 1999).

13. See David L. Chambers, "The Baker Case, Civil Unions, and the Recognition of Our Common Humanity: An Introduction and a Speculation" (2000) 25 *Vermont Law Review* 5, 6.

14. See Vt. Stat. Ann. tit. 15 s 1204(a), s 1201(4) (2002).

option: the decision mandates equal access to legal marriage, and cannot be satisfied by legislative enactment of a lesser status.¹⁵

During 2003, the California Legislature followed Vermont's lead by enacting an expanded Domestic Partnership statute that will become effective in 2005,¹⁶ while two other state courts—the Court of Appeals of Arizona,¹⁷ and a Superior Court in New Jersey¹⁸—rejected claims that their respective state constitutions require the state to grant same-sex couples access to legal marriage.¹⁹

With marriage and marriage-like provisions for same-sex couples in place in only a few countries, it may seem premature to consider the conflict of laws aspects of same-sex divorce. Yet great uncertainty exists regarding the effect of even these few provisions in other states or countries,²⁰ and at least one reported Connecticut case has refused to entertain a proceeding to dissolve a Vermont civil union for lack of subject matter jurisdiction.²¹

The conflicts issue in the divorce cases is not choice of law. Rather, the issue is one of a court's jurisdiction to entertain the divorce proceeding and the enforcement of its resulting judgment elsewhere. Indeed, the conflicts divorce problem is created in large part because same-sex marriage does involve choice of law: each jurisdiction that has extended marriage to same-sex couples without imposing a residence requirement has become a beacon attracting such couples from around the world to solemnise their unions. But while marriage is usually not limited to persons who are resident

15. See *Opinions of the Justices to the Senate*, 802 NE 2d 565 (2004), confirming the holding in *Goodridge v Dep't of Public Health*, 798 NE 2d 941, 969 (Mass. 2003) (following the remedy fashioned by the Ontario court in *Halpern* and construing "civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others"). In the immediate wake of the opinion, however, both some Massachusetts legislators and the state Attorney General held out the possibility that the court's order could be satisfied by the enactment of a civil union statute similar to that of Vermont. See Pam Belluck, "Gays' Victory Leaves Massachusetts Lawmakers Hesitant" *New York Times* 20 November 2003, at A25 (noting that the options discussed by legislators ranged from doing nothing to seeking a middle ground that would preserve the name "marriage" for opposite-sex couples to enacting a bill authorising same-sex marriage and spelling out how to obtain a marriage license); Frank Phillips & Raphael Lewis, "AG Suggests Bill: Same-Sex Benefits Without Marriage" *Boston Globe* 21 November 2003, at A1 (quoting Attorney General Thomas F. Reilly as saying he did not read the opinion to require the state to issue marriage licenses to gay and lesbian couples, and noting that Harvard Law Professor Laurence H. Tribe held the opposite view: that the court had mandated that same-sex couples be provided the right to marry). Acting on this possibility, the Massachusetts Senate requested an advisory opinion from the Justices of the Supreme Judicial Court as to whether a civil union bill would be constitutional. See S. 2176 (Mass. 2003). This question was answered in the negative. *Ibid.* 802 NE 2d at 572.
16. See The California Domestic Partner Rights and Responsibilities Act of 2003, 2003 Cal. Legis. Serv. Ch. 421 (West) (A.B. 205) (to be codified at, and amending, Cal. Fam. Code ss 297-99.5 & Cal. Gov't Code s 14771) [hereinafter Domestic Partner Act]. The Act, which was signed by Governor Gray Davis on 19 September 2003 at a ceremony held at the San Francisco Lesbian Gay Bisexual Transgender Community Center, see Mark Simon, "Davis Signs Bill Giving Partners Rights: Alimony, Property Settlement Issues Covered in Legislation" *San Francisco Chronicle* 20 September 2003, at A1, becomes effective on 1 January 2005. Domestic Partner Act, above, s 14.
17. See *Standhardt v Superior Court*, 77 P.3d 451 (Ariz. Ct. App. 2003).
18. See *Lewis v Harris*, No. 15-03 (NJ Super. Ct. 5 November 2003). In January 2004 the New Jersey legislature passed a measure extending some rights to same-sex couples, but falling short of provisions enacted earlier in Vermont and California. See Laura Mansnerus, "New Jersey Senate Passes Bill Recognizing Same-Sex Unions" *New York Times* 9 January 2004, at A17.
19. A lower court in the District of Columbia has also rejected such a claim. See *Dean v District of Columbia*, 653 A.2d 307 (DC 1995) (applying D.C. Human Rights Act).
20. See Cox, above n 6, at 137-44.
21. See *Rosengarten v Downes*, 802 A.2d 170 (Conn. App. Ct. 2002), appeal granted, 806 A.2d 1066 (Conn. 2002), appeal dismissed as moot (31 December 2002) (copy of Order dismissing appeal on file with the author). See below nn 146-74 and accompanying text.

or domiciled within the place of marital celebration, divorce typically does require that sort of permanent connection between the parties, or one of them, to the place of marital dissolution. Thus, if a US opposite-sex couple decides to hold their wedding in romantic Niagara Falls, Ontario, they cannot return there to obtain a divorce without proof that at least one of them has become an Ontario resident.²² The same rules apply to a same-sex couple who hold their wedding in Toronto because Ontario law permits them to marry. The difference is that the opposite-sex couple can file for divorce at home, where at least one of them is likely to be domiciled, while the same-sex couple may not be able to do so, at least if their home state refuses to recognise that they are legally married. Yet if a member of either couple remarries another partner without obtaining a divorce, Ontario likely would view them as bigamists.

A same-sex couple who live outside Vermont and who travel there to enter into a civil union may encounter similar problems of jurisdiction and recognition of judgments if they later seek a dissolution of their relationship in Vermont or at home.

Given these problems, some preliminary consideration of the conflict of laws aspects of same-sex divorce seems appropriate. Both the parties litigating the conflict of laws issues in these cases and the judges deciding them are hampered by a lack of clear doctrinal guidance, giving rise to the possibility of failure in the even-handed administration of justice. In Part One of this paper, I will discuss divorce following legal marriage, first in international cases and second in interstate US cases as well as in interprovincial Canadian cases. In Part Two, I will examine the availability in the United States of divorce or dissolution following a marriage substitute such as domestic partnerships and civil unions. Finally, in the Conclusion, I will offer some suggestions for reform.

I. DIVORCE FOLLOWING LEGAL MARRIAGE

A. INTERNATIONAL DIVORCE

In the Netherlands, Belgium, and the Canadian Provinces of Ontario, British Columbia, and Quebec, where same-sex couples currently enjoy the same access to legal marriage as do opposite-sex couples, it seems clear that for both sets of couples, marriage can be terminated only in one of the two usual ways: by death or by divorce. This result follows from the very nature of the marriage reform, which was to expand the legal definition of marriage to include same-sex couples. The same result has followed from other expansions in the definition of marriage, such as those that ended the anti-miscegenation laws in the United States by permitting mixed-race couples to marry²³ and those that ended an affinity prohibition in Britain by permitting

22. E-mail from Professor Nicholas Bala, Faculty of Law, Queen's University, Ontario, Canada, to Herma Hill Kay (9 December 2003, 12:26:48) (on file with author).

23. See *Loving v Virginia*, 388 US 1 (1967) (invalidating Virginia's miscegenation law as a violation of the equal protection clause); Walter Wadlington, "The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective" (1966) 52 *Virginia Law Review* 1189 (tracing the historical development of the prohibition against mixed race marriage).

marriage between a man and the sister of his deceased wife.²⁴ Indeed, access to legal divorce by same-sex couples in countries where they are permitted to marry is considered so unproblematic that it is taken for granted by advocates of same-sex marriage in their discussion of the legal consequences of marriage reform.²⁵

Yet the effect to be given same-sex divorces elsewhere remains unclear. As we have seen, the conflicts problem in the divorce cases is not choice of law, but instead centres on jurisdiction and recognition of judgments. To explore what same-sex divorce might mean in practice in an international conflict of laws case, I will consider two hypothetical cases, the first involving an Ontario couple married and divorced in their home country, with enforcement sought in California, the second involving a California couple who married in Toronto and who now seek a divorce. I do not examine in this paper the conflict of laws issues relevant to the custody and support of children.

1. *Marriage and divorce at home; enforcement abroad.* Let us begin with the easiest scenario: that of a Toronto gay or lesbian couple who married there on 10 June 2003, the earliest date that legal marriage was available to them. The relationship founders, and one spouse files a divorce proceeding in the Superior Court of Justice for the Province of Ontario.²⁶ In order to file a divorce proceeding in any Canadian province, at least one spouse must have been “ordinarily resident” in the province for one year.²⁷ The federal law authorises “either or both spouses” to apply for a divorce based on the no-fault ground “that there has been a breakdown of their marriage.”²⁸ Breakdown of marriage, in turn, must be established either by a showing that the spouses have been living separate and apart for at least one year,²⁹ or, if not, that one spouse has committed a fault-based matrimonial offense against the other, either adultery or cruelty.³⁰ The separation component of the marriage breakdown provision is not available to our hypothetical couple because (as of the date of this Lecture, 11 December 2003) they have not been married for one year, and therefore they cannot have lived separate and apart for at least one year prior to filing the petition.³¹ If

24. Deceased Wife's Sister's Marriage Act, 1907, 7 Edw. VII, c. 47 (Eng.).

25. See David L. Chambers, “What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples” (1996) 95 *Michigan Law Review* 447, 476–79 (discussing the regulation of financial relationships between married partners in the context of divorce); see also Kathleen Burge, “For Gays, Divorce May Soon Be a Useful Right” *Boston Globe* 3 December 2003 at B1 (noting that access to divorce is “an equally powerful benefit that flows from the ruling” of the Massachusetts Supreme Judicial Court upholding same-sex marriage).

26. See Divorce Act, R.S.C., ch. 3 (2d Supp.), s 2(1) (1985) (Can.) (effective 1986).

27. *Ibid.* s 3 (1) (“A court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been ordinarily resident in the province for at least one year immediately preceding the commencement of the proceeding.”). I assume that this section does not create a one year waiting period for commencement of proceedings, but that a spouse who had been ordinarily resident in the province for at least one year prior to the marriage could file for divorce at any time.

28. *Ibid.* s 8(1).

29. *Ibid.* s 8(2) (“Breakdown of a marriage is established only if (a) the spouses have lived separate and apart for at least one year immediately preceding the determination of the divorce proceeding and were living separate and apart at the commencement of the proceeding; . . .”).

30. *Ibid.* (“(b) the spouse against whom the divorce proceeding is brought has, since celebration of the marriage, (i) committed adultery; or (ii) treated the other spouse with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses.”).

31. See James C. MacDonald and K Ferrier, *Divorce Law in Practice* (2nd ed., Toronto: Carswell Publishing, 1986) S.3 s 1 (stating that the statutory residence requirements are substantive and not procedural and cannot be ignored by the court).

they want an immediate divorce, they must show either adultery or cruelty. In order to avoid potential definitional problems associated with the ground of adultery as applied to a same-sex couple,³² let us assume that the dissolution is sought for breakdown of the marriage because of mental cruelty. Assume further that the Ontario court grants a divorce on that basis, and enters a judgment dissolving the marriage and ordering the payment of periodic support by one party (the "obligor") to the other (the "obligee") in the amount of \$500 per month.³³ The obligor moves from Canada to the United States, settling in California, and fails to make any payments. When the past due payments total \$5000, the obligee (who has continued to live in Toronto) files suit in California to enforce the Ontario judgment.

