

**Interjurisdictional Recognition of Civil Unions, Domestic Partnerships, and Benefits  
Friday, November 5, 2004, at Brigham Young University Law School, Provo, Utah**

**Abstracts**

"Judgment Recognition and the Federal DOMA"

Professor Emeritus Sheldon A. Vincenti, University of Idaho College of Law

What is now Section 1738 of title 28 of the United States Code has been with us in one form or another since 1790. Until 1948, that provision required states to give special respect to legislative acts. Thus, in deciding such landmark cases as *Alaska Packers v. Industrial Accident Commission* and *Pacific Employers v. Industrial Accident Commission* the Supreme Court was interpreting Article IV of the Constitution directly, without the benefit of intervening federal statutes.

The passage of the federal DOMA denies certain judgments the protection of Section 1738. With regard to such judgments, therefore, courts must decide what sort of deference Article IV itself requires. I will discuss and assess the possible standards and the arguments which might support each of them.

"The Massachusetts Law on Marriage in Evasion of the Law of the Domicile as a Barrier to the Export of Same-Sex Marriage"

by Dwight Duncan, Southern New England School of Law.

In 1913, Massachusetts passed the uniform law on marriage outside the state in evasion of the law of the domicile. Codified as Mass. G. L. c. 207 s. 11, it prohibits and declares null and void any marriage in Massachusetts "contracted by a party residing and continuing to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction." Both the Governor and the Attorney General of Massachusetts interpret this as a bar to same-sex marriage in Massachusetts by out-of-state residents. The law is currently being challenged in the Massachusetts courts on grounds of selective enforcement and violation of the Privileges and Immunities Clause of the U.S.

Constitution art. IV, s. 2. Both these grounds are examined and found wanting. If ultimately upheld by the SJC, this law will prove a substantial barrier to the export of same-sex marriages from Massachusetts to the rest of the country, though it will not impede attempts to export same-sex marriage by couples legitimately domiciled in Massachusetts who subsequently move to other jurisdictions.

Interstate Recognition of Civil Unions

Barbara Cox, California Western School of Law

Despite discussion for over ten years, we still do not have any decisions on interstate or international recognition of marriages by same-sex couples. We do have, however, seven cases in the United States on the interstate recognition and validation of Vermont civil unions, one of which is still pending. In each of these seven cases, same-sex couples from different states who had entered into Vermont civil unions came to their domicile's state courts seeking resolution of legal issues that arose in their relationships. I will briefly

discuss these cases and whether the courts recognized the civil union for the particular incident of marriage at issue in each case. I also consider whether using an "incidents of marriage" analysis would lead other courts to also recognize and validate these civil unions for, at least, the limited purpose raised in the lawsuit.

#### What Constitutes Sufficient Interest to Decline Recognition of Civil Unions?

Stanley E. Cox, Professor of Law, New England School of Law

This paper will consider what constitutes acceptable forum interest that would allow a jurisdiction opposing a same sex union/ partnership to apply its own law to invalidate that union/partnership, or perhaps more accurately, the incidents of it. I will continue to argue, along lines similar to Kramer, that public policy objection alone is not enough to support forum law against a same sex state's interests, when the same sex state has continuing true interest in the underlying union/relationship (e.g., the home state of the couple). The opposing state must at least have sufficient interest that it could apply its own law to the underlying relationship or incidents. I will likely explore whether some determinations as to status, and/or accompanying incidents of status, might be incapable of being invalidated by an opposing state; whether, in other words, only one state's law might be required to be applied by all states as to some issues. (I don't know how I would come out yet on specific issues and fact patterns - that's why it would be interesting to explore this further.) I would want to include fact patterns involving divorce jurisdiction and judgments from the same sex state based on the prior relationship. Finally, I will continue to argue that the 1738-C part of DoMA is not a constitutionally proper choice of law rule, since it authorizes states to refuse recognition of laws and judgments based on content, thus discriminating against permissible policy balances made by other states as co-equal sovereigns. Accordingly, since I think DoMA as currently drafted can play no legitimate role in resolving interstate disputes, I think same sex judgments and choice of law disputes must be approached under normal conflicts principles.

#### Contemporary Interjurisdictional Recognition Issues: Assessing The Impact of Technological Innovations in Procreation

Professor L. Lynn Hogue Georgia State University College of Law

Social changes including innovations in artificial procreative technologies are raising new and challenging issues regarding interjurisdictional recognition regarding procreation, parental status and benefits. This paper will consider conflicts of laws issues that may arise, present an analysis of those issues under existing and developing conflicts principles, and suggest how those issues are likely to be resolved.

#### Civil Unions and Domestic Partnerships: The Meaning of the Public Policy Exception at the Boundaries of Domestic Relations Law

Emily J. Sack, Roger Williams School of Law

While inter-jurisdictional recognition of same-sex marriages has captured the public's attention in recent months, the issue of granting inter-jurisdiction recognition to civil unions and domestic partnerships may be even more complex. A body of law regarding

full faith and credit recognition to marriages and its exceptