Same-Sex Divorce Jurisdiction: A Critical Analysis of Chambers v. Ormiston and Why Divorce Is an Incident of Marriage that Should be Uniformly Recognized Throughout the States

Danielle Johnson

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation
Available at: http://digitalcommons.law.scu.edu/lawreview/vol50/iss1/4

This Comment is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.
SAME-SEX DIVORCE JURISDICTION: A CRITICAL ANALYSIS OF CHAMBERS V. ORMISTON AND WHY DIVORCE IS AN INCIDENT OF MARRIAGE THAT SHOULD BE UNIFORMLY RECOGNIZED THROUGHOUT THE STATES

Danielle Johnson*

One of the benefits of marriage is divorce. For a lot of couples, that benefit is very complicated and very costly in ways that heterosexual couples would never have to experience.1

I. INTRODUCTION

Margaret Chambers and Cassandra Ormiston are in a bind. They were married in Massachusetts in 2004, shortly after the state legalized same-sex marriage.2 In 2006, they filed for divorce in their home state of Rhode Island, where the law is silent on the legality of same-sex marriage.3 The Supreme Court of Rhode Island held that the family court

*Technical Editor, Santa Clara Law Review, Volume 50; J.D. Candidate, Santa Clara University School of Law; B.S., Santa Clara University. I would like to acknowledge my appreciation and gratitude to all the members of the Santa Clara Law Review for their contribution to the publication of this comment. I also want to thank my friends, family, and loved ones for all their support and patience during this process. Finally, a note of thanks to Professor Patricia Cain for her comments on an earlier draft.

3. Id. at 959; see also Andrew Koppelman, Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges, 153 U. PA. L. REV. 2143, 2165 (2005) (noting that there is no authority in Rhode Island on same-sex marriage).
lacked jurisdiction to perform their divorce because the state legislature had limited its definition of marriage as a union between a man and a woman. Under Massachusetts law, at least one party seeking a divorce must live in Massachusetts for one year before filing a divorce petition. Massachusetts law, however, specifies that a divorce will not be granted if it appears that the party established residency for the purpose of obtaining a divorce. Now that the couple cannot rely on Massachusetts or Rhode Island law, their options are rather limited.

The extraordinary burden facing this couple merits an analysis of how the courts can come to a more sensible result. Same-sex spouses, who were married in states that recognize same-sex marriage, face numerous difficulties when divorcing in a state where the law conflicts with or is silent on the legality of the underlying marriage. The increasing legal recognition of same-sex marriage, coupled with a lack of uniformity between marriage and divorce law across the states, has prompted courts throughout the United States to seek clarity and guidance when resolving these legal disputes.

First, Part II of this comment will discuss the current state of the law regarding same-sex marriage, the evolution of those laws, and general principles and approaches to marriage recognition. Part III of this comment will introduce the problems posed by the current lack of uniformity, and Part IV will analyze how these problems should be resolved by discussing pertinent cases and use of an “incidental approach” to marriage recognition. Ultimately,
this comment proposes that courts should use an incidental approach to marriage recognition when considering a divorce petition in order to avoid unreasonably burdensome, illogical results.10

II. BACKGROUND

Issues of family law—including marriage, divorce, and child custody—have generally been left to the autonomy of the states.11 Accordingly, each state individually determines the requirements of same-sex marriage jurisdiction.12 Parties in same-sex marriages, however, often act outside their home state or move elsewhere, drawing attention to the problem of the lack of uniformity of marriage laws.

The debate over same-sex marriage gained national recognition in 1993, when the Supreme Court of Hawaii handed down a decision appearing to indicate that the state would soon recognize same-sex marriage.13 This decision, *Baehr v. Lewin*, produced significant concern among Americans.14 Particularly, many people believed that if same-sex marriages were legalized in Hawaii, "the Full Faith and Credit Clause of the . . . Constitution would compel every other state to recognize those unions."15

In 1996, Congress reacted to the uproar by enacting the federal Defense of Marriage Act (DOMA),16 which declared that same-sex marriage would not be recognized for federal purposes.17 Additionally, DOMA amended the Full Faith and Credit Act to allow states not to recognize same-sex

for each particular case, analyze the policies behind that incident, and then decide whether the couple should be viewed as marriage for that limited purpose. *Id.* at 719 (citing Willis L.M. Reese, *Marriage in American Conflict of Laws*, 26 INT'L & COMP. L.Q. 952, 952 (1977)).

10. See infra Part V.


14. *Id.* at 436.

15. *Id.*


17. See 1 U.S.C. § 7 ("[T]he word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers to a person of the opposite sex who is a husband or a wife.").
marriages from sister states. Subsequently, states began affirmatively reacting to DOMA through the adoption of their own so-called “mini-DOMAs,” banning same-sex marriage and declaring a public policy against its recognition. Meanwhile, some states explicitly adopted blanket nonrecognition provisions that refused to recognize out-of-state same-sex marriages.

Currently, same-sex marriage is recognized in the following U.S. states: Massachusetts, Connecticut, Iowa, Vermont, Maine, New Hampshire and for some couples in California. Additionally, many other states offer some

18. See 28 U.S.C. § 1738C (“No State . . . shall be required to give effect . . . to any judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State.”).


20. See id. (explaining that states embraced DOMA’s “offer” to refuse recognition and began adopting express anti-same-sex marriage provisions, termed “mini-DOMAs”).

21. Id.


28. In 2008, the California Supreme Court legalized same-sex marriage with its decision in In re Marriage Cases, 183 P.3d 384 (Cal. 2008), but a voter initiative subsequently overturned the decision. In May 2009, the California Supreme Court ruled that the voter initiative was not effective for those marriages that were valid before November 5, 2008, the day that the voter initiative was passed. Strauss v. Horton, 207 P.3d 48, 64 (Cal. 2009). It is estimated that around eighteen thousand marriages were performed before the
form of a legally recognized same-sex partnership, but without the formal title of "marriage," while others may be on the verge of legalizing same-sex marriage.

A. The Evolution of Inconsistent Marriage Laws across the United States

Marriage laws throughout the United States are inconsistent. Historically, "states imposed ... restrictions on marriage based either on the capacity of the individual or the nature of the union," including prohibitions against polygamous marriages, marriages of the insane, and interracial marriage. During the twentieth century, there were several attempts to create uniformity in marriage laws. The National Conference of Commissioners on Uniform State Laws (NCCUSL), founded in 1892, promulgated the Uniform Marriage and Marriage License Act in 1911, and the Uniform Marriage License Application Act in 1950. Neither attempt succeeded because very few states adopted these provisions. Judicial action has been more successful at creating uniformity throughout the country but has only rarely been accomplished. Most notably, in 1967, the Supreme Court of United States held in Loving v. Virginia that laws prohibiting interracial marriages are unconstitutional. Thus, Loving prompted uniformity in this aspect of marriage law.

As of the early 1990s, all states continued to prohibit bigamous marriages, incestuous marriages, and marriages of minors below an age set by the states. At that time, "[n]o state [had] affirmatively authorized same-sex marriage, but

initiative was adopted. Id. at 59.


30. See id. (listing states with possible legislative action in favor of same-sex marriage as of April 2009).


32. Id. at 437–38.

33. Id. at 438–39 ("All but twelve states [prohibited] interracial marriage at some point in history ... ").

34. Id. at 440–41.

35. See id. at 440–42.


37. See id.

38. Grossman, supra note 13, at 443.
very few expressly precluded it.” Despite the Hawaii Supreme Court’s decision in *Baehr*, *Hawaii never recognized same-sex marriage.* “Other states, however, soon moved toward [at least some form of legal] recognition of same-sex couples.” *California, for example, provides same-sex couples with a civil status equivalent to marriage.* Similarly, a number of other states offer recognition of same-sex relationships in some form.

**B. General Principles of Marriage Recognition**

Marriage recognition cases often involve the laws of more than one jurisdiction, thus forcing the courts to decide which law to apply by engaging in a choice of law analysis. The choice of law analysis is constrained by the common law principle of comity, whereby the court considers whether its jurisdiction will recognize the validity and effect of another jurisdiction’s judicial and legislative proceedings. Most jurisdictions abide by the principle that a marriage that is valid where performed is valid in all other states. While this rule usually means that an out-of-state marriage will be recognized in all states, there are two well-established policy-based exceptions.

The first exception is that a state can refuse to recognize

---

39. *Id.* at 444. “Wyoming was one of the only states to expressly mention gender in its marriage statute” before the middle of the 1990s. *Id.* at 444 n.52.
41. “While the case was being appealed, a state constitutional amendment was adopted giving the legislature the right to reserve marriage to opposite-sex couples.” KOPPELMAN, *supra* note 12, at 8 n.15. See also HAW. REV. STAT. art. I, § 23 (Supp. 2007).
42. See KOPPELMAN, *supra* note 12, at 8.
43. California offers same-sex couples the option of domestic partnership, which is similar to civil unions. See CAL. FAM. CODE § 298 (West Supp. 2009).
47. The rule, often referred to as the “place of celebration” rule, originated with Joseph Story, who stated that “the general principle certainly is . . . that . . . marriage is to be decided by the law of the place where it is celebrated.” *Id.* at 461 (citing JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* § 113a (8th ed. 1883)).
48. See *id.* at 461-70.
marriages thought to violate natural law. Polygamous and certain incestuous marriages fall into this category. “Courts have struggled to define the conditions that trigger [this exception].” Some courts have applied the doctrine so broadly that out-of-state law would hardly ever apply, effectively ending all choice of law analyses. Although states have reserved this exception for use at their discretion, all states have banned marriages that have universally been regarded as offensive, such as polygamous and incestuous marriages. As a result, there has been little occasion for the invocation of the natural law exception.

The second exception is the express public policy exception. This exception may be used where a statute declares certain marriages void or invalid because such marriages are against public policy of the state. This public policy exception is not unique to marriage law, but rather, can be invoked whenever a court decides a choice of law issue.

Recently, in Beth R. v. Donna M., a New York court considered these general principles and exceptions when it allowed the divorce of a same-sex marriage that was formed in Canada. New York’s law is silent on same-sex marriage, but the court recognized the marriage for purposes of hearing the divorce petition. The court deferred to the law of the jurisdiction where the couple was married, and observed

49. An exception thought to violate natural law is one “deemed contrary to the law of nature, as generally recognized in Christian countries.” Id. at 462 n.140 (citing Commonwealth v. Graham, 31 N.E. 706, 707 (Mass. 1892)).

50. Id. at 462.

51. KOPPELMAN, supra note 12, at 21.

52. Id. There is, however, the possibility that the doctrine would “displace all other choice of law rules,” so the doctrine is not often invoked. Id.


54. Id.

55. Grossman, supra note 13, at 463. This exception also referred to a “positive law” exception because the policy must be expressly declared by statute. Id. at 463–64.

56. Id. at 464.

57. KOPPELMAN, supra note 12, at 21 (noting that the doctrine dates back to the Middle Ages when medieval authorities talked about “odious statutes” whose jurisdiction was limited).


59. Id. at 506–07.

60. Id. at 505.
that New York courts have previously recognized out-of-state marriages that could not have been formalized within the state for the purposes of divorce.\textsuperscript{61} Additionally, the court indicated if there was no legislation regarding same-sex marriage, then their decision could not violate the state’s public policy.\textsuperscript{62}

Even before the same-sex marriage controversy arose, the Second Restatement of Conflict of Laws provided a fairly simple rule for handling marriage recognition cases,\textsuperscript{63} which states that “[a] marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.”\textsuperscript{64} The state with the “most significant relationship” to the parties will usually be the one where the parties are domiciled.\textsuperscript{65} Determining domicile can often be complex, as a person’s domicile is generally understood as “the place where [the party] makes his or her home and intends to remain.”\textsuperscript{66} Cases often turn on this determination because intention is “crucial to the question of whether someone has changed domicile,” and it is not always easy to discern intent.\textsuperscript{67}

The Restatement rule is flawed in that it limits a state’s power to invoke the public policy exception to when the parties live in that state at the time of the marriage.\textsuperscript{68} If, for example, a same-sex couple is domiciled and married in Massachusetts and they later move to a state that does not recognize same-sex marriage, the new state will not be able to use this rule because the same-sex couple lived in Massachusetts at the time of the marriage.\textsuperscript{69} The logic is that it does not make sense for new residents of a state to have entitlement to same-sex marriage, while it is denied to

\begin{footnotes}
\item[61] Id. at 505-06.
\item[62] Id.
\item[63] \textit{Restatement (Second) of Conflict of Laws} § 283(2) (1971).
\item[64] Id.
\item[65] KOPPELMAN, \textit{supra} note 12, at 17 (internal quotation marks omitted).
\item[66] Id. at 19 (emphasis omitted).
\item[67] Id.
\item[68] Id. at 18.
\item[69] Id.
\end{footnotes}
longtime residents of that state. Thus, the Restatement "prevents the marriage validity question from being repeatedly reconsidered" once domicile is established, but gives "inadequate weight to the public policies of states that do not want [to recognize] same-sex couples cohabiting . . . within their borders.

C. The Incidental Approach to Marriage Recognition

Many courts and scholars would prefer it if the choice of law determination depended on which incident of marriage is at issue. When utilizing the "incidental" approach, courts "develop choice of law rules for marriage . . . by considering the issue facing the court in each particular case, [analyzing] the policies behind the . . . issue, and [deciding] whether the couple should be viewed as married for that [limited] purpose." Courts could therefore recognize certain "incidents" of a marriage, such as the right to inherit a spousal share, even when the court is unwilling to recognize the underlying marriage. Moreover, courts have begun to recognize that different incidents of marriage involve different policies. However, it may be "unacceptably burdensome to require same-sex couples to 're-litigate their marital status'" each time they request recognition of an isolated incident of their marriage.

The incidental approach was used in an English case to recognize a marriage solely for the purpose of divorce. In 1939, an English woman named Kathleen Lawson married an Indian man named Nawal Baindail in England, only to

70. See id. at 20 (noting that "Utah['s] . . . very strong public policy against recognizing same-sex marriages" would be violated by a "migrant gay couple setting up housekeeping in Salt Lake City" just as much as it is by "a local couple doing so after a weekend trip to Boston").
71. KOPPELMAN, supra note 12, at 95.
73. Id. at 719.
74. Grossman, supra note 13, at 470. See, e.g., In re Dalip Singh Bir's Estate, 188 P.2d 499, 502 (Cal. Ct. App. 1948) (permitting two wives who were both parties to a polygamous union celebrated in India to inherit equal shares from their husband's estate despite the state's strong public policy against polygamy and its refusal to recognize such unions).
75. See KOPPELMAN, supra note 12, at 93–94.
76. See id. at 94; see also Cox, supra note 10, at 718–22.
discover that he was married to another woman. Ms. Lawson sought to annul her marriage on the basis of bigamy. Mr. Baindail argued that potentially polygamous marriages were not considered marriages under English law and, therefore, even though he was married under the laws of another country, he was legally single at the time of his English marriage because England does not recognize polygamous marriages. Although there was substantial support for Nawal's argument, the court granted the annulment because otherwise "this English lady would find herself compelled in India either to leave her husband or to share him with his Indian wife." Although the court did not recognize polygamy, the prior marriage was recognized for the limited purpose of granting the annulment. The court's decision articulates the repercussions of a "blanket rule of nonrecognition," where a state would ignore an otherwise valid marriage from another state. Such rules can lead to "multiple marriages [as well as] . . . uncertainty about spousal rights and inheritance."

The incidental approach "protect[s] the interests and expectations of parties to a [marriage]," while simultaneously allowing a state to express disapproval of the underlying marriages. Parties, however, will continue to face substantial uncertainty. Courts will likely decide cases concerning separate incidents of marriage differently, leading to unpredictable results based on how a court will weigh

---

78. Id.
79. Id.
80. Id. See also KOPPELMAN, supra note 12, at 92–93 (discussing the Baindail case).
81. Nawal Baindail relied on British authority standing for the notion that polygamous marriages will be completely unrecognized by English law for any purpose whatsoever. KOPPELMAN, supra note 12, at 83.
82. Id. at 84 (citing Baindail, All E.R. at 347).
83. See id.; see also Application of Sood, 142 N.Y.S.2d 591 (Sup. Ct. 1955) (denying a man a license to marry a woman in the United States after he had entered a potentially polygamous marriage in India).
84. A blanket rule of nonrecognition would be a law that declares all same-sex unions to be void outside of the jurisdiction that recognized them. See KOPPELMAN, supra note 12, at 69–81.
85. See id. at 69–70.
86. Id. at 84.
87. See Grossman, supra note 53.
88. KOPPELMAN, supra note 12, at 93.
While states that refuse to recognize same-sex marriage might be more willing to allow limited recognition of a marriage for a limited purpose, the approach inevitably produces situations where a marriage might be recognized for purposes of divorce, but not for purposes of child custody or another related incident.  

D. Categories of Same-Sex Marriage Cases

Different types of same-sex marriage cases present distinct problems for the courts. Cases involving jurisdiction in same-sex marriage generally fall into one of four categories based on the policies of their home state, and the reasons the parties left that state. These marriage types are "evasive" marriages, "migratory" marriages, "visitor" marriages, and "extraterritorial" marriages.

"Evasive" marriages occur when the parties marry outside of their home state for the express purpose of evading their home state's prohibition against same-sex marriage, and return to their home state immediately thereafter. These marriages are invalid if they violate the home state's strong public policy. Determining the state's public policy is simple if the home state has a mini-DOMA, but without such a statute, the outcome becomes more uncertain. Sometimes, the determination of whether a marriage is "evasive" is not clear.

---

89. Id.
90. Id. at 94 (citing Reese, supra note 10, at 54).
91. See generally id. at 101–13.
92. See id. at 101–02.
93. Id.
94. KOPPELMAN, supra note 12, at 102.
95. Id. The idea behind this is that "states have the right to govern their own residents." Id.
96. Id. at 103.
97. See, e.g., Chambers v. Ormiston, 935 A.2d 956, 958 (R.I. 2007). The parties were residents of Rhode Island who traveled to Massachusetts to get married, and immediately returned to Rhode Island. Id. at 958. However, there was no affirmative law in Rhode Island prohibiting the marriage. Id. at 961–62. Thus, it is unclear whether they were "evading" a prohibition in their home state. Id. at 958–67. See also Cote-Whitacre v. Dep't of Pub. Health, No. 04-2656, 2006 Mass. Super. LEXIS 670 at *2 (Mass. Super. Sept. 29, 2006) (involving a Massachusetts trial justice who found no "prohibitory positive law" to exist in Rhode Island, and ordered a declaratory judgment be entered that same-sex marriage is not prohibited in Rhode Island).
When there is a mini-DOMA, courts are split over whether to construe the law to forbid same-sex couples from divorcing when the marriages were evasive. This is an especially important issue because a few states, Vermont and Massachusetts, for example, have residency prerequisites for filing a divorce petition. Therefore, these decisions can leave couples with extraordinary burdens when ending their relationship because the courts have created unnecessary roadblocks. Two Connecticut courts construed Connecticut law as denying Connecticut domiciliaries jurisdiction to dissolve a Vermont civil union and to annul a Massachusetts same-sex marriage. A Texas court declined to dissolve a civil union, but approved the couple's division of property. Iowa and West Virginia courts dissolved uncontested divorces between two couples joined by Vermont civil unions.

Contrary to evasive marriages, "migratory" marriages occur when the parties enter into a valid marriage where they lived (e.g., Massachusetts), but later moved to a state where their marriage was prohibited. "Absent a statutory ban on same-sex marriage, [a] state's public policy [is often] not . . . clear enough to justify withholding recognition [of the marriage]." Even if there is a ban, the strength of the public policy will often turn on the incident of marriage at

98. KOPPELMAN, supra note 12, at 104.
99. Vermont has a six-month residency requirement, and the residency must have continued for a year before a final decree is issued. VT. STAT. ANN. tit. 15, § 592 (2002). In Massachusetts, at least one party must have been resident for one year before filing the divorce petition. MASS. GEN. LAWS ch. 208, § 5 (2007).
102. Id. at 738–42 (citing In re KJB and JSP, No. CDCD 119660 (Woodbury County Dist. Ct. Iowa, Nov. 14, 2003); In re M.G. and S.G., No. 02-D-292 (Fam. Ct. W. Va. Jan. 3, 2003)).
103. KOPPELMAN, supra note 12, at 106.
104. Id. "Recognition is also appropriate if a same-sex marriage in another state has ended in divorce, and the divorce decree requires one of the former spouses to make regular payments to the other, for either alimony or child support." Id. at 108. If one of the former spouses moves to a new state where same-sex marriage is not recognized, the new state should still enforce the judgment. Id. The state does not need to address the validity of the underlying relationship because "[a]ll the court is being asked to do is enforce monetary obligations." Id.
issue.\textsuperscript{105} "Some incidents . . . can be conferred by contract, such as those involving inheritance or the ability . . . to make medical decisions for his or her partner,"\textsuperscript{106} while "[o]thers . . . can be conferred only by operation of law, such as the right to file a joint tax return."\textsuperscript{107} If the parties could have achieved the right through contract, under state law of the forum, then the forum cannot technically have a public policy against the enjoyment of the incident achieved contractually and the right or obligation should be recognized.\textsuperscript{108}

"Visitor" marriage cases occur when "a couple [or a party] is temporarily visiting a state that does not recognize their marriage."\textsuperscript{109} Although there are few examples of these cases, some scholars maintain that such marriages "should always be recognized," for all purposes.\textsuperscript{110} Arguably, "[a]ny other result is inconsistent with the constitutional right of citizens to travel."\textsuperscript{111} Similarly, "extraterritorial" marriage cases are not frequently litigated.\textsuperscript{112} This last category of marriages occurs when "the parties have never lived within [a] state, but . . . the marriage is relevant to litigation conducted there."\textsuperscript{113}

\begin{footnotesize}
\begin{enumerate}
\item[105.] See id. at 106-07.
\item[106.] Id. at 107.
\item[107.] Id.
\item[108.] Id. at 107-08. Koppelman notes that "a state can simply call the foreign marriage a contract and treat it as a contract under state law," avoiding the question of whether the relationship will be treated as a marriage. Id. at 108.
\item[109.] KOPPELMAN, supra note 12, at 110.
\item[110.] Id. at 111; see, e.g., Ex parte Kinney, 14 F. Cas. 602 (E.D. Va. 1879) (No. 7825) (finding that a member of an interracial marriage would have a right of transit and of temporary stoppage with his wife through Virginia, even though Virginia criminalized interracial marriage).
\item[111.] Koppelman, supra note 3, at 2145; see also Crandall v. Nevada, 73 U.S. 35, 49 (1867) (declaring that it is well settled that there is a constitutional right to travel and that "all citizens of the United States . . . must have the right to pass and repass through every part of it without interruption").
\item[112.] Professor Koppelman argues that since "these marriages were routinely upheld" in the miscegenation cases, and if "public policy was not enough to prevent recognition then, it should not [prevent recognition] now, either." KOPPELMAN, supra note 12, at 112.
\item[113.] Id. An example would be when, after the death intestate of one spouse, the other seeks to inherit property that was located within the forum state. See Miller v. Lucks, 36 So. 2d 140, 142 (Miss. 1948) (recognizing an otherwise prohibited interracial marriage only to the extent that one of the parties may inherit from the other property located within the state).
\end{enumerate}
\end{footnotesize}
E. The Effect of DOMA and the Mini-DOMAs on the Marital Rights of Same-Sex Couples

DOMA was a Congressional response to the Supreme Court of Hawaii's decision in Baehr, which seemed to indicate same-sex marriage would soon be recognized in that state. The proponents of DOMA feared that if Hawaii allowed same-sex marriage, then the Full Faith and Credit Clause would require recognition by all states. This fear was ill-founded because states have always had the ability to decline recognition of out-of-state marriages. The Full Faith and Credit Clause has never been interpreted to apply to marriage recognition. Rather, it compels a state to enforce a judgment issued by another state. Therefore, DOMA has no effect on a state's ability to create choice of law rules concerning recognition of marriage. Although the Clause has been enforced "only weakly with respect to laws," it has been strictly enforced with regard to judgments. Accordingly, the Clause has implications for divorce, not marriage.

DOMA has a unique effect on marriage recognition because it provides that a state need not give effect to a "judicial proceeding" regarding a same-sex marriage. This "implies that all judgments in which the prevailing party pleaded the existence of a same-sex marriage can be ignored by other states." To complicate matters, "federal law, as

115. Id. at 436; see also KOPPELMAN, supra note 12, at 117.
116. KOPPELMAN, supra note 12, at 117.
118. KOPPELMAN, supra note 12, at 117 (discussing the original intent of the Full Faith and Credit Clause and concluding that since 1790, the rule has been that "a judgment is to be given the same effect that it would have in the state that issued it").
119. Id. at 123.
120. Id.
121. Id. (noting that since divorces were entitled to full faith and credit, "Nevada . . . was able to set itself up as a divorce haven for residents of states where divorces were hard to [obtain]").
122. See 28 U.S.C. § 1738C (2006) ([a] state need not "give effect to any . . . judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship").
123. KOPPELMAN, supra note 12, at 123–24 (noting that under this provision,
amended by DOMA, withdraws full faith and credit only from judgments in which the . . . court recognizes a same-sex marriage, while continuing to require full faith and credit for judgments in which the . . . court denies recognition.”124 Thus, depending on what a court holds, its decision may be “entitled to full faith and credit,” depending on what the court holds.125 In drafting the DOMA, Congress apparently failed to contemplate “any genuine adversarial proceeding” where a court would address judgments as well as choice of law decisions, even though only adversarial proceedings “can generate a judgment entitled to full faith and credit.”126

Although there are no same-sex divorce cases on point, *Miller-Jenkins v. Miller-Jenkins* illustrates how DOMA can complicate the dissolution of civil unions involving interstate recognition and, assumingly, same-sex divorce as well.127 In 2000, Janet and Lisa Miller-Jenkins were residing in Virginia, and formed a civil union in Vermont.128 Lisa conceived a child through artificial insemination in 2002; shortly thereafter, Janet and Lisa moved to Vermont.129 In 2003, Lisa filed to dissolve the civil union in a Vermont court.130 After the Vermont judge granted Janet joint custody of their daughter, Lisa filed another suit in Virginia.131 The Virginia trial court ruled that Janet had no parental rights because her claims were based on Vermont’s civil union law, which is not recognized under Virginia law.132 Ultimately, the

---

124. *Id.* at 124 (emphasis omitted).

125. *Id.*

126. *Id.* at 126.


128. KOPPELMAN, supra note 12, at 114 (summarizing the facts and analyzing the *Miller-Jenkins* litigation).

129. *Id.*

130. *Id.*

131. Janet argued “that the Virginia court was barred from reopening the custody question by [the federal Parental Kidnapping Prevention Act (PKPA)],” which holds that when custody is already being considered in one state, no other state can consider the matter. *Id.* at 115–16. Lisa responded “that PKPA was modified by DOMA,” and that “the Vermont judgment that Janet had parental rights was a judgment . . . ‘between persons of the same sex’” and therefore “not entitled to full faith and credit.” *Id.* at 116.

132. *Miller-Jenkins*, 637 S.E.2d at 332. Had the lower court decision been
Virginia appellate court reversed, holding that the custody and visitation orders of the Vermont court were to be given full faith and credit in Virginia.\textsuperscript{133}

Even though DOMA is “irrelevant to the question of when and whether same-sex marriages will be recognized” by the states, “the numerous state [mini-DOMAs] declaring a strong public policy against same-sex marriage” are highly relevant.\textsuperscript{134} Almost all of the mini-DOMAs are intended to address the “evasive” marriage, where parties travel out of their home state to avoid that state’s prohibition against same-sex marriage, marry in a state that allows such unions, and then return to the home state immediately after.\textsuperscript{135} Some mini-DOMAs are “clumsily worded,” such that it is unclear which scenarios legislators are trying to reach.\textsuperscript{136} On the other hand, the statutes may be so broadly worded that they come close to blanket nonrecognition.\textsuperscript{137} Courts can use these “positive law” exceptions to declare a marriage invalid as violating the public policy of the state.\textsuperscript{138} Commentators have noted that many mini-DOMAs depart from “conventional concepts of comity and conflicts,”\textsuperscript{139} and have opined that if upheld, this would imply that “no parental right arising out of a same-sex marriage is secure in the United States.” KOPPELMAN, supra note 12, at 116.

\textsuperscript{133} Miller-Jenkins, 637 S.E.2d at 332.

\textsuperscript{134} KOPPELMAN, supra note 12, at 137 (emphasis omitted).

\textsuperscript{135} See id. at 139-40 (noting that a state can permissibly decline to recognize such marriages because “the evasion cases . . . are the strongest cases for nonrecognition”); see also Koppelman, supra note 3, at 2145.

\textsuperscript{136} KOPPELMAN, supra note 12, at 140.

Some specify that . . . marriages are invalid within the jurisdiction, which leaves open the status of couples outside the state. Others deem them contrary to the state’s public policy, but it is not . . . clear whether that public policy is so strong that the state will attempt to apply it to transactions . . . involving nondomiciliaries.

\textsuperscript{137} See e.g., ALA. CODE § 30-1-19(e) (1998) (stating that Alabama “shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged or have occurred as a result of the law of any jurisdiction”).

\textsuperscript{138} A “positive law” exception refers to a statute that expressly declares certain marriages void or invalid as being against the public policy of the state. See Grossman, supra note 13, at 463-64; see also supra note 55 and accompanying text.

\textsuperscript{139} See Grossman, supra note 13, at 478 (discussing how a state’s law “declar[ing] certain marriages invalid regardless of where the parties were
courts were to address the constitutionality of these mini-DOMAs, many would likely find them unconstitutional. In states without mini-DOMAs, the outcomes of marriage recognition cases are unpredictable. Absent a clear ban on same-sex marriage, it is unclear how the public policy of the state should be manifested. Langan v. St. Vincent’s Hospital illustrates this point well, and presents a strong case for recognition in the absence of a mini-DOMA. There, the same-sex couple resided in New York, but established a civil union in Vermont. After his partner died, the plaintiff sought recognition as a “spouse” for purposes of a wrongful death suit he brought in New York, and the trial court held that the case could proceed, noting that New York had no policy against same-sex marriage, and thus no basis for refusing recognition. In coming to this conclusion, the court utilized the incidental approach to marriage recognition, explaining that “the court will not determine whether plaintiff has a valid marriage in the State of New York for all purposes, but only whether he may be considered a spouse for purposes of the wrongful death statute.” Additionally, since there was no New York law that prevented the court from recognizing the civil union, the court looked to the purpose behind Vermont’s civil union statute and determined that Vermont does not distinguish between civil unions and marriages. Thus, the plaintiff would be recognized as a spouse in Vermont, entitling him to recover in his wrongful death action. The only issue remaining before the court was whether New York would recognize a spouse from a domiciled at the time the marriage was celebrated is entirely inconsistent with the Second Restatement’s approach to conflict of laws”).

140. Id. at 479 (noting that if DOMA was found to be invalid as a violation of equal protection or due process, or that it was invalid as exceeding Congress’ power under the Full Faith and Credit Clause, that decision could have a ripple effect on the mini-DOMAs); see also KOPPELMAN, supra note 12, at 126-48 (extending the discussion of the unconstitutionality of DOMA and the effect of the mini-DOMAs).
141. See KOPPELMAN, supra note 12, at 103.
142. Id.
144. Id. at 412.
145. Id. at 418, 422.
146. Id. at 415.
147. Id. at 418.
148. Id.
sister state's common law marriage. The court looked to the legislative intent behind New York's wrongful death statute, concluded that the plaintiff fell within the meaning intended for the term "spouse," and determined that the plaintiff was entitled to recovery. Although this case was ultimately reversed on appeal, it highlights the unpredictability of marriage recognition cases in the absence of an express statute.

F. Chambers v. Ormiston

Margaret Chambers and Cassandra Ormiston were Rhode Island residents who were married in Massachusetts in May 2004. The two women thereafter returned to Rhode Island, where they resided together until the couple decided to dissolve their marriage. After the couple brought their claim to the Rhode Island Family Court, the Rhode Island Supreme Court considered whether the family court had subject matter jurisdiction to grant the petition for divorce of a same-sex couple legally married under the law of Massachusetts. In December 2007, the court held that the family court may not recognize the marriage for the purpose of entertaining the divorce petition.

The majority’s opinion was based entirely on its interpretation of the word “marriage,” in the context of Rhode

---

150. Id. at 419–20. The court found that the plaintiff was the person “most likely to have expected support and to have suffered pecuniary injury” within the meaning of the wrongful death statute. Id. at 419.
151. The New York Court of Appeals relied on the plain language of the New York wrongful death statute, which limited recovery to a surviving spouse. Id. at 476. Because the Vermont Supreme Court “had not equated civil unions with heterosexual marriage,” and New York law does not recognize civil unions, the plaintiff could not be considered married per se, and therefore, could not be considered a spouse. See KOPPELMAN, supra note 12, at 99–100 (citing Langan, 802 N.Y.S.2d at 476). The judges “[found] it decisive that Vermont [did not] regard the relationship as a marriage," but rather as a civil union. Id. at 100. In essence, the appellate court did not even consider the principles of marriage recognition because the relationship was a civil union. Langan, 802 N.Y.S.2d at 483.
153. Id. Ms. Chambers filed a petition for divorce in the Rhode Island Family Court on October 23, 2006; Ms. Ormiston filed her answer and counterclaim on October 27, 2006. Id. at 959.
154. Id.
155. Id. at 967.
Island’s divorce jurisdiction statute.\textsuperscript{156} It looked to the original intent of the statute, and interpreted the ordinary meaning of “marriage” at the time of the statute’s enactment in 1961.\textsuperscript{157} The court determined that the statute was unambiguous and therefore looked to legislative intent and various dictionaries published or revised around 1961.\textsuperscript{158} These sources indicated or referred to “marriage” as the union between a man and a woman.\textsuperscript{159} Therefore, the court concluded that the family court lacked jurisdiction to entertain the divorce petition.\textsuperscript{160}

The dissent, on the other hand, argued that the family court had jurisdiction to hear the divorce petition, whether or not their marriage was legally valid in Rhode Island, because the parties were validly married under Massachusetts law.\textsuperscript{161} Criticizing the majority for employing such formal rules of interpretation, the dissent analyzed the broad objectives of the statute and “common sense of the situation” to conclude that the legislators at the time of the enactment of the statute would have intended to provide to all Rhode Island citizens with “a comprehensive forum for resolving issues concerning marital relations.”\textsuperscript{162} Additionally, since the parties did not challenge the validity of the marriage, the court could have conferred jurisdiction without having to determine the legality of the underlying marriage.\textsuperscript{163} In other words, the dissent argued that the court incorrectly focused on the underlying marriage, when it should have focused on what the parties were asking for—a divorce.

\textsuperscript{156} Id. at 961-63. The statute reads in pertinent part: “There is hereby established a family court . . . to hear and determine all petitions for divorce from the bond of marriage.” R.I. GEN. LAWS § 8-10-3(a) (1956).
\textsuperscript{157} Chambers, 935 A.2d at 961-63.
\textsuperscript{158} Id.
\textsuperscript{159} Id. at 962.
\textsuperscript{160} Id. at 963. The court notes that the same result would have been reached had the statute been ambiguous and certain canons of statutory construction utilized. Id. at 963-65.
\textsuperscript{162} Id. at 971, 973-74.
III. CONFLICTING MARRIAGE LAWS ACROSS THE STATES PLACE EXTREME BURDENS ON SAME-SEX DIVORCES

To procure a divorce decree in Massachusetts, Ms. Chambers or Ms. Ormiston would have to establish residency in that state for one year.\(^{164}\) Even if one of the women moved, the Massachusetts courts may disallow the divorce if it found that the parties established residency solely for the purpose of obtaining a divorce.\(^{165}\) If only one of the parties established residency, "the Massachusetts courts [would] not have jurisdiction to award alimony or an equitable division of property" because, to do so, both parties must be domiciled in Massachusetts.\(^{166}\) State imposition of such regimes is unduly burdensome to the couple trying to obtain a divorce.

Similarly, blanket nonrecognition of same-sex marriage produces unreasonable burdens on same-sex spouses.\(^{167}\) By refusing to recognize these marriages, states allow parties to flee in order to avoid obligations arising from their divorce, may allow some to people marry multiple times, and may deny a parent to avoid child support obligations.\(^{168}\) Parties to a marriage could dissolve a marriage in one state and avoid obligations to account for marital assets by residing in another.\(^{169}\) Nonrecognition can create havens for those avoiding support or property obligations arising from lawful marriages.\(^{170}\) Additionally, "[a] same-sex spouse could marry again in another state without having to dissolve the earlier marriage or even having to disclose [that marriage] to the new spouse."\(^{171}\) Such a scenario would effectively legalize a form of bigamy.\(^{172}\) Lastly, a parent in a same-sex relationship who is not the biological parent could flee to another state if he or she wanted to avoid child support obligations or the enforcement of parental rights.\(^{173}\) These are but a few of the

---

165. See id.
166. See KOPPELMAN, supra note 12, at 72.
167. See id. at 70.
168. See id. at 71–74.
169. Id. at 71.
170. Id.
171. Id. at 74; see, e.g., Baindail v. Baindail, [1945] 2 All E.R. 374.
172. KOPPELMAN, supra note 12, at 74; see, e.g., Baindail, 2 All E.R. at 374.
173. See KOPPELMAN, supra note 12, at 73–74.
unfortunate scenarios that could result from blanket nonrecognition of same-sex marriage.

Such predicaments create uncertainty for couples who were legally married outside of their state of current residence should they desire to terminate their relationship in the future. As Justice Robert Jackson stated in 1948, "[i]f there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom."[174] A couple who has entered into a good faith, legal marriage in one state should not have to doubt whether their marriage will be given recognition in another state, particularly in their home state.[175] For many same-sex couples, the ability to dissolve the relationship is an important component of recognition.[176]

IV. ANALYSIS

If a court with proper jurisdiction is presented with a divorce petition from a same-sex couple that was validly married in another state, then that court should perform the divorce. When the law of the forum state conflicts, with or is silent on, the legality of the underlying marriage, the court can use an incidental approach to marriage recognition and consider the divorce as an incident of that marriage.[177] By recognizing the marriage for the limited purpose of the

175. See Chambers v. Ormiston, 935 A.2d 956, 974 (R.I. 2007) (Suttell, J., dissenting) ("[W]e believe [entertaining a divorce petition] to be consistent with the expectations of those Rhode Island residents who have in good faith entered into same-sex marriages in Massachusetts.").
176. See Brenda Cossman, Betwixt and Between Recognition: Migrating Same-Sex Marriages and the Turn Towards the Private, 71 LAW & CONTEMP. PROBS. 153, 161-64 (2008). For some, the legal recognition of divorce is part of the process of relationship recognition: "[W]hen our marriages don't work, I hope we insist on proper divorces . . . because we deserve to honor our unions with this validation too. We deserve help breaking up households and navigating custody of children. Just as we insist on the right to marry, we have to demand that the legal system help us dissolve our unions when we have to.
Id. at 163 (citing Kathy Anderson, My Vermont Divorce, ADVOCATE, Sept. 28, 2004, at 10).
divorce, the court can confine its consideration of the relationship so as to avoid addressing the validity of the underlying marriage. The ability to legally end a marriage validly performed in another state is an incident of that marriage that should be available uniformly across the states, regardless of whether that state disagrees with the underlying marriage. Parties seeking an uncontested dissolution of their union are not asking the court to validate the union; they are simply asking the court to dissolve it. By refusing to perform a divorce in a same-sex couple's home state, some states have made it incredibly burdensome for that couple to legally end their relationship. Chambers provides an example of such burdens because Rhode Island refused to hear the divorce petition.

A. Options Available to the Courts to Apply a More Sensible Standard

Courts can apply various commonly accepted principles of marriage recognition when determining divorce jurisdiction over same-sex couples married in other states. When a state has no affirmative law regarding the underlying marriage, principles of comity suggest that the state should respect the decision of another state to legalize a marriage. Using the place of celebration rule, the state can defer questions regarding the validity of a marriage to the law of

178. See Cox, supra note 10, at 718-46.
179. See KOPPELMAN, supra note 12, at 105.
180. See Kay, supra note 177, at 89; see also Rosengarten v. Downes, 802 A.2d 170 (Conn. App. Ct. 2002).
181. If a same-sex couple who married in Massachusetts and subsequently relocated to Washington wishes to separate, the parties can only get a divorce through the Massachusetts court because Washington does not recognize their marriage. See KOPPELMAN, supra note 12, at 71-72. The parties would have to move back to Massachusetts, establish domicile there, and take a resulting divorce decree back to Washington to have that state award support and divide property. Id.
182. See Chambers v. Ormiston, 935 A.2d 956, 958 (R.I. 2007). After the ruling, Cassandra Ormiston stated: "There is now no way for me to get divorced unless I move back to Massachusetts, establish residency and then wait a year before I file, and I simply will not do that." Dafna Linzer, Same-Sex Divorce Challenges the Legal System, WASH. POST, Jan. 2, 2008, at A3.
183. See Grossman, supra note 53.
184. Grossman, supra note 13, at 460-61 (discussing use of the principle of comity when recognizing marriages absent a statute declaring a public policy against the marriage).
state that performed the marriage. Additionally, the court considering the divorce petition can look to its case law to determine if other forms of marriage were recognized in the past—marriages that would not otherwise have been performed in that state.

Where an affirmative law declaring a public policy against same-sex marriage exists, courts can use the incidental approach to recognize the marriage for the limited purpose of performing the divorce. Under this approach, the same relationship can be analyzed in different contexts, depending on the policies behind the particular incident at issue. When considering divorce, however, it is likely that a state's policies and concerns will favor entertaining a divorce petition among the state's domiciliaries. Parties that are domiciled in a state generally own property in that state; so, the state will have proper jurisdiction over both parties, such that child or spousal support may be awarded. This would significantly simplify the divorce.

Instead of basing all decisions on a reluctance to accept same-sex marriages, the courts should be more concerned with providing assistance to its citizens than with politics. Divorce is generally a difficult ordeal, and imposing additional burdens on the parties is unnecessary when the relationship could be resolved. States like West Virginia

---


186. See id. at 505-06 (noting that New York has validated incestuous, underage, and adulterous marriages).

187. See generally Cox, supra note 10, for a thorough discussion of the application of this approach to same-sex dissolution cases. See also Kay, supra note 177, at 71. There is no reason why the incidental approach cannot be used when the law of the forum state is silent on the same-sex marriage issue. See Cox, supra note 10, at 753-54 (discussing how a New York court used an incidents of marriage analysis to recognize a civil union when New York’s law was silent on the matter).

188. See Cox, supra note 10, at 719.

189. See Chambers v. Ormiston, 935 A.2d 956, 973-74 (R.I. 2007) (Suttell, J., dissenting) (arguing that the purpose behind the divorce jurisdiction statute was to give all Rhode Island citizens a means of determining their marital status); see also KOPPELMAN, supra note 12, at 72 (noting that a court will not be able to divide property or award support if they do not have proper jurisdiction over the parties).

190. See KOPPELMAN, supra note 12, at 72.

191. See Cox, supra note 10, at 734-35.

192. See id. at 732-34.
and Iowa have evidenced their concern with the welfare of their residents. Courts in those states have granted dissolutions of civil unions. Although the issues involved when dissolving civil unions are not identical to those involved in same-sex marriage cases, the state courts indicate an increased concern with the welfare of its citizens. When defending his decision, a district court judge from Iowa stated, "[W]e can't turn people away from our court system and say we can't resolve your disputes . . . I clearly look at this as a dispute between parties that in some way I'm going to have to solve." Similarly, a judge from West Virginia acknowledged that the spouses seeking dissolution were "in need of a judicial remedy." Essentially, parties who enter into a legal relationship in one state should have access to a forum where disputes can be resolved in another.

B. What We Can Learn from the Cases Involving Dissolution and Interstate Recognition of Civil Unions

Currently, there is little authority on interstate recognition of same-sex marriages for the purpose of divorce. An analysis of civil union jurisprudence regarding dissolution

---

193. Id. at 738–42 (citing In re KJB and JSP, No. CDCD 119660 (Woodbury County Dist. Ct. Iowa, Nov. 14, 2003); In re M.G. and S.G., No. 02-D-292 (Fam. Ct. W. Va., Jan. 3, 2003)).

194. Id. at 738–42 (citing In re KJB and JSP, No. CDCD 119660; In re M.G. and S.G., No. 02-D-292).

195. Id. at 744 (citing Frank Santiago, Judge Revises His Ruling on Lesbians' Divorce, DES MOINES REG., Dec. 31, 2003, at 3B). The Iowa opinion of a Vermont civil union did not address subject matter jurisdiction or any contrary Iowa statutes. See id. at 742–44. Although the Judge later admitted that he did not realize the parties were of the same sex at the time of the decision, he upheld the divorce. See id. After several plaintiffs brought suit against the Judge on the basis that he lacked legal authority to dissolve the civil union, he issued a revised opinion upholding his earlier decision. Alons v. Iowa Dist. Ct., 698 N.W.2d 858 (Iowa 2005); see also Cox, supra note 10, at 743–44.

196. Cox, supra note 10, at 739–42 (citing In re M.G. and S.G., No. 02-D-292). The court granted dissolution after determining that the West Virginia statute, which purported to refuse recognition to same-sex marriages, did not apply to the Vermont civil union at issue. Id. at 739–40. The court could have determined that the statute encompassed a civil union but chose not to deny relief. See W. VA. CODE § 48-2-603 (2001) ("A . . . judicial proceeding of any other state . . . respecting a relationship between persons of the same sex that is treated as a marriage under the law of the other state . . . shall not be given effect by this state."). The court might have determined that a civil union falls within this section because Vermont law treats civil unions the same as marriages. Cox, supra note 10, at 740.
and interstate recognition is beneficial because dissolution
and interstate recognition of civil unions present the same or
very similar issues for the courts as they would in the
marriage context.

Rosengarten v. Downes illustrates the illogical results
that can occur when a court refuses to perform a divorce
based on the underlying relationship. Glen Rosengarten, a
resident of Connecticut, filed an action to dissolve the civil
union that he and his partner, Peter Downes, a resident of
New York, entered into in Vermont. The appellate court
refused to dissolve the civil union because the union was not
a “marriage” within the meaning of the statute and therefore
could not be “dissolved” under Connecticut law. The court
looked at the issue of divorce jurisdiction only from the
perspective of marriage and concluded that the plaintiff could
not have entered into a marriage or civil union in
Connecticut. Rosengarten shows the court’s reluctance
about providing assistance to one of its own citizens in what
must have been a difficult and challenging
situation. Glen Rosengarten was not asking the court to validate his Vermont
civil union; he was simply asking for help dissolving his civil
union. Using the incidental approach, the Rosengarten
Court could have recognized the marriage for the sole purpose
of performing the dissolution.

In West Virginia and Iowa, courts have granted
dissolutions arising out of Vermont civil unions. In the
Iowa opinion granting dissolution, which did not address
subject matter jurisdiction nor any contrary Iowa statutes,

2002).
198. Id. at 172.
199. Id. at 172–75.
201. See id. at 734.
202. Id. at 732–34. Professor Herma Hill Kay notes that even though the
only issue before the court was the dissolution of the civil union, “virtually all of
the analysis was devoted to [the propriety of] same-sex marriage rather than to
... divorce.” Kay, supra note 177, at 88. Professor Kay also questioned why
Connecticut’s marriage law should control whether a dissolution petition
involving a Vermont civil union was properly before the court and insists that
the focus should have been on the question of divorce. Id. at 88–89.
203. See Cox, supra note 10, at 735.
204. Id. at 738–42 (citing In re KJB and JSP, No. CDCD 119660 (Woodbury
County Dist. Ct. Iowa, Nov. 14, 2003); In re M.G. and S.G., No. 02-D-292 (Fam.
Ct. W. Va., Jan. 3, 2003)).
the court said, "we can't turn people away from our court system and say we can't resolve your disputes . . . I clearly look at this as a dispute between parties that in some way I'm going to have to solve."205

Similarly, a West Virginia court demonstrated that it was willing to honor the relationship that its citizens had entered into, acknowledging that the women were "in need of a judicial remedy."206 The court granted the dissolution after determining that the West Virginia statute, which purported to refuse recognition to same-sex marriages, did not apply to the Vermont civil union at issue.207 Although the court could have determined that the statute encompassed a civil union,208 the court made clear that "the parties should not be denied the relief they were seeking."209

Regarding interstate recognition, the trial court's reasoning in Langan v. St. Vincent's Hospital, discussed supra, is worth noting.210 The plaintiff sought recognition of his Vermont civil union in order to recover for the death of his partner, under New York's wrongful death statute.211 New York had no affirmative law prohibiting civil unions, and thus the court applied the "place of celebration" rule in finding that the civil union was valid everywhere and will be recognized in New York for purposes of the wrongful death statute.212 The court then explicitly followed the incidental approach, recognizing the civil union in New York for the sole purpose of the wrongful death statute, and did not address the validity of the underlying relationship in New York for all

205. Id. at 744 (citing Santiago, supra note 195).
206. Id. at 740 (citing In re M.G. and S.G., No. 02-D-292, ¶ IX).
207. See id. at 739–40 (citing In re M.G. and S.G., No. 02-D-292, ¶ 1).
208. See W. VA. CODE § 48-2-603 (2001) ("A . . . judicial proceeding of any other state . . . respecting a relationship between persons of the same sex that is treated as a marriage under the law of the other state . . . shall not be given effect by this state."). The court might have determined that a civil union falls within this section because Vermont law treats civil unions the same as marriages. Cox, supra note 10, at 740.
209. Cox, supra note 10, at 740.
211. Langan, 765 N.Y.S.2d at 412.
212. Id. at 414; see also discussion supra Part II.B (discussing that when the state has no affirmative law regarding the underlying relationship, principles of comity suggest that the state ought to respect the decision of sister states using the "place of celebration" rule).
purposes. Additionally, the court looked to the purposes behind Vermont's civil unions statute, finding that a "the civil union is indistinguishable from marriage, notwithstanding that the Vermont legislature withheld the title of marriage from application to the union."214

The court concluded that the plaintiff would be entitled to recover as the decedent's spouse in Vermont, then decided that, based on the legislative intent behind New York's wrongful death statute, a spouse in a sister state's common law marriage would be recognized in New York.215 In short, the trial court looked at the policy reasons behind the incident at issue, and concluded that the civil union should be recognized for the limited purpose of the wrongful death action.216

C. How Chambers Should Have Been Decided

The Rhode Island Supreme Court had several options before it that would have yielded a much more sensible result when it decided Chambers.217 Because Rhode Island does not have an affirmative prohibitory law, the court could have used principles of comity to recognize the marriage.218 Alternatively, the court could have used the incidental approach to grant a divorce but not full recognition of the marriage.219 These alternatives would have provided divorces to citizens of Rhode Island who were "in need of a judicial remedy."220 Additionally, the court had some flexibility to use an alternative option given the lack of prohibitory law against same-sex marriage in Rhode Island, so long as recognition of the marriage does not offend any public policy of the state.221 Even if the court was unwilling to fully recognize the marriage, it was able to use the incidental approach to defer

214. Id. at 417–18.
215. Id. at 419–20; see discussion supra Part II.E.
216. See Cox, supra note 10, at 756–57.
218. See supra Part II.B.
219. See supra Part II.C.
220. See supra notes 206–09 and accompanying text.
221. See supra note 184 and accompanying text.
questions regarding the validity of the marriage and focus solely on what was being requested: a divorce.  

As the dissent acknowledged, it is illogical to analyze the meaning of the term “marriage” circa 1961 because the drafters of the Rhode Island marriage statute had not anticipated or even contemplated same-sex marriage at that time. Since 1961, many states have lifted their marriage restrictions. Nothing suggests that a Rhode Island court can only divorce a couple if their marriage would have been legal in 1961. “The question . . . [should be] whether the couple is now ‘married’ and [thus] entitled to seek [divorce].” If the court had accepted the divorce petition, it could have concluded that Rhode Island could grant full recognition to the marriage, or grant limited recognition for the sole purpose of performing the divorce.

V. PROPOSAL

Because it is imperative that same-sex spouses be able to divorce without having to overcome unreasonable burdens, the incidental approach to marriage recognition should, at a minimum, be the level of recognition applied to same-sex marriages throughout the United States. Even if the forum state has a mini-DOMA, that statute does not expressly prohibit the use of an incidental approach for the purposes of

222. See supra Part II.C; see also Kay, supra note 177, at 88-89 (discussing the Rosengarten case).

223. Chambers v. Ormiston, 935 A.2d 956, 961-63, 971 (R.I. 2007) (Suttell, J., dissenting); see also Grossman, supra note 217 (noting that the same-sex marriage movement did not even exist—legally or as a social movement—in 1961 and supporting this conclusion by noting that no 1961 legislature made a conscious decision to provide for the rights of same-sex couples when drafting their marriage laws).

224. See Grossman, supra note 217. These changes have allowed marriages between the mentally-disabled, marriages for those below a certain age, and some states have abolished or modified their prohibitions on first-cousin marriages. Id.

225. Id.

226. Id.


In mini-DOMA states, courts can utilize the incidental approach to avoid addressing the validity of the underlying marriage. West Virginia and Iowa, despite the existence of mini-DOMAs, have granted divorces based on this rationale. Courts should be willing to provide a way for their citizens to divorce when a marriage was performed under the laws of another state. In states without mini-DOMAs, courts are less constrained because there is no express public policy against recognition of same-sex marriage. These states can choose to use the incidental approach to marriage or recognize the underlying marriage.

Although the legislative purpose and intent behind divorce jurisdiction statutes will vary from state to state, the family courts were intended as a comprehensive forum for resolving issues concerning marital relations. Upon reviewing the legislative history behind the Rhode Island divorce jurisdiction statute, the dissenting judges in Chambers, determined that the legislators surely would have wanted to give all Rhode Island citizens a means of determining their marital status and dissolving their marriage.

Using the incidental approach, the court can view divorce as an incident of marriage, analyze the policies behind the incident at issue, and then decide whether the marriage

229. But see Grossman, supra note 13, at 483. Grossman notes that there are eleven states that statutorily bar an incidents approach, refusing to recognize any claim, right, or incident arising out of a prohibited same-sex marriage. Id. Those eleven states are Alaska, Arkansas, Florida, Georgia, Kentucky, Louisiana, Minnesota, Missouri, Texas, Virginia, and West Virginia. Id. at 447 n.71.

230. Although the cases cited do not expressly use the incidental approach when dissolving a marriage deemed contrary to the laws of the forum state, courts have dissolved such cases for other reasons. See Cox, supra note 10, at 738–42 (citing In re KJB and JSP, No. C1CD 119660 (Woodbury County Dist. Ct. Iowa, Nov. 14, 2003) (granting dissolution of a civil union when contrary law existed); In re M.G. and S.G., No. 02-D-292 (granting dissolution of a civil union when contrary law existed)).

231. See id.

232. See id. at 736–46.

233. See KOPPELMAN, supra note 12, at 137–48; see also Grossman, supra note 13, at 446–71.

234. See Chambers, 935 A.2d at 974 (Suttell, J., dissenting) (discussing the purpose behind the Rhode Island divorce jurisdiction statute).

235. Id. at 971, 973–74.

236. For example, looking at the intended purpose and effect of the divorce jurisdiction statute.
should be recognized for the sole purpose of performing the divorce. In a case where a couple petitions a court in their home state, the couple likely owns property in that state that must be divided and might require spousal support to be awarded. Only a court with proper jurisdiction can accomplish these tasks. It is disappointing that some courts and states are reluctant to provide this assistance to its own citizens, especially when it is infeasible or unreasonably burdensome for a couple to obtain a divorce in the state where the marriage was performed.

VI. CONCLUSION

Margaret Chambers and Cassandra Ormiston are still in a bind after the Supreme Court of Rhode Island decided their case. Although decisions concerning same-sex divorce jurisdiction will vary from state to state, courts have a variety of ways to perform divorces for same-sex spouses, even if recognition of the marriage is for the limited purpose of performing the divorce. An incidental approach to marriage recognition for the purpose of divorce can be utilized throughout the United States, even in states that have mini-DOMAs. Allowing all married citizens to divorce is consistent with the notion that a family court should be a comprehensive forum for resolving marital issues between citizens of that state. All states should allow its citizens to divorce, regardless of whether the marriage is a same-sex marriage.

237. See Cox, supra note 10, at 736-46; see also discussion supra Part II.C.
238. See KOPPELMAN, supra note 12, at 71-72.
239. See id. at 71-74.
241. See KOPPELMAN, supra note 12, at 105; see also Cox, supra note 10, at 736-46.