Will the California court enforce the support obligation? It is not compelled to do so. While the obligation is a money judgment for a determinable amount, not retroactively modifiable in Ontario except under extraordinary circumstances,³⁴ it is not a sister-state judgment entitled to Full Faith and Credit pursuant to the US Constitution.³⁵ The Uniform Foreign Money-Judgments Recognition Act, which California has adopted, does not apply to "a judgment for support in matrimonial or family matters."³⁶ However, the Uniform Interstate Family Support Act,³⁷ which California has also adopted,³⁸ authorises the state where the obligor is present to act as a responding tribunal for the purposes of recognition and enforcement of a child or spousal support order entered by an initiating tribunal in another state or a foreign jurisdiction which has enacted or established substantially similar procedures for the issuance and enforcement of support orders.³⁹ The Province of Ontario has been

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32. Some uncertainty may exist concerning what is meant by "adultery" in a same-sex marriage. The term is not defined in Canadian divorce legislation, and case-law supplies only the usual interpretation applicable to opposite-sex couples. See *ibid.* at S.8 s 19 (Release 2000-5) (citing *Orford v Orford*, [1921] OLR 15, 22-23, stating, per Orde, J, that the "essence of the offense of adultery consists . . . in the voluntary surrender to another person of the reproductive powers or faculties of the guilty person"). The Supreme Court of New Hampshire has recently held, in a husband's divorce action against his wife, that her sexual relationship with another woman did not constitute adultery, basing its holding on a dictionary definition referring to "voluntary sexual intercourse between a married man and someone other than his wife or between a married woman and someone other than her husband" and a second definition of "sexual intercourse" that required "insertion of the penis into the vagina" and concluding that this act "clearly can only take place between persons of the opposite gender." See *In re Blanchflower*, 834 A.2d 1010, 1011 (NH 2003).
33. See *M. v H.*, [1999] 2 SCR 3 (holding that refusal to allow same-sex partners to seek support while granting such relief to unmarried opposite-sex conjugal couples constituted discrimination on the basis of sexual orientation); Bala, above n 4, at 68-72; Divorce Act, R.S.C., ch. 3 (2d Supp.), s 15(2) (1985) (Can.) (effective 1986).
34. See *Marinangeli v Marinangeli*, [2003] OJ 2819 (Ct. App.) (granting wife's motion for retroactive increase in spousal support where husband failed to disclose a material increase of nearly 20% in his income and salary during the year following entry of the support order in breach of his implicit obligation to make disclosure; noting, *ibid.* para 72, that while "the decision to award retroactive support is one to be exercised sparingly" in this case the trial judge's order was justified); followed in *Murray v Murray*, [2003] OJ 3350 (Super. Ct.) (setting aside waiver of spousal support in separation agreement because of husband's failure to disclose increased assets).
35. See US Const. art. IV, s 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.")
36. See Cal. Civ. Pro. Code s 1713.1(2) (West 1982) ("Foreign judgment" means any judgment . . . other than . . . a judgment for support in matrimonial or family matters."); 13 ULA 419 (1980).
37. See 9 ULA 348 (Supp. 1999).
38. See Cal. Fam. Code ss 4900-5005 (West 1994 & Supp. 2003).
39. *Ibid.* s 4901(s)(2) (defining "state").

designated as a “foreign reciprocating country” for these purposes.⁴⁰ Thus, assuming that California is willing to treat the obligee as a “spouse” (a point to which I will return in a moment) and the order as one for “spousal support,” the Ontario order could be enforced in California under this procedure.

Moreover, apart from the statutory procedure, existing precedent would permit a California court to recognise the Ontario judgment voluntarily on the basis of comity between nations. In 1955, in *Worthley v Worthley*,⁴¹ Justice Roger Traynor of the California Supreme Court handed down the leading US case permitting voluntary recognition and enforcement of a non-final sister-state spousal support judgment.⁴² In 1960, an intermediate California appellate court extended *Worthley* to permit recognition and enforcement of a modifiable English decree awarding permanent alimony.⁴³ Based on these precedents, a California court could and should recognise and enforce the Ontario spousal support judgment in this case.

True, the parties could not have been married in California. Their marriage was, however, valid in the country of their ordinary residence where it was performed. Existing California precedent indicates that recognition and enforcement of an incident of the marital status—here, the support obligation—does not entail an inquiry into the validity of the status itself. Thus, in 1948, a California appellate court recognised the rights of two wives of Dalip Singh Bir, a deceased native of India, to claim their equal intestate shares in his California bank account.⁴⁴ The important point here is that in both cases the marriage status had already been dissolved when relief was sought in a California court: by death in the inheritance case,⁴⁵ and by an Ontario divorce in our hypothetical case. Neither the polygamous family nor the same-sex couple sought to live together as married persons in California. Similar results followed even in courts from Southern states in the United States during the period when mixed-race marriages were prohibited by miscegenation laws: as long as the petitioners did not seek to cohabit within the forum state, their claims to the incidents of marriage were recognised and upheld.⁴⁶ A California court could do as much for the obligee in our case.

2. *Marriage abroad, divorce either at home or abroad.* Suppose, however, that our hypothetical same-sex couple were two Californians who traveled to Toronto to get married

40. See Cal. Dep’t of Child Support Services, CSSIN Letter # 03-01 (21 January 2003); see also Ann Wilton and Judy S. Miyauchi, *Enforcement of Family Law Orders and Agreements: Law and Practice* 1 s 15(1) (2003) (noting that all Canadian provinces and territories have enacted reciprocal enforcement of maintenance orders legislation).

41. 283 P.2d 19 (1955) (extending recognition and enforcement to a New Jersey judgment that was both retroactively and prospectively modifiable).

42. See Eugene F. Scoles et al., *Conflict of Laws* (3rd ed., St. Paul: West Group, 2000) s 24.8, at 1153-54 (noting that except for child support orders, recognition of sister-state judgments is constitutionally required only for final decrees and judgments).

43. See *Herczog v Herzog*, 9 Cal. Rptr. 5 (Cal. Ct. App. 1960); see also Scoles et al., above n 42, s 15.37, at 655-56 (calling *Herczog* a “progressive decision”).

44. See *In re Estate of Bir*, 188 P.2d 499, 502 (Cal. Ct. App. 1948) (reversing the trial court’s order that only the first wife could be recognised as decedent’s legal widow).

45. *Ibid.* at 502 (“The decision of the trial court was influenced by the rule of ‘public policy’; but that rule, it would seem, would apply only if decedent had attempted to cohabit with his two wives in California.”).

46. See Andrew Koppelman, “Same-Sex Marriage and Public Policy: The Miscegenation Precedents” (1996) 16 *Quinnipiac Law Review* 105, 109, 126.

on 10 June 2003, and returned immediately to live in California. This case actually may not be so hypothetical. Of the more than 590 gay and lesbian couples who obtained marriage licenses in Toronto during the first nine weeks following the *Halpern* decision, more than 100 were Americans who had crossed the border to marry.⁴⁷ If the marriage of our hypothetical California same-sex couple breaks down, where can they seek a divorce? In California, in Ontario, or elsewhere? Let us examine each of these possibilities in turn.

a. *California*. The California Family Code confers jurisdiction to enter a judgment of dissolution of marriage on the Superior Court of the county in which one of the parties to the marriage has been a resident for three months and a resident of the state for six months immediately preceding the filing of the petition.⁴⁸ The United States Supreme Court has interpreted the word “resident” in such statutes to mean “domiciliary” for the purpose of requiring sister states to recognise another state’s *ex parte* divorce judgment under the Full Faith and Credit Clause of the US Constitution.⁴⁹

Assume that the same-sex couple in our hypothetical case satisfies California’s domicile and residence requirements. Is that sufficient to enable them to obtain a divorce in California? Perhaps not. The divorce court’s jurisdiction is not merely to award support or divide the marital property—although making orders touching those matters normally accompanies a divorce action—its jurisdiction is first and foremost to dissolve the parties’ marriage.⁵⁰ The marriage that is sought to be dissolved took place in Ontario, where it was valid. Had the spouses been Ontario residents who obtained a divorce there, their Ontario divorce unquestionably would have dissolved their marriage,⁵¹ and would have been recognised to have done so throughout Canada.⁵² Must the California court necessarily recognise the validity of the Ontario same-sex marriage in order to have power to dissolve it, thereby restoring the spouses to the status of unmarried persons?

Even if the California court is logically required to recognise the marriage for this limited purpose (a point I will examine below), would its doing so violate California’s public policy against same-sex marriage? Since 1872 the California Civil Code has contained a statutory choice of law rule initially providing that “[a]ll marriages contracted

47. See Clifford Krauss, “Now Free to Marry, Canada’s Gays Say, ‘Do I?’” *New York Times* 31 August 2003 s 1, at 1.

48. See Cal. Fam. Code s 2320 (West 1994) (“A judgment of dissolution of marriage may not be entered unless one of the parties to the marriage has been a resident of this state for six months and of the county in which the proceeding is filed for three months next preceding the filing of the petition.”).

49. *Williams v North Carolina*, 325 U.S. 226, 229–30 (1945) (citations omitted):

Under our system of law, judicial power to grant a divorce...jurisdiction, strictly speaking...is founded on domicile. The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it. Domicil implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance. The domicil of one spouse within a State gives power to that State, we have held, to dissolve a marriage wheresoever contracted.

See also U.S. Const. art. IV, s 1 (text quoted above n 35).

50. See Cal. Fam. Code s 2300 (West 1994) (“The effect of a judgment of dissolution of marriage when it becomes final is to restore the parties to the state of unmarried persons.”).

51. See Divorce Act, RSC, ch. 3 (2d Supp.), s 14 (1985) (Can.) (effective 1986) (“On taking effect, a divorce granted under this Act dissolves the marriage of the spouses.”).

52. *Ibid.* s 13 (“On taking effect, a divorce granted under this Act has legal effect throughout Canada.”).

outside this state which would be valid by the laws of the country in which the same were contracted, are valid in this state.”⁵³ The current statement of the rule substitutes the term “jurisdiction” for “country” but otherwise remains essentially the same.⁵⁴ Both texts omit any reference to the usual US “public policy” exception to marriage recognition which permits the forum to refuse to recognise marriages validly contracted elsewhere which violate its local public policy, such as marriages that would be polygamous or incestuous under forum law.⁵⁵ In the early twentieth century, the public policy exception was thought to be strongest when applied to couples whose planned marriage was forbidden by the law of their common domicile and who traveled to another state or country where the marriage was permitted, planning to return home following the ceremony and to resume residence there as a married couple.⁵⁶ In 1912, the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) promulgated the Uniform Marriage Evasion Act, which declared such marriages void. No national consensus could be mustered in support of this approach, however, and NCCUSL formally withdrew the Act in 1943.⁵⁷

A different conflict of laws approach has been taken to the recognition of the incidents, as distinguished from the status, of marriage. Scholars both in the US⁵⁸ and Canada⁵⁹ have argued that the state or country where the incident is sought to be enjoyed, rather than the place where the marriage was performed, should provide the governing law. This was the approach taken by the court in *Estate of Bir*,⁶⁰ which, as we have seen, recognised the right of two wives in a polygamous marriage validly contracted in India to claim their intestate share of their deceased husband’s California property. In doing so, the appellate court rejected the trial court’s reliance on California’s public policy against polygamous marriages as a basis for denying enforcement of the financial incidents of that marriage. Under this analysis, divorce is itself considered to be one of the incidents of marriage.⁶¹ California’s statutory marriage recognition choice of law rule, read literally and without qualification by the public policy exception, would permit a California court to recognise the parties’ Ontario marriage for any purpose. If so, one might argue, surely that rule would permit a California divorce court to recognise the marriage for the limited incidental purpose of dissolving it.

53. See Cal. Civ. Code s 63 (Dering 1872) (current version at Cal. Fam. Code s 308 (West 2003)) (based on 1850 Cal. Stat. ch. 140 s 5, reprinted in Compiled Laws of the State of California, 1850–1853, ch. XXXV s 5 (S. Garfiele, 1853) (“All marriages contracted without this state which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places within this state.”)).

54. See Cal. Fam. Code s 308 (“A marriage contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state.”).

55. See Patrick J. Borchers, “*Baker v General Motors*: Implications for Interjurisdictional Recognition of Non-Traditional Marriages” (1998) 32 *Creighton Law Review* 147, 155 (tracing the origin of this place-of-celebration rule in the United States to Joseph Story’s *Commentaries on the Conflict of Laws*, first published in 1834).

56. See Charles W. Taintor, Jr., “Marriage in the Conflict of Laws” (1956) 9 *Vanderbilt Law Review* 607, 629–30.

57. *Ibid.* at 629 & n 116 (noting that only eleven states adopted this provision, while only five states adopted the entire Act).

58. *Ibid.* at 614–16 (citing cases from England, Canada and the United States).

59. See Peter D. Maddaugh, “Validity of Marriage and the Conflict of Laws: A Critique of the Present Anglo-American Position” (1973) 23 *University of Toronto Law Journal* 117, 142–45.

60. See *In re Estate of Bir*, 188 P.2d 499, 502 (Cal. Ct. App. 1948).

61. See Taintor, above n 56, at 615–16; Maddaugh, above n 59, at 142.

Even if this argument might have prevailed when *Bir* was decided in 1948, however, two subsequent statutory enactments have imposed obstacles that must be overcome before reaching that conclusion today. First, in 1977, the California legislature amended the definition of marriage to limit the persons who may be married in the state to “a man and a woman.”⁶² Secondly, in 2000, California voters adopted an Initiative Measure which provides that “[o]nly marriage between a man and a woman is valid or recognized in California.”⁶³ As codified, the initiative measure now appears as Family Code section 308.5, immediately following section 308, which contains the unaltered choice of law rule. Is there a conflict between the two provisions? If so, which should prevail in our hypothetical California same-sex divorce case—the more recent and specific prohibition in section 308.5, or the general language of section 308?

To answer this question, it is necessary to consider the effect of the Federal Defense of Marriage Act (DOMA), a statute enacted by Congress and signed by President Clinton in 1996⁶⁴ during the height of the mainland debate over the impact in sister states of the possible legalisation of same-sex marriage in Hawaii. Between 1993, when the Hawaii Supreme Court held that denial of marriage licenses to same-sex couples violated the state constitution and 1997, when the voters of Hawaii approved a constitutional amendment affirming the legislature's power to limit marriage to opposite sex couples,⁶⁵ debate over whether the Full Faith and Credit clause of the Federal Constitution would require sister states to recognise same-sex marriages reached “epidemic proportions.”⁶⁶ One of DOMA's major purposes was to relieve other states of the possibility that the Full Faith and Credit clause would be given such effect.⁶⁷ On this point, the coverage of DOMA is limited to the scope of the Full Faith and Credit clause: both apply only to a state of the United States, a territory or possession of the United States, or to an Indian tribe.⁶⁸ Neither the Full Faith and Credit clause itself, nor DOMA, has any application to our hypothetical California divorce case because the same-sex marriage the parties seek to dissolve took place in Ontario, which as a Canadian province is not subject to the Full Faith and Credit clause.

In the wake of DOMA, a majority of states enacted similar provisions, called “mini-DOMAs,” declaring their local public policy against same-sex marriages. California's Initiative Measure, section 308.5, is one of these provisions. The immediate question is whether section 308.5 applies more broadly than DOMA to prohibit recognition of same-sex marriages performed in other nations.

62. See Cal. Fam. Code § 300 (West 1994) (“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.”) (as amended by 1977 Cal. Stat. ch. 339 § 1).

63. See Cal. Fam. Code § 308.5 (West 2003). (Section 1 of Proposition 22 reads “This act may be cited as the ‘California Defense of Marriage Act.’”).

64. See Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 USC § 7 and 28 USC § 1738C (2000)). DOMA provides in relevant part that “[n]o 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.” 28 USC § 1738C.

65. See above nn 9–10.

66. See Borchers, above n 55, at 148.

67. *Ibid.* at 150.

68. See above n 64.

In interpreting statutes, California courts attempt to ascertain the intent of the lawmakers in order to effectuate the statutory purpose, and they use the same approach in construing initiative measures.⁶⁹ To discover the intent of the voters who enacted the initiative measure, courts typically look to the arguments pro and con set forth in the voter information guide distributed as part of the election materials.⁷⁰ The Voter Information Guide accompanying the 7 March 2000, primary election does not mention marriages performed in foreign countries. The opposing arguments by proponents and opponents of the initiative measure, Proposition 22, are limited to discussing marriages performed in other states of the United States.⁷¹ For example, the rebuttal to the argument against Proposition 22 stated in part that: "The truth is, unless we pass Proposition 22, legal loopholes could force California to recognize 'same-sex marriages' performed in other states."⁷²

The language of Proposition 22 is strikingly narrower than that contained in most of the mini-DOMAs enacted in other states. An examination of 30 such provisions enacted between 1994 and 1998⁷³ identifies their common motivation as a reaction to the same-sex marriage debate involving Hawaii, and notes that 26 of the 30 statutes "include explicit language that foreign marriages between persons of the same sex will not be recognized."⁷⁴ The broadest provision is that of Florida, which prohibits recognition of same-sex marriages entered into "in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location."⁷⁵ As of 2003, only two of the mini-DOMAs are expressly limited to marriages performed in another state.⁷⁶ Moreover, five states with statutory marriage recognition choice of law provisions substantially similar or identical to California's Family Code section 308⁷⁷ made clear in the enactment of their mini-DOMAs that these earlier provisions do not apply to same-sex marriage.⁷⁸ California's provision does not contain such an express

69. See *Day v City of Fontana*, 19 P.3d 1196, 1198-99 (Cal. 2001).

70. *Ibid.* at 1200-04.

71. California Voter Information Guide, 7 March 2000 Primary Election 50-55, 132 (Cal. Secretary of State Bill Jones, 2000). The analysis by the legislative analyst, which is provided for all initiative measures, provides the following "background" to the measure: "Under current California law, 'marriage' is based on a civil contract between a man and a woman. Current law also provides that a legal marriage that took place outside of California is generally considered valid in California. No state in the nation currently recognizes a civil contract or any other relationship between two people of the same sex as a marriage." *Ibid.* at 51.

72. *Ibid.* at 53 (Rebuttal to Argument Against Proposition 22, signed by Dana S. Kruckenberg, Amy Williams, and Star Parker).

73. See David Orgon Coolidge & William C. Duncan, "Definition or Discrimination? State Marriage Recognition Statutes in the 'Same-Sex Marriage' Debate" (1998) 32 *Creighton Law Review* 3, 5 (noting that these statutes "originated as a spiral of responses to a sequence of three events in Hawaii").

74. *Ibid.* at 12.

75. Fla. St. Ann. s 741.212(1) (West 2003) (effective 5 June 1997).

76. Okla. Stat. Ann., tit. 43, s 3.1 (West 1996) (effective 1 January 1997) ("A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage."); W. Va. Code Ann. s 48-2-603 (West 2003) (effective 1 September 2001) ("A 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 the other state, territory, possession, or tribe, or a right or claim arising from such relationship, shall not be given effect by this state.");

77. See above nn 53-54 and accompanying text.

78. Ark. Code Ann. s 9-11-107 (West 2003); Kan. Stat. Ann. s 23-115 (2002); N.D. Cent. Code s 14-03-08 (2003); S.D. Codified Laws s 25-1-38 (2003); Wash. Rev. Code Ann. s 26.04.020 (West 2003).

statement of intent to amend section 308. Instead, the text of Family Code section 308.5, read in light of its purpose as stated in the Voter Information Guide, is limited to declaring that California will not be bound to recognise a sister state law extending the right to marry to same-sex couples. This limitation is hardly surprising, since California, like other states, is free to grant or deny recognition to foreign country same-sex marriages simply by invoking its local public policy on a case-by-case basis without fear of contrary direction from the Full Faith and Credit clause.⁷⁹ There was, and is, no need to mandate protection against a non-existent constitutional compulsion to recognise foreign country marriages.

How, then, are Family Code sections 308 and 308.5 to be read together? The broadest interpretation might be to join the two sections together to form a single provision, somewhat as follows: "Only a marriage between a man and a woman contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid or recognized in California." Even this expansive reading, however, would not prohibit a California court from granting a divorce to a California same-sex couple who married in Ontario. This result follows from the distinction mentioned earlier⁸⁰ between recognition of the status of the marriage for purposes of its performance in California and recognition of the incidents of that status upon its dissolution. Both the Ontario court in *Halpern*, and the Massachusetts court in *Goodridge* listed examples of the benefits that flow from marriage.⁸¹ A California same-sex couple married in Ontario could not expect to be granted these benefits while living together as a married couple in California, because to extend that recognition would be to treat the marriage as valid. On the other hand, if a California court, in adjudicating the couple's claims against each other in the process of granting them a divorce, confirmed ownership to property in one or the other, its decision would not constitute recognition of the marriage, but merely an enforcement of its financial incidents.

It should be evident that what is ultimately at stake here is the affirmation of the same-sex couple's right to claim their inclusion in the public institution of marriage. That is what sections 308 and 308.5, if expansively read together, prohibit at least as applied to a same-sex marriage performed in a sister state.

A narrower reading, however, is possible in the case of same-sex marriages performed in foreign countries. This interpretation would leave section 308 as it stood prior to the adoption of section 308.5 and would limit the latter provision to the purposes for which it was enacted. Thus, both section 308.5 and the earlier amendment to California's definition of marriage⁸² were designed to make clear that same-sex marriages can neither be performed in California, nor, if contracted in sister-states, be recognised as valid in California. Neither provision expressly prevents a California

79. See Larry Kramer, "Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception" (1997) 106 *Yale Law Journal* 1965, 1987-90 (arguing that although DOMA and the state mini-DOMAs are unconstitutional as a violation of the Full Faith and Credit Clause, which he reads to prohibit "a state's refusal to apply another state's law, otherwise applicable under forum choice-of-law rules, on the ground that it promotes a policy the forum finds repugnant," this objection does not apply to international cases).

80. See above nn 58-60.

81. *Halpern*, 65 OR (3d) at paras 102-07, pp. 188-90; *Goodridge*, 798 N.E.2d at 955-57.

82. See Cal.Fam.Code s 300 (West 1994) (text quoted above n 62).

court from dissolving a same-sex marriage contracted in a foreign country. To the extent that the divorce court's jurisdiction must analytically rest on the prior existence of a marriage, it is sufficient for the court to refer to Ontario law to establish the validity of the marriage there. Since the parties do not seek to live together as a married couple in California, or to enjoy the benefits of marriage there, California's public policy opposing same-sex marriage is not offended by the divorce court's issuance of a decree of dissolution any more than the state's public policy against polygamy was offended by the probate court's grant of property rights to the two widows in *Estate of Bir*.⁸³ True, the marriage had previously been terminated by death in *Bir*, whereas the California court is itself being called upon to dissolve the Ontario marriage in our hypothetical case. But the court's action in doing so actually furthers California's local public policy against same-sex marriage since its judgment will put to rest any claim that the parties may assert to cohabit in California as a married couple. Their right to cohabit in California as an unmarried couple is unchallenged.⁸⁴

A similar conceptual problem faced the California Supreme Court earlier, in the case of *Hudson v Hudson*,⁸⁵ when it had to decide whether to grant alimony in the absence of an existing marriage. The parties in *Hudson* separated in California on 6 April 1957, when the husband left the wife and went to Idaho, where he obtained an *ex parte* divorce on 19 June 1957. In the interim, on 22 April 1957, the wife filed a divorce action in California, seeking temporary and permanent alimony. The husband appeared in the California action, tendered his Idaho decree, and objected to the court's jurisdiction over the wife's action. He contended that the Idaho judgment, which was entitled to Full Faith and Credit in California, had preempted the court's power to dissolve the marriage a second time. He argued further that the California Civil Code required an existing marriage as a jurisdictional prerequisite for the award of temporary alimony. Justice Traynor held that jurisdiction in California was proper. He reasoned that at the time the wife filed her action, there was an existing marriage. Although under the US Supreme Court's doctrine of divisible divorce⁸⁶ Idaho had jurisdiction to dissolve the marriage, it lacked jurisdiction to terminate the wife's right to claim alimony without personal jurisdiction over her. Therefore, Traynor held, "if the Idaho decree dissolved the marriage, her prayer for divorce is moot and only her prayer for permanent alimony remains to be adjudicated."⁸⁷ To defendant's further argument that a California court could grant alimony only in an action for divorce, Traynor cited an 1869 case holding that the trial court had general equity powers to grant alimony in cases aside from those specifically provided for by statute.⁸⁸ He

83. See *In re Estate of Bir*, 188 P.2d 499, 502 (Cal. Ct. App. 1948).

84. See 1975 Cal. Stat. ch. 877 s 1 (codified as amended at Cal. Penal Code s 286 (West 1999 & Supp. 2003)) repealing criminal laws prohibiting sodomy and oral copulation between consenting adults). This result now follows in all states, pursuant to the decision in *Lawrence v Texas*, 123 S. Ct. 2472 (2003). See above n 8.

85. 344 P.2d 295 (Cal. 1959).

86. See *Estin v Estin*, 334 US 541, 549 (1948) ("The result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony. It accommodates the interests of both Nevada and New York in this broken marriage by restricting each State to the matters of her dominant concern.").

87. See *Hudson*, 344 P.2d at 299.

88. *Ibid.* at 300 (citing *Galland v Galland*, 38 Cal.265, 267-68 (1869)).

concluded that “California has a dominant interest in the well-being of her domiciliaries, and the courts of this state are open to adjudicate their support rights following an *ex parte* divorce.”⁸⁹

Hudson makes the larger point that, once a marriage has broken down, divorce is a necessary and wholesome device for sorting out the conflicting claims of the adults who initially formed the relationship, settling property disputes, clarifying title to land, and, in cases where there are children, providing for their future custody and support.⁹⁰ The configuration of California’s marriage and divorce statutes prior to the introduction of divisible divorce was not shaped with migratory divorce in mind. Accordingly, the pre-existing laws had to be reinterpreted to accommodate the new legal regime, even if that required allowing a court to grant alimony to a previously divorced spouse. Similarly, the existing pattern of divorce laws was not drafted with same-sex marriage in mind. Yet the same need exists to provide a legal remedy in international cases where a same-sex marriage has broken down, even if that requires allowing a court to grant a divorce to a couple who could not have been married within the court’s jurisdiction.

b. *Ontario*. Now suppose that our California same-sex couple, instead of seeking a divorce at home, decided to return to Ontario, where the marriage was performed, to try to obtain a divorce there. In order to file a divorce proceeding in any Canadian province, at least one spouse must have been “ordinarily resident” in the province for at least one year immediately prior to the commencement of the proceeding.⁹¹ Whether the spouse who establishes an ordinary residence in Ontario also must show an intention to remain there is less clear. Jean-Gabriel Castel and Janet Walker, in their treatise on Canadian conflict of laws, indicate that although the term “residence” is not the same as the term “domicile,” since an individual may have more than one residence,⁹² for the purpose of establishing divorce jurisdiction “an individual is considered to have only one ordinary residence at or during a given time.”⁹³ In determining divorce jurisdiction, the Canadian courts reportedly have followed the interpretation of the words “ordinarily resident” in English cases construing the Matrimonial Causes Act of 1950, and courts in both countries have adopted the “real home” test of ordinary residence.⁹⁴ Thus, it may be the case that unless at least one of the California spouses is prepared to relocate to Ontario, no divorce may be obtained there.

If this conclusion is accurate, the argument for sustaining California’s jurisdiction to grant a divorce to our same-sex couple is strengthened. California’s governmental inter-

89. *Ibid.* at 300-01.

90. See Lawrence Friedman, “Rights of Passage: Divorce Law in Historical Perspective” (1984) 63 *Oregon Law Review* 649, 662-63.

91. See above n 27 and accompanying text.

92. See Jean-Gabriel Castel & Janet Walker, *Canadian Conflict of Laws* (Makham, Ontario: Butterworths Publishing Co., 2003 and Supplement July 2003) s 4.17.

93. *Ibid.* at s 4.17.b.

94. *Ibid.*

“The inference is strong that the inquiry must be directed at finding the one true home among several places of residence. This element of exclusivity makes the inquiry resemble that which is carried on in a determination of domicile; the mental element or the intention of permanency (be it to remain in the case of a new place of residence or to return in the case of a place where roots have already been established) becomes paramount where the test is ‘what is the individual’s real home?’”

est in regulating the family relationships of her domiciliaries extends to providing a procedure that will enable them to regularise their status, just as in the *Hudson* case that interest extended to providing a procedure for the wife to press her alimony claim following her husband's *ex parte* divorce.⁹⁵ If no such relief is available in the country where the same-sex couple contracted the marriage, the country of their common domicile should step in to provide a remedy. As we have seen, even if the parties married in Ontario in order to evade the contrary marriage law of their common domicile, the policy against recognition of such evasive marriages has been considerably weakened and should not prevent the court from terminating the disfavored status.⁹⁶

c. *Nevada*? Unhappy US spouses began resorting to Nevada, known as the country's most prominent "divorce mill,"⁹⁷ in the 1920s through the 1940s to seek release from marriage bonds that could not be untied conveniently under the restrictive divorce laws of their home states. In these cases, unlike the same-sex divorce cases, the paramount issue was choice of law. Based on two mandatory requirements—six weeks actual residence in the state by one spouse and testimony establishing domicile—which together conferred both subject-matter jurisdiction over the marriage and a constitutional basis for applying forum law, Nevada's unilateral *ex parte* divorces⁹⁸ and her bilateral decrees entered with participation of the other spouse⁹⁹ flourished under the protection of US Supreme Court interpretation of the Full Faith and Credit clause until the nation-wide adoption of no-fault divorce laws in the 1970s and 1980s rendered migratory divorce largely unnecessary.¹⁰⁰ Although the nation's mores about divorce have changed, Nevada's liberal divorce laws and procedures have remained the same. The Nevada voters, however, adopted a mini-DOMA as part of the state constitution, effective 22 November 2002,¹⁰¹ which would create the same problems of interpretation considered earlier. At any event, given California's position as the pioneer in the "no fault divorce revolution,"¹⁰² it would be an embarrassingly regressive

95. See above n 90 and accompanying text.

96. See above nn 56–57 and accompanying text. But see Borchers, above n 55, at 157 (noting that "[e]ven without a 'marriage evasion' statute, courts have looked with less favor on marriages in states with very little connection to the parties, and entered into for the purpose of circumventing the domiciliary state's restrictions."). See also Maine Rev. Stat. Ann. tit. 19-A s 701(1) (West 2003) ("When residents of this State, with intent to evade this section and to return and reside here, go into another state or country to have their marriage solemnized there and afterwards return and reside here, that marriage is void in this State.").

97. See Lawrence Friedman, "A Dead Language: Divorce Law and Practice Before No-Fault" (2000) 86 *Virginia Law Review* 1497, 1504 (noting that "[t]hroughout much of the twentieth century, the divorce mill was Nevada."); see also Nelson Manfred Blake, *The Road to Reno: A History of Divorce in the United States* (New York: Macmillan Publishing Co., 1962) 152–59.

98. See *Williams v North Carolina*, 317 US 287 (1942) (requiring North Carolina to recognise a Nevada *ex parte* divorce obtained there on a showing of domicile by one party to the marriage).

99. See *Sherrer v Sherrer*, 334 US 343 (1948) (holding that husband who had appeared in wife's Florida divorce proceeding and had the opportunity to litigate the court's jurisdiction was barred from relitigating these matters in a subsequent Massachusetts case he brought against the former wife).

100. See Herma Hill Kay, "From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century" (2000) 88 *California Law Review* 2017, 2039 & n 134.

101. See Nev. Const. art. 1 s 21 ("Only a marriage between a male and female person shall be recognized and given effect in this state."). See also Nev. Rev. Stat. Ann. s 122.020 (Mitchie, 1998 Replacement Vol.) (defining the persons capable of marriage as "[a] male and a female person, at least 18 years of age, not nearer of kin than second cousins or cousins of the half-blood, and not having a husband or wife living, may be joined in marriage.").

102. See Friedman, above n 90, at 664.

move for the state now to be forced to reinvent migratory divorce for its married same-sex couples.

B. INTERSTATE OR INTERPROVINCIAL DIVORCE

How, if at all, will the situation upon divorce of a California same-sex couple planning to marry in Massachusetts in May 2004, or that of an Alberta same-sex couple who married in Ontario, British Columbia, or Quebec differ from that of our hypothetical California couple who married in Toronto in June 2003? In both cases, any attempt by the couple to procure a divorce in the place where the marriage was performed will encounter the same jurisdictional objections involving ordinary residence or domicile previously examined.¹⁰³ Accordingly, I will focus here on whether the same-sex couple can be divorced in their home state or province following a marriage elsewhere.

1. *Interstate divorce in California following a Massachusetts marriage.* A threshold barrier here is the 1913 Massachusetts Marriage Evasion statute which prohibits nonresidents from contracting marriages in Massachusetts that would be void if contracted in their home jurisdiction.¹⁰⁴ Since the California same-sex couple could not marry at home, this statute defers to their home state policy by refusing to permit them to marry in Massachusetts as well. The logic of *Goodridge* appears to foreclose resort to this statute. If the Massachusetts constitution prohibits refusing access to marriage to same-sex couples, how can that same constitution permit such refusal based on the differing marriage law of California? Note that the Massachusetts statute does not distinguish between same-sex couples based on their status as resident or nonresident: a non-resident couple from a state that permitted same-sex marriage could marry in Massachusetts. Rather, the distinction is drawn based on the substantive prohibition in the other jurisdiction's marriage law. But if Massachusetts denies the California couple a marriage license, it is not simply applying the other jurisdiction's law but rather imposing a prohibition created by its own law. It seems inconsistent with the reasoning of *Goodridge* to defer to a law the state deems unconstitutional simply because another jurisdiction takes a different view of the matter.

Even if this argument is accepted, however, and the California same-sex couple is allowed to marry in Massachusetts, a more difficult obstacle to their ability to obtain a divorce in California appears. This difficulty lies in the application of DOMA and California's mini-DOMA, the first a Federal statute authorising and the second a state statute requiring California to deny recognition to same-sex marriages performed in the state.¹⁰⁵ Once again, however, the text of the California provision is narrower than that of other similar statutes. For example, it does not provide, as the Georgia

103. See above nn 91-94 (ordinarily resident),—nn 97-100 (domicile) and accompanying text.

104. See MASS. GEN. L. ANN. § 11 (West Group 1998) ("No marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void."). See also above nn 56-57 and accompanying text.

105. See above nn 64-84 and accompanying text.

mini-DOMA does,¹⁰⁶ that “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.” Nor does it exclude, as some others do,¹⁰⁷ recognition of the incidents of marriage granted upon termination.¹⁰⁸ I would argue as a textual matter, therefore, that California is free to grant a dissolution of the Massachusetts marriage without violating Family Code section 308.5. Even apart from this argument, there remains the larger question of whether the mini-DOMAs—and DOMA itself—are constitutional in the interstate as distinguished from the international context. US conflicts scholars are divided on this point,¹⁰⁹ with Professor Kramer arguing that these provisions are unconstitutional, and with Professor Borchers taking the opposite view. Resolution of this dispute is beyond the scope of this paper, but it will surely be presented in the context of the Massachusetts ruling.

2. *Interprovincial divorce in Alberta following an Ontario marriage.* To avoid being forced into recognition of same-sex marriage, the Province of Alberta enacted the Adult Interdependent Relationships Act, effective 1 June 2003, which created the new status of an “adult interdependent relationship,” applicable to same-sex and opposite-sex non-marital conjugal relationships, while reserving the status of “marriage” for opposite-sex couples.¹¹⁰ Whether Alberta, considered the most conservative of Canadian provinces, would be required to grant a divorce to an Alberta couple married in Ontario is unclear. The issue may shortly become moot, however, for as Professor Bala¹¹¹ points out in his recent paper, Canada appears to be moving toward a national solution to same-sex marriage. The Government chose not to appeal the decision of the Ontario Court of Appeals in *Halpern* that held the *Charter* forbade denial of marriage to same-sex couples. Instead, it announced its support of same-sex marriage, and referred draft legislation to achieve that end to the Supreme Court of Canada for an opinion of its constitutional validity.¹¹² Since the federal government has jurisdiction over marriage, including defining the capacity to marry,¹¹³ a decision by the

106. See Ga. Code Ann. s 19-3-3.1(b) (West 2003):

No 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 any such marriage.

107. See, e.g. Minn. Stat. Ann. s 517.01(b) (West 2003) (“A marriage entered into by persons of the same sex, either under common law or statute, that is recognized by another state or foreign jurisdiction is void in this state and contractual rights granted by virtue of the marriage or its termination are unenforceable in this state.”).

108. See Coolidge & Duncan, above n 73, at 12 & nn. 66-67 (citing the Minnesota statute quoted above n 106 as well as those from six other states).

109. See Kramer, above n 79, at 1986-87; Borchers, above n 55, at 167-71; see also Scoles et al. above n 42, s13.19, at 574-76. Kramers's argument may also invalidate Mass. Gen L. Ann. s 11, see above n 104.

110. See Bala, above n 4, at 99-103.

111. *Ibid.* at 83-84.

112. *Ibid.* at 84-85 (noting that the *Draft Bill* contains two key provisions: “1. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others. 2. Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs.”).

113. *Ibid.* at 87-88.

Court upholding the *Draft Bill* would supersede Alberta's attempt to restrict marriage to opposite-sex couples. At the time Professor Bala's paper was published, the Court was expected to hear argument on the Reference by spring 2004 and he anticipated a decision by the end of 2004 or early 2005.¹¹⁴ The current government, however, may have lengthened that schedule by suggesting an additional question for the Court's consideration: whether a civil union bill would be a permissible alternative.¹¹⁵

II. LEGAL DIVORCE FOLLOWING CIVIL UNIONS AND DOMESTIC PARTNERSHIPS WITHIN THE UNITED STATES

The most comprehensive and recent US statutory provisions creating marriage-like relationships for same-sex couples were enacted in Vermont in 2000 and in California in 2003.¹¹⁶ Both Vermont's Civil Union Act¹¹⁷ and California's Domestic Partner Rights and Responsibilities Act¹¹⁸ expressly differentiate the relationships they create from marriage. Both statutes also create provisions for terminating the same-sex relationships they authorise. The Vermont Act simply confers jurisdiction to dissolve civil unions upon the family court, which also dissolves marriages, and instructs the court to use the same procedures and afford the same substantive rights and obligations in both sets of cases.¹¹⁹ The California Act tracks the Family Code by providing two procedural avenues for ending a domestic partnership: a dissolution procedure¹²⁰ and a

114. *Ibid.* at 86.

115. See Campbell Clark and Kim Lunman, "Cabinet may broaden same-sex reference" *Toronto Globe & Mail* 10 January 2004, at A8 (quoting Justice Minister Irwin Cotler). See also below n 187.

116. See Vt. Stat. Ann. tit. 15, ss 1201-07 (2002); Domestic Partner Act, above n 16. The Act was signed by Governor Gray Davis on 19 September 2003 at a ceremony held at the San Francisco Lesbian Gay Bisexual Transgender Community Center. See Simon, above n 16.

117. See Vt. Stat. Ann. Tit. 15, s 1201(2) & (4) ("Civil union" means that two eligible persons have established a relationship pursuant to this chapter, and may receive the benefits and protections and be subject to the responsibilities of spouses."); ("Marriage" means the legally recognized union of one man and one woman.).

118. See Domestic Partner Act, above n 16, s 1(c) ("This act is not intended to repeal or adversely affect any other ways in which relationships between adults may be recognized or given effect in California, or the legal consequences of those relationships, including, among other things, civil marriage, enforcement of palimony agreements, enforcement of powers of attorney, appointment of conservators or guardians, and petitions for second parent or limited consent adoption."). For good measure, the California Act also disclaims any intent to affect Proposition 22, California's mini-DOMA. See *ibid.* s 4(j) ("This section does not amend or modify any provision of the California Constitution or any provision of any statute that was adopted by initiative.").

119. See Vt. Stat. Ann. tit.15, s 1206 ("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.").

120. See Domestic Partner Act, above n 16, s 8(d):

"The superior courts shall have jurisdiction over all proceedings relating to the dissolution of domestic partnerships, nullity of domestic partnerships, and legal separation of partners in a domestic partnership. The dissolution of a domestic partnership, nullity of a domestic partnership, and legal separation of partners in a domestic partnership shall follow the same procedures, and the partners shall possess the same rights, protections, and benefits, and be subject to the same responsibilities, obligations, and duties, as apply to the dissolution of marriage, nullity of marriage, and legal separation of spouses in a marriage, respectively, except as provided in subdivision (a) [relating to termination of domestic partnerships, see below n 121], and except that, in accordance with the consent acknowledged by domestic partners in the Declaration of Domestic Partnership form, proceedings for dissolution, nullity, or legal separation of a domestic partnership registered in this state may be filed in the superior courts of this state even if neither domestic partner is a resident of, or maintains a domicile in, the state at the time the proceedings are filed."

termination procedure.¹²¹ As in Vermont, the California Act grants jurisdiction to the Superior Court over the dissolution of domestic partnerships and similarly instructs the court to follow the procedures and enforce the same rights and responsibilities applicable to the dissolution of marriage. The termination procedure is modeled after the procedure set forth in the Family Code for Summary Dissolution of Marriage, applicable to uncontested proceedings where the marriage is of short duration (five years or less), childless, and where the parties own no real property and only a small amount of community personal property (\$25,000 or less), owe less than \$4000 of outstanding debt, and waive any rights to spousal support.¹²² The termination of a domestic partnership is an extra-judicial proceeding in which both partners file a Notice of Termination with the California Secretary of State, which becomes effective six months after the date of filing. The termination has the same effect as the entry of a judgment of dissolution of a domestic partnership.¹²³

A. DISSOLUTION OF VERMONT CIVIL UNIONS

How does a same-sex couple who entered into a civil union in Vermont get their relationship dissolved? Once again, as in the situation of the Ontario same-sex marriage, the domestic case—that of a same-sex couple from Vermont who entered into a Vermont Civil Union—seems easily resolved, while the conflicts problem—that of a couple domiciled elsewhere who came to Vermont to form a civil union—is quite complex. Each will be examined briefly in turn.

1. *Formation and dissolution of Civil Union at home, enforcement abroad.* Assume a Vermont couple enters into a civil union in Vermont and later seeks a dissolution there. Like other states in the United States, Vermont requires both residence and domicile to establish jurisdiction to grant a divorce. The statutory requirement is that either party to the marriage must have been a resident of the state for six months before a complaint may be filed and for one year before the divorce decree may be entered.¹²⁴ The domicile requirement has been supplied by the courts.¹²⁵ Presumably, our hypothetical Vermont same-sex couple can meet both requirements. Vermont's list of grounds for divorce¹²⁶ is a mixture of fault¹²⁷ and no-fault grounds.¹²⁸ The no-fault ground requires six months separation and a finding "that the resumption of

121. See *ibid.* s 8(a) ("A domestic partnership may be terminated without filing a proceeding for dissolution of domestic partnership by the filing of a Notice of Termination of Domestic Partnership with the Secretary of State pursuant to this section, provided that all of the following conditions exist at the time of the filing: [ten conditions are listed in s 8 (a)(1)-(10)]").

122. See Cal. Fam. Code ss 2400-06 (West 1994) (the dollar amounts specified are adjusted each biennium to reflect changes in the value of the dollar and in the California Consumer Price Index).

123. See Domestic Partner Act, above n 16, s 8(b).

124. See Vt. Stat. Ann. tit. 15, s 592 (2002).

125. See *Walker v Walker*, 200 A.2d 267, 269 (Vt. 1964) ("In divorce matters in this jurisdiction, domicile is defined as a place where a person lives or has his home, to which, when absent, he intends to return, and from which he has no present purpose to depart").

