

Abstracts

for the *Symposium on Contemporary Conflict of Laws Issues in Family Law,* at **BYU Law School, February 1, 2008**

Same-sex Relationships Across the Canada/US Border

By Martha Bailey
University of Toronto

This paper outlines recent developments in law governing same-sex relationships in Canada and the US, and discusses private international issues that are raised by these developments.

The first part of the paper will distinguish between status and incidents of status. It will further trace the “unbundling” of the incidents of marriage from the status of marriage. Finally, it will explain the distinction between recognizing a foreign status; giving effect to the incidents of status; and on the other

The second part of the paper will discuss the opening up of civil marriage to same-sex couples in Canada. It will outline the availability of “tourist” marriages in Canada and the phenomenon of US same-sex couples travelling to Canada in order to marry there. It will consider the extent to which same-sex marriages solemnized in Canada could be recognized or given effect in Canada and the US.

The third part of the paper will outline the “civil union” laws in Canada and the US, focussing on the civil union regimes in province of Quebec and in the state of Vermont. The paper will then examine the problems relating to recognition of civil union status or incidents of civil union status across borders.

The fourth part of the paper will examine the phenomenon of extending marriage-like rights and obligations to unmarried couples on the basis of cohabitation. It will then consider issues relating to the enforcement of such rights and obligations across borders.

The fifth part of the paper will look at marriage-like rights and obligations created by contracts and the extent to which such rights and obligations will be enforceable across borders.

After discussing the private international law aspects of the various legal forms governing same-sex relationships, the paper will discuss the implications of the very different laws relating to same-sex relationships in (and within) the two countries.

The Coming Collision: “Romer” and State Defense of Marriage Acts

by Patrick Borchers

Creighton University

In reviewing Andrew Koppelman’s book “Same Sex, Different States: When Same-Sex Marriages Cross States Lines,” it became clear to me that the grounds are shifting in the same-sex marriage debate as it relates to choice of law. Early on, most of the attention was devoted to the Full Faith and Credit Clause as it was widely assumed that recognition of a marriage in one state would automatically force all other states to recognize it. Courts and sophisticated commentators now, however, seem to recognize that this position is untenable. The coming collision, thus, is not between same-sex marriage and full-faith-and-credit principles, but more likely between state Defense of Marriage Acts and equal protection principles originating from the Supreme Court’s decision in *Romer v. Evans* which, while not extending suspect or quasi-suspect treatment to classifications involving homosexuals, clearly entailed something more than traditional rationality review. Even if the *Romer* line of cases does not lead to a blanket rule requiring same-sex marriages on the same terms as opposite-sex marriages, it will give rise to serious arguments that certain “incidental” aspects of same-sex unions (for instance, rights of hospital visitation or some rights of succession) must extend even into states that by statute or state constitutional amendment forbid giving any effect to same-sex unions. In this article, I will attempt to examine just how slippery the slope created by *Romer* will prove to be.

Abortion Across State Lines

By Joseph W. Dellapenna

Villanova University School of Law

In 1996, Rosa Marie Hartford, whose 19-year-old son faced a charge of statutory rape when his 13-year-old girl friend became pregnant, took the girl from Pennsylvania to New York for an abortion without the consent of, or even telling, the girl's mother. The case briefly became a national *cause célèbre*, raising questions that are likely to become more salient if the Supreme Court returns authority to regulate or prohibit abortion to the states: To what extent can a states require its citizens to comply with the state's laws and policies on abortion outside the state, whether the action was deliberately taken in order to avoid or evade those laws or policies or otherwise. This paper examines the question in both the interstate and the international settings. The SSRN link for the paper is http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1011007#PaperDownload

Intercountry Adoption in Russia: Pluses and Minuses of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption

Olga A. Dyuzheva

Moscow State University Faculty of Law

This paper will address some aspect of international adoptions under Russian law as well as under the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (Hague Inter-Country Adoption Convention). It acknowledges the diversity of global peoples, practices and legal perspectives, as well as the legal issues that arise from adoption interactions with other societies and legal systems. Both inter-country adoption and in-country Russian adoption law issues will be reviewed and analyzed.

Protection of Children's Rights in the Private International Law of Russia

by

Galina Y. Fedoseeva

Professor, Moscow State Legal Academy

This paper reviews and analyzes four most sensitive questions of child protection by means of Private International Law:

1) Child's right to live in a family other than his/her biological family. Beside adoption based families Russian legislation provides various (at least 4) forms of foster families. From the point of Private International Law it is interesting to analyze what law should be chosen if a child and his potential foster parents are the citizens of different countries.

2) How violation of parent's visitation rights affects a child if he/she and a parent live in different countries.

3) How the autonomy of will in family relations affects children's rights from the international perspective.

4) How to apply so called soft conflict principles in the sphere of family law to choose more favorable law for a child.

**What if the Beckhams Move to L.A. and Divorce?
Marital Property Rights of Mobile Spouses When The Divorce in the U.S.**

*By Thomas Oldham
John Freeman Professor of Law
University of Houston*

Marital property rights at divorce are governed by state law. An increasing number of spouses divorcing in the U.S. have lived in more than one state, sometimes in more than one country. U.S. courts do not now agree about what law should govern the rights of such spouses. In my paper, I will summarize U.S. precedent and suggest what I believe would be the best approach.

Interstate Pluralism: The Role of Federalism in the Same Sex Marriage Debate

By Jeff Rensberger

South Texas College of Law

This paper discusses the role of federalism in the debate over interstate recognition of same-sex marriages. It examines and rejects as simplistic the argument that the role of full faith and credit is to promote greater national uniformity. Instead, full faith and credit requires a balancing between the policy of uniformity and its counterweight, state autonomy and particularism (which is termed interstate pluralism). The paper identifies how interstate pluralism is reflected in a wide variety of ways in the law. It then seeks to show the benefits to the individual of having different legal communities to choose from. It then uses extensive economic and demographic data to demonstrate just how pluralistic our states are. It concludes that state should generally apply forum law to decide whether to recognize same-sex marriages.

**Interstate Recognition of Adoptions:
On Jurisdiction, Full Faith and Credit, and Potential, Future Difficulties**

*by Mark Strasser
Trustees Professor of Law
Capital University Law School,
Columbus, Ohio*

Recent cases highlight some of the potential dangers for parent-child relationships that can arise when at least one member of a same-sex couple moves from one state to another. While final adoption decrees must be given full faith and credit, the recognition of that status does not afford as much protection as might be thought and parent-child relationships might still be undermined in significant ways. That potential for relationship-undermining might induce parents to take defensive measures which themselves are non-optimal for the families involved. Unless and until additional protective measures are incorporated into law, it seems reasonable to expect more protracted litigation and more harm to children.

Interjurisdictional Issues Regarding Controversial Domestic Relations: From Slavery to Same-Sex Marriage

by

Lynn D. Wardle

Bruce C. Hafen Professor of Law

J. Reuben Clark Law School, Brigham Young University

This paper will provide a comprehensive report and review of reported American court cases addressing questions concerning inter-state recognition of same-sex domestic relations for the twelve years from 1996-2007. Thus, it will consider such questions as inter-state recognition of same-sex marriages, civil unions, domestic partnerships, and adoptions by gay and lesbian partners and couples. of specific benefits or rights to benefits, and obligations or duties that flow from those relations. It will also review cases addressing interjurisdictional issues concerning the collateral benefits and obligations including financial aspects and consequences of such relations. In addition to these judicial decisions, statutory developments and constitutional amendments and provisions that have come into force during this period of time will also be considered.

Interstate and international conflict of laws issues concerning the importation of controversial novel or antiquated forms of domestic relationships created in another jurisdiction are not uncommon in American legal history. Indeed, at the very time of the founding of our nation, interstate recognition of one particularly controversial form of domestic relations – slavery – was a deeply divisive issue, resulting in several special provision being added to the Constitution (including a unique choice of law provision) that led to some of the most incendiary cases and issues decided in the first seven decades of our nation’s existence. In the last half of the nineteenth century, interstate and international recognition of another controversial form of domestic relations – polygamy – produced more interesting Anglo-American judicial decisions that led to unexpected difficulties (and, ultimately, repudiation). Adoptions of adults and cross-border marriages by teenagers produced additional conflict of laws controversies in the twentieth century.

Now, another set of controversial new forms of domestic relationships have emerged as an outgrowth of the gay rights movement – same sex marriage, marriage-equivalent civil unions, domestic partnerships, and adoptions by gay and lesbians couples and partners (herein collectively “gay family relations”). Again, inter-state conflict of laws issues are arising.

This paper will position the contemporary debate over conflicts of laws issues regarding gay family relations within the long history of public contentions involving interjurisdictional recognition of controversial (sometimes notorious) forms of domestic relationships. It will compare the historical treatment of similar controversial conflicts issues with current developments regarding recognition of imported gay family relations.

The consistency of the emerging rules with the historical rules governing interstate recognition of controversial domestic relations will be addressed in the paper. It also will evaluate the legal analysis used to decide the issues using generally accepted contemporary and historic principles of conflict of laws in domestic relations (choice of law, judgment recognition, and record recognition), and will identify and analyze the constancies and changes in these areas of conflicts law.