126. See Vt. Stat. Ann. tit. 15, s 551 (2002).

127. *Ibid.* s 551(1) (adultery), (2) (imprisonment for three or more years), (3) ("intolerable severity in either party"), (4) (willful desertion or seven years' absence), (5) (failure to support, having the ability to do so), (6) (incurable insanity).

128. *Ibid.* at s 551(7) (six months separation, plus finding "that the resumption of marital relations is not reasonably probable").

marital relations is not reasonably probable.”¹²⁹ The list of fault grounds includes one—called “intolerable severity”—¹³⁰ that may seem more malleable than the others, but which traditionally has been construed narrowly.¹³¹ Even though it requires a six month waiting period, the separation ground is probably safest.

An immediate problem that arises in the Vermont domestic case is similar to the one that confronted the California court with respect to the same-sex couple who married in Ontario: is there a “marriage” to be dissolved here? Some tension appears to exist between Vermont’s divorce provisions, which (as in California) confer jurisdiction on the court to entertain a “complaint for divorce . . . brought if either party to the marriage” has resided within the state for a specified time,¹³² and its Civil Union Act, which confers jurisdiction on the family court “over all proceedings relating to the dissolution of civil unions.”¹³³ This apparent conflict should not be difficult to resolve. The Civil Union Act, the more recent of the two statutory enactments, should simply be interpreted to have enlarged the jurisdiction of the Vermont divorce court to encompass both complaints for divorce and proceedings to dissolve civil unions. Such an interpretation would be consistent with the policy underlying the Civil Union Act, which is to create an alternative form of relationship distinct from, but parallel to, marriage.

2. *Civil Union formed abroad in Vermont, dissolution either abroad or at home.* So far, so good. Now comes the hard part: that of the same-sex couple from outside Vermont—say from Connecticut—who enter into a civil union in Vermont and then want to have the relationship dissolved. Let us consider three possible jurisdictions that might be available: first, Vermont itself; secondly, another state (such as California) which has enacted a statute creating a status similar to the civil union legislation; and thirdly, another state without similar legislation where the couple, or one of them, resides. Let us begin with Vermont.

(a) *Vermont.* As we have seen, Vermont has empowered its family court to dissolve civil unions. In doing so, however, it has expressly retained “any residency requirements”¹³⁴ imposed under the divorce provisions. As noted above, these requirements¹³⁵ include six months residence within Vermont before the proceeding is commenced, and a full year before any decree may be entered, plus a showing of domicile. This appears to mean that at least one member of the civil union must be prepared to spend a year in Vermont in order to obtain a dissolution of the relationship there. Does it also mean that one of them must establish a domicile there? Arguably not: insofar as the domicile requirement rests on the United States Supreme Court’s constitutional holdings governing jurisdiction to dissolve a marriage, the requirement may not apply to the dissolution of a relationship, such as a civil union,

129. *Ibid.*

130. See above n 127.

131. See *Winslow v Winslow*, 251 A.2d 419, 421 (Vt. 1969) (“An unhappy marriage is not, without more, so severe in and of itself that jeopardy to health is an inevitable consequence.”).

132. See Vt. Stat. Ann. tit. 15, s 592 (2002).

133. See Vt. Stat. Ann. tit. 15, s 1206 (2002).

134. See *Ibid.*

135. See above nn 124–25 and accompanying text.

which by definition is not a marriage. Of course, there is nothing to prevent a Vermont court from interpreting the civil union provision to impose a jurisdictional domicile requirement as a matter of state law. Once again, however, the policy underlying the creation of the civil union as an alternative to marriage which nonetheless effectively confers upon same-sex couples the benefits and responsibilities of marriage—including access to the courts for purposes of the dissolution of their relationship—would seem to weigh against any such additional requirement. Such an interpretation would mean that the Connecticut same-sex couple could return to Vermont to have their civil union dissolved simply by meeting the residency requirements. Of course, spending a year in Vermont may not be convenient, or even possible, for one of the parties. It seems wise, therefore, to explore the remaining alternatives.

(b) *California*. The California Domestic Partnership Act that will become effective on 1 January 2005, contains a conflict of laws provision that does not appear in the Vermont Act, which might facilitate a California court's award of a dissolution to the Connecticut couple following a Vermont civil union. Section 9 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."¹³⁶

By its terms, section 9 applies to Vermont Civil Unions, but not to either Ontario, British Columbia, Quebec or (in 2004) to Massachusetts same-sex marriages.¹³⁷ Moreover, as we have seen, the California Act permits a same-sex couple who entered into a Domestic Partnership in California to file a proceeding for dissolution of the partnership there "even if neither domestic partner is a resident of, or maintains a domicile in, the state at the time the proceedings are filed."¹³⁸ Do these two provisions, read together, permit our Connecticut same-sex couple who entered into a civil union in Vermont to file dissolution proceedings in a California Superior Court without a showing of residence or domicile? Perhaps. But a bit of analytical work is required to reach that result.

As applied to same-sex couples who enter into a Domestic Partnership in California, the dissolution jurisdiction provision is in two parts. The first part requires same-sex couples who file a Declaration of Domestic Partnership form in California to consent to the jurisdiction of the California Superior Court in the event of dissolution, "even if one or both partners ceases to be a resident of, or to maintain a domicile in, this

136. See Domestic Partner Act, above n 16, s 9. A notewriter proposed the enactment of such a provision as compelled by California's progressive public policy toward homosexuals and same-sex couples. See Christopher D. Sawyer, Note: "Practice What You Preach: California's Obligation to Give Full Faith and Credit to the Vermont Civil Union" (2003) 54 *Hastings Law Journal* 727, 749.

137. The drafters of the Domestic Partner Act may have thought that recognition of marriages performed elsewhere was already covered by Cal. Fam. Code s 308, see above nn 53-54, or they may have been wary of running afoul of Cal. Fam. Code s 308.5, see above n 63. For a discussion of these two provisions, see above nn 53-84 and accompanying text.

138. See Domestic Partner Act, above n 16, s 8(d) (quoted above n 120).

state.”¹³⁹ The second part provides that a dissolution proceeding may be filed in the Superior Court in accordance with this consent “even if neither domestic partner is a resident of, or maintains a domicile in, the state at the time the proceedings are filed.”¹⁴⁰ These provisions confer jurisdiction on the Superior Court to dissolve a domestic partnership entered into in California based on the consent of the parties. Put in conflict of laws terms, these provisions, taken together, define the dissolution of a domestic partnership as an action *in personam*, rather than an action *in rem*. Unlike a divorce action, which requires subject matter jurisdiction over the marriage *res* normally conferred by the domicile of at least one party within the state, the dissolution of a domestic partnership may proceed by the parties’ submission to the court. But the California statute does not make this provision available to any same-sex couple. Instead, the consent provision must be filed at the time of the formation of the domestic partnership, rather than at the time of its dissolution. Read literally, only same-sex couples who have filed and registered their Declaration of Domestic Partnership form in California are permitted to rely on their written consent set out there for purposes of obtaining jurisdiction for dissolution of the partnership without regard to subsequent domicile or residence in the state.

This is the point at which the meaning of section 9 becomes critical. A broad interpretation of section 9 might overcome the limiting effect of a literal reading of the consent provision. Section 9 extends recognition to participants in a Vermont civil union and treats them the same as partners in a California domestic partnership. One incident of a California domestic partnership is the ability to consent to jurisdiction *in personam* for purposes of dissolving the partnership. If the Vermont couple is prepared to consent to jurisdiction in California at the time of dissolution, why should their consent be rejected simply because their relationship—which is “substantially equivalent” to a California domestic partnership—was not formed in California? The statutory language of section 9 seems broad enough to encompass this interpretation.

What objections might be raised against such an interpretation? One that comes easily to mind is that California may not want to open the doors of its courts to entertain same-sex dissolution proceedings arising from relationships formed elsewhere. Given the large number of non-resident same-sex couples who have flocked to Vermont to enter into civil unions,¹⁴¹ California, a state whose public services are already strained for lack of adequate funding, may not wish to attract more business for its family courts. From this perspective, California has already done more than other states by facilitating dissolution proceedings in its courts by same-sex couples—many of whom may also turn out to be from other states—who have chosen to file their Domestic Partnership forms in the state.

Constitutional objections may exist, however, that prevent California from refusing to extend access to its courts to same-sex couples who are citizens or residents of other states. The Privileges and Immunities Clause¹⁴² is the major obstacle, although

139. See *Ibid.* s 5(c)(3).

140. See *Ibid.* s 8(d).

141. See Burge, above n 25 (pointing out that nearly 6,500 civil unions were performed in Vermont in the three years since the law went into effect, and that only about 1,000 of these involved Vermont residents).

142. See US Const. art. IV, s 2 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States”).

the Equal Protection Clause¹⁴³ may also play a role. The role played by the former clause in the conflict of laws remains obscure,¹⁴⁴ despite recent judicial efforts at clarification of its scope.¹⁴⁵ Still, the unifying policy underlying its prohibition against discrimination aimed at non-residents would tend to support an argument that California is required to extend this benefit to citizens and residents of other states if its denial is based simply on the fact of non-residency. In particular, since California has voluntarily extended recognition to civil union participants for other purposes, to deny them access to the California courts for purposes of dissolution seems unjustified.

(c) Connecticut. In discussing the situation of a non-resident same-sex couple who entered into a civil union in Vermont and later sought a dissolution in Connecticut, we finally encounter an actual, rather than a hypothetical, case. Plaintiff Glen Rosengarten and defendant Peter Downes entered into a civil union in Vermont on 31 December 2000. On 11 July 2001, Rosengarten filed a complaint in Connecticut seeking an order dissolving the civil union. At the time he filed the complaint, plaintiff alleged that he had been a resident of Connecticut for at least one year¹⁴⁶ and that defendant was a resident of New York.¹⁴⁷ The trial court judge, without holding a hearing, dismissed the action on his own motion for lack of subject matter jurisdiction. Plaintiff appealed. In response to an order from the Connecticut Appellate Court to articulate the reasons for his order, Judge Michael Shay indicated that neither the Connecticut statute nor the Practice Book which defines the court's jurisdiction mentions any power to dissolve civil unions.¹⁴⁸ Citing a Connecticut statute providing that "the current public policy of the state of Connecticut is now limited to a marriage between a man and a woman"¹⁴⁹ as well as DOMA, he concluded that "the legislature of a sister state cannot, in effect, make such a determination for the people of Connecticut."¹⁵⁰

Judge Shay's order was affirmed by the Appellate Court on 30 July 2002. The court noted, in an opinion written for a three judge panel by Judge Joseph P. Flynn, that plaintiff had not sought to invoke the trial court's jurisdiction under section 46b-1 (1) over dissolution of marriage, since a Vermont civil union is not a marriage, but had instead relied on the court's jurisdiction under section 46b-1 over "all such other matters within the jurisdiction of the Superior Court concerning children or family relations as may be determined by the judges of said court."¹⁵¹ Despite his recognition

143. See US Const. amend. XIV, s 1 ("nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.")

144. See Brainerd Currie and Herma Hill Schreter, "Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities" (1960) 69 *Yale Law Journal* 1323, reprinted in Brainerd Currie, *Selected Essays on the Conflict of Laws* (Durham: Duke University Press, 1963) 455-525.

145. See *Supreme Court of New Hampshire v Piper*, 470 US 274 (1985) (invalidating New Hampshire's residency requirement for admission to the bar).

146. See Conn. Gen. Stat. Ann. s 46b-44 (West 1995) (imposing residence requirement of one year in the state).

147. *Rosengarten v Downes*, 802 A.2d 170, 172 (Conn. App. Ct. 2002), appeal granted, 806 A.2d 1066 (Conn. 2002), appeal dismissed as moot (31 December 2002) (copy of Order dismissing appeal on file with the author). Defendant did not appear in the proceedings. *Ibid.* at 173.

148. *Ibid.* at 174.

149. *Ibid.*; see also Conn. Gen. Stat. Ann. s 45a-727a(4) (West 1993 and Supp. 2003).

150. *Rosengarten*, 802 A.2d at 174.

151. *Ibid.* at 175 (citing Conn. Gen. Stat. Ann. 46b-1 (West 1995 & Supp. 2003)). The matters listed in subsections (1) through (16) include, for example, dissolution of marriage, legal separation, annulment of marriage, alimony, support, custody and other similar matters. Subsection (17) is the catchall provision.

that plaintiff did not ask the trial court to terminate a marriage, Judge Flynn reasoned that plaintiff's argument implicitly required the court "to recognize the validity of the Vermont civil union as a matter concerning family relations," adding that "[i]f Connecticut does not recognize the validity of such a union, then there is no res to address and dissolve."¹⁵²

Judge Flynn's argument equates a civil union with a marriage for purposes of subject matter jurisdiction to dissolve the relationship. In doing so, it equates a marriage-like status with traditional marriage, and treats the state's interest in regulating the status of marriage as the same as its interest in affording same-sex couples the common benefits of legal marriage. This argument goes beyond what Vermont did in creating the civil union as an alternative to marriage. While Vermont extended "all the same benefits, protections, and responsibilities" to same sex couples "as are granted to spouses in a marriage"¹⁵³ it withheld from them the status of marriage. The Connecticut appellate court has also withheld from them the remedy of divorce, on the ground that to grant a dissolution of the civil union would be to admit the existence of marriage itself. This is contrary to what Vermont did. Instead, by conferring upon its Family Court the power to dissolve civil unions in addition to its existing power to dissolve marriages, the Vermont legislature preserved the distinction between the civil contract and the public status even at the point of dissolution.

At bottom, the Connecticut appellate court does not appear to be so much opposed to the idea of a dissolution of the civil union as it is unwilling even to consider that it could grant a dissolution without elevating the civil union to a marriage. As we have seen, this analytical problem is not insurmountable even where a state like California is asked to dissolve a foreign country same-sex marriage.¹⁵⁴ It should pose even less difficulty here, where the state creating the same-sex civil union has expressly refused to equate it with marriage.

The Connecticut appellate court is on firmer ground in its rejection of the plaintiff's attempt to bring his dissolution proceeding under the Superior Court's catchall jurisdiction over "family relations." Noting that the subsection (17) was added as part of a court merger bill joining the jurisdiction of the Connecticut Court of Common Pleas and the Superior Court, Judge Flynn reasoned that nothing in the legislative history of that merger supported such an expansive interpretation of the subsection.¹⁵⁵ If the legislative history indicates that the legislative intent was not to go beyond an effectuation of the court merger, this interpretation appears to be a reasonable, albeit limited, reading of the provision. This ground alone would have been sufficient to sustain the trial court's decision without going into the question of whether granting the relief requested would equate a civil union with a marriage.

Turning to plaintiff's argument that Connecticut owed Full Faith and Credit to the Vermont Civil Union Act, the appellate court agreed with the trial court's observation that the Vermont legislature could not legislate for the people of Connecticut. Judge Flynn reasoned that Vermont's action in creating a civil union did not have the

152. *Ibid.*

153. See Vt. Stat. Ann. tit.15, s 1204(a), s 1201 (2002).

154. See above nn 83-84 and accompanying text.

155. *Rosengarten*, 802 A.2d at 177.

“extraterritorial effect” of expanding Connecticut’s definition of a “family relations matter” to include jurisdiction over proceedings to dissolve civil unions.¹⁵⁶ Plaintiff had sought to bring recognition of the civil union within the marriage recognition choice of law rule discussed earlier,¹⁵⁷ arguing that “only if there is a strong public policy in Connecticut against recognition of civil unions should the court refuse to recognize the civil union and thus justify a refusal to act on its dissolution.”¹⁵⁸ Pointing out that Connecticut has a strong public policy against discrimination based on sexual orientation, plaintiff noted that a Connecticut citizen who entered into a marriage in Vermont could have the marriage dissolved by divorce in Connecticut, but a Connecticut citizen who entered into a civil union in Vermont would be required to move to Vermont and establish residency there to dissolve the civil union—a clear discrimination against homosexuals.¹⁵⁹ Moreover, plaintiff argued, Connecticut’s refusal to enact a mini-DOMA “signaled its willingness to recognize civil unions by refusing to state that as a matter of public policy it will refuse to recognize same sex marriages.”¹⁶⁰ Finally, as his third point designed to show that Connecticut policy was not opposed to civil unions, plaintiff cited the recent enactment of a statute permitting second parent adoptions for gay partners, a statute that overturned a contrary court decision.¹⁶¹

In rejecting these arguments, Judge Flynn convincingly established that there is another side to the statutes relied on by plaintiff—one which accompanied each step taken in Connecticut toward expanding the rights of homosexuals to be free of job discrimination and to adopt children with limiting statutory language designed to prevent these laws from being used as a springboard to seek a more general recognition of the gay lifestyle.¹⁶² Thus, in prohibiting employment discrimination against homosexuals, the legislature had cautioned that nothing in the statute shall be construed “(1) to mean the state of Connecticut condones homosexuality or bisexuality or any equivalent lifestyle . . . (4) to authorize the recognition of or the right of marriage between persons of the same sex, or (5) to establish sexual orientation as a specific and separate cultural classification in society.”¹⁶³ And in authorising second parent adoption by gay couples, the legislature had inserted into the statute a statement of “public policy re marriage” which reads: “It is further found that the current public policy of the state of Connecticut is now limited to a marriage between a man and a woman.”¹⁶⁴ Moreover, it had further cabined its action in passing the “gay adoption bill” by adding a section dispelling the notion that anything in the statute could be

156. *Ibid.* at 178.

157. See above nn 53–57 and accompanying text.

158. See Brief of Plaintiff-Appellant at 6, *Rosengarten v Downes*, 802 A.2d 170, 172 (Conn. App. Ct. 2002) (No. 22253) (citing Restatement (Second) of Conflict of Laws s 283(2) (1991)).

159. *Ibid.* at 7 (citing *Romer v Evans*, 517 U.S. 620, 635 (1996) for its holding that a state could not, consistent with the Equal Protection Clause, enact a statute that “classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.”).

160. *Ibid.* at 8–9.

161. *Ibid.* at 9 (citing *In re Adoption of Baby Z*, 724 A.2d 1035 (Conn. 1999)).

162. See *Rosengarten*, 802 A.2d at 179–82.

163. *Ibid.* at 179 (quoting Conn. Gen. Stat. Ann. s 46a-81r (West 1995)).

164. *Ibid.* at 180–81 (quoting Conn. Gen. Stat. Ann s 45a-727a(4) (West 1993 & Supp. 2003)).

"construed to establish or constitute an endorsement of any public policy with respect to marriage, civil union or any other form of relation between unmarried persons or with respect to any rights of or between such persons other than their rights and responsibilities to a child who is a subject of adoption as provided for in [these] sections."¹⁶⁵

In explaining these two legislative statements, Judge Flynn cited legislative history relevant to the enactment of the adoption bill to show that a number of legislators sought to prevent the Connecticut courts from using it as a stepping stone toward extending marriage-like rights to gay and lesbian couples as the Vermont court had done earlier with a similar statute.¹⁶⁶ Finally, Judge Flynn noted that the Connecticut legislature had failed to act on two bills introduced on 2 February 2002, one to authorize same-sex marriage, the other to create civil unions.¹⁶⁷ He concluded that "a civil union is not a family relations matter and, therefore, the court was correct in determining that it had no subject matter jurisdiction to dissolve the civil union under s46b-1 (17)."¹⁶⁸

Although the opinion in *Rosengarten* does not carry the authority of a decision by the state's highest court, which had granted an appeal to review the issue of subject matter jurisdiction only to dismiss the case as moot when plaintiff's death ended the relationship,¹⁶⁹ it nonetheless deserves careful attention as the first US court to address the question of a state's jurisdiction to dissolve a same-sex relationship entered into in another state.¹⁷⁰ From that perspective, the most striking aspect of the appellate court's opinion is that virtually all of its analysis is devoted to same-sex marriage, rather than to same-sex divorce. Yet the only issue before the trial court was whether plaintiff, a citizen and resident of Connecticut, could have access to the superior court to dissolve a legal relationship he contracted in Vermont. As he made clear in his brief,¹⁷¹ his only alternative was to move to Vermont and establish residence there as a prerequisite for obtaining the relief he sought. In its analysis of plaintiff's Full Faith and Credit claim, the court acknowledged his connection to Connecticut in these words:

"[w]e conclude that the plaintiff in the present case has a significant set of contacts with this state because he is a resident of Connecticut and has chosen a Connecticut court as the forum in which he seeks the dissolution of this civil union. . . . [O]ther than having entered the civil union in Vermont, neither party to the civil union has any other significant contact with that state."¹⁷²

165. *Ibid.* at 182 (quoting Conn. Gen. Stat. Ann s 45a-727b (West 1993 & Supp. 2003)).

166. *Ibid.* 181-82 (citing *Baker v State*, 744 A.2d 864 (Vt. 1999)).

167. *Ibid.* at 179 & n 6 (citing Conn. House Bills No. 5001 & 5002, both of which died in committee following a public hearing held on 11 February 2002).

168. *Ibid.* at 184.

169. The Supreme Court of Connecticut granted an appeal in *Rosengarten* limited to the question whether the superior court had subject matter jurisdiction over the case, see 806 A.2d 1066 (Conn. 2002). The appeal was subsequently dismissed as moot when plaintiff died. See Debra Rosenberg, "Breaking Up is Hard to Do" *Newsweek* 7 July 2003, at 44.

170. See Symeon C. Symeonides, "Choice of Law in the American Courts in 2002: Sixteenth Annual Survey" (2003) 51 *American Journal of Comparative Law* 1, 80 (citing *Rosengarten* as one of two cases involving same sex unions established in Vermont; the second case did not involve a dissolution of the civil union).

171. See Brief of Plaintiff-Appellant, above n 158, at 6-7.

172. See *Rosengarten*, 802 A.2d at 178-79.

The appellate court's analysis of the relative contacts of the parties and the transaction with the respective states for purposes of the Full Faith and Credit clause is correct as far as it goes. Its own statement of the test, however, omits the crucial role played in that analysis by the factor of state interests—a factor that was expressly mentioned by the authorities it cited. As initially phrased by the United States Supreme Court in *Allstate Insurance Co. v Hague*,¹⁷³ and as quoted in the *Rosengarten* opinion, the test to be satisfied by the forum state in order to be able to apply its own law rather than the law of another state is that the forum state “must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”¹⁷⁴ Connecticut's contacts with the plaintiff, as its citizen, and his status as a member of a civil union that he sought to dissolve, are the factors that create a state interest in the application of Connecticut law. But which Connecticut law is to be applied? The appellate court looked at the matter only from the perspective of marriage law, rather than divorce law, and concluded that since plaintiff and his same-sex partner could not have entered into any kind of marriage or marriage-like legal relationship in Connecticut that required dissolution, the trial court was correct to have dismissed his case. What the court did was to decide that Connecticut, having the constitutional right to apply its law, in effect had no law to apply.

If the court had focused on the question of divorce, and if it had kept clearly in mind that plaintiff did not ask to be allowed to cohabit in Connecticut with his partner in the Vermont civil union but rather to be freed of any such obligation, and—most significantly—if it had been able to put aside its obvious concern that to recognise the civil union for purposes of its dissolution might require it in future cases to recognise such unions for all purposes, it might have reached a different conclusion. But that outcome will have to await another day, and perhaps another court.

B. DISSOLUTION OF CALIFORNIA DOMESTIC PARTNERSHIPS

Since the new California Domestic Partnership law will not become effective until 1 January 2005, no cases have yet arisen under its dissolution provisions.¹⁷⁵ One aspect of those provisions is worth notice now, however, since it may serve as a model for other states considering the problems of same-sex divorce in the conflict of laws. The provision confers jurisdiction on the California Superior Courts over “proceedings for dissolution, nullity, or legal separation of a domestic partnership registered in this state . . . even if neither domestic partner is a resident of, or maintains a domicile in, the state at the time the proceedings are filed.”¹⁷⁶ As noted earlier,¹⁷⁷ this provision effectively makes dissolution of a domestic partnership a proceeding *in personam* rather than *in rem*. Proceedings for a declaration of nullity or legal separation brought by married persons have not been thought to require domicile as the basis for jurisdiction, since neither proceeding dissolves the marriage *res*. A divorce, however, does dissolve the

173. 449 US 302 (1981).

174. See *Rosengarten*, 802 A.2d at 178 (quoting a Congressional Research Service source that cited *Allstate*).

175. The Domestic Partnership Law currently in effect permits only a termination procedure, not a dissolution procedure. See Cal. Fam. Code s 299 (West 1994 & Supp. 2003).

176. See Domestic Partner Act, above n 16, s 8(d).

177. See text following n 140, above.

marriage and so domicile has been constitutionally required.¹⁷⁸ Is the California provision, which permits dissolution of a domestic partnership without a showing of domicile, constitutional?

As long as the distinction between a domestic partnership (or a civil union) and the status of marriage is preserved, the provision on its face does not appear to encounter constitutional problems. In the absence of marriage, California may look to contacts other than domicile with the parties and the transaction to support the application of California law. As drafted, the provision is based on two contacts: the consent of the parties at the time of the formation of the domestic partnership to submit to the jurisdiction of the California divorce court, and the fact that the parties entered into the domestic partnership in California. The first contact—consent—is normally accepted as sufficient to confer jurisdiction on a court of general jurisdiction over a transitory personal civil claim,¹⁷⁹ while the second follows the lead of New York, which for many years conferred jurisdiction on its courts to grant divorces to couples who had married in New York, regardless of their current residence or domicile.¹⁸⁰ These two contacts should be sufficient here to confer jurisdiction on the California court to dissolve the domestic partnership registered in California, and as I have argued above,¹⁸¹ also to dissolve similar marriage-like legal unions to which California has extended recognition.

The adoption of similar provisions conferring jurisdiction on divorce courts to dissolve domestic partnerships without a showing of domicile or residence will solve many of the conflict of laws problems examined in this paper. If Vermont had enacted a similar provision, for example, Glen Rosengarten could easily have returned to Vermont to seek a dissolution of his civil union. With personal jurisdiction over both parties, the divorce court would be able to settle their financial and property claims. States that enact domestic partnership or civil union laws should anticipate that same-sex couples from other states will be drawn to avail themselves of this symbolic recognition of their relationship. These states should also be willing to remove existing barriers to the dissolution of those relationships.

CONCLUSION

The debate over same-sex marriage is only a small part of the larger controversy about the status and legal treatment of homosexuals. The consecration of an openly gay Episcopal Bishop in New Hampshire in November 2003 threatened to split the worldwide Anglican Communion.¹⁸² The presence of gay and lesbian soldiers in the US military services remains an open secret.¹⁸³ Even the wisdom of allowing gay and lesbian parents to rear children is contested.¹⁸⁴ Still, the right of same-sex couples to

178. See above n 49 (citing *Williams v North Carolina*, 352 US 226 (1945)).

179. See Scoles et al. above n 42, s 6.3, at 334-36.

180. See *Rosenstiel v Rosenstiel*, 209 NE 2d 709, 712 (NY 1965) (citing NY Dom. Rel. L. ch. 14 s 170 subd. 2).

181. See text following n 140, above.

182. See Laurie Goodstein, "Openly Gay Man is Made a Bishop" *New York Times* 3 November 2003, at A1.

183. See John Files, "Gay Ex-Officers Say 'Don't Ask' Doesn't Work" *New York Times* 10 December 2003, at A14.

184. See Lynn D. Wardle, "The Potential Impact of Homosexual Parenting on Children" (1997) *University of Illinois Law Review* 833.

marry touches an especially sensitive cultural nerve in western industrialised countries and accordingly has been particularly hard fought.¹⁸⁵ In both Canada and the United States, the opposing sides are readying themselves for a final struggle. But the attitudes of the two nations are quite dissimilar, with Canadians being more tolerant and accepting of same-sex marriage and other controversial social issues than Americans.¹⁸⁶ Still, political efforts are underway both in Canada and the United States to evade the judicial decisions rendered in 2003 upholding same-sex marriage. In Canada, where Prime Minister Jean Chrétien's government had accepted the court decisions, and moved to make same-sex marriage part of the federal law, the current government led by Prime Minister Paul Martin has broadened the Reference to the Supreme Court of Canada to include a third question asking whether the opposite-sex requirement for civil marriage is consistent with the *Charter*.¹⁸⁷ In the United States, President George W. Bush defended the limitation of marriage to a man and a woman in the wake of the contrary Massachusetts ruling, but stopped short of calling for an amendment to the US constitution.¹⁸⁸ By the end of February, 2004, however, with gay and lesbian couples flocking to San Francisco to take advantage of Mayor Gavin Newsom's order that marriage licences be issued to same-sex couples, President Bush announced his support for a constitutional amendment to protect marriage.¹⁸⁹

In the furor over same-sex marriage and marriage-like relationships, the matter of providing for a dissolution procedure for these relationships, even as a matter of domestic internal family law, has been neglected. A US notewriter has proposed a uniform judicial dissolution proceeding for same-sex couples in domestic partnerships or civil unions.¹⁹⁰ The American Law Institute has created rules that govern termination of the relationship of domestic partners, applicable to both same-sex and opposite-sex couples.¹⁹¹ The Civil Partnerships Bill now pending in the House of Lords empowers a court to provide that a civil partnership is to cease to have effect by issuing a "cessation order."¹⁹² None of these proposals examine the conflict of laws aspects of the dissolution procedure and none discuss divorce following same-sex marriage.

This paper has identified the two major conflict of laws problems that require resolution if same-sex divorce is to become available alongside same-sex marriage: the provision of a court empowered to dissolve the marriage, and a mechanism for

185. See Katherine Shaw Spaht, "Revolution and Counter-Revolution: The Future of Marriage in the Law" (2003) 49 *Loyola Law Review* 1, 19-28

186. See Clifford Krauss, "Canada Stance on Social Issues Is Opening Rifts With the US" *New York Times* 2 December 2003, at A1.

187. See Fact Sheet, *Reference to the Supreme Court of Canada on Civil Marriage and the Legal Recognition of Same-sex Unions*, (Dept. Jus. Can. 1/28/04; see also above n 115.

188. See Elisabeth Bumiller, "What Partisans Embrace, Politicians Fear" *New York Times* 23 November 2003, s 4, at 1; Katharine Q. Seelye, "Conservatives Mobilize Against Ruling on Gay Marriage" *New York Times* 20 November 2003, at A25.

189. See Elizabeth Bumiller, "Bush Backs Ban in Constitution on Gay Marriage" *New York Times* 25 February 2004, at A1.

190. See Jessica A. Hoogs, Note, "Divorce Without Marriage: Establishing a Uniform Dissolution Procedure for Domestic Partners Through a Comparative Analysis of European and American Domestic Partner Laws" (2003) 54 *Hastings Law Journal* 707.

191. See American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* ss 6.01-6.02 (2000).

192. See HL Bill 41, ss 31-32 (introduced 9 Jan. 2002).

enforcing the judgment of such a court elsewhere. These problems arise because same-sex marriage is so unusual today. Unlike opposite-sex marriage, same-sex couples cannot count on being able to obtain divorces at the place where they choose to live together as a married couple. If their matrimonial domicile does not itself recognise same-sex marriage, then same-sex divorce may be unavailable there as well. One solution to this problem is for countries (including states and provinces) that allow same-sex marriage to make provision in their own laws permitting parties who married there to return there if divorce becomes necessary without regard to the customary requirements of domicile, ordinary residence, nationality, or lengthy periods of physical presence. These requirements have traditionally been used to safeguard the interests of the parties' home state against migratory divorce in which the parties were seeking a liberal divorce law to escape their own rigid laws. They used a divorce jurisdiction approach to solve a divorce choice of law problem. Today, a country, state or province that permits same-sex marriage should have no policy against providing a procedure for same-sex divorce, even if the parties are not and never have been domiciled or ordinarily resident there. When the marriage has broken down, the smooth administration of the law should facilitate the orderly settlement of the claims of the parties against each other and against third parties.¹⁹³

If this suggestion is accepted and spelled out clearly in legislation, the second conflict of laws problem arises: that of recognition and enforcement of the divorce judgment. This problem is analytically easier to resolve than the first, although paradoxically its solution may be more difficult for other countries (including states and provinces) to accept. The normal conflict of laws rule for marriage recognition permits enforcement of the incidents of marriage—one of which is divorce—even if the status of marriage itself would not be recognised. If the country where the incident is sought to be enforced accepts this choice of law rule, it should be willing to enforce the judgment. If, however, the recognising country takes the position of the Connecticut appellate court that decided *Rosengarten*, it may not be willing to do so. This problem, unlike the first, cannot be resolved by the rendering country acting alone, although bilateral agreements remain a possibility.

If the Supreme Court of Canada rules favourably on the Reference submitted by former Prime Minister Chrétien's government, both these conflict of laws problems could be resolved as part of the federal legislation that could be drafted to implement the decision. In the United States, where the Congressional DOMA, the many state mini-DOMAs, and a potential Constitutional amendment forbidding same-sex marriage all stand in the way of such a solution, more divisive and contentious struggle seems to lie ahead. Still, it may not be too soon for the American Law Institute, which has taken the bold step of proposing both the creation and dissolution of domestic partnerships, to begin considering a Model Same-Sex Divorce Law, with attention given to the conflict of laws implications.

193. See Hoogs, above n 190, at 716-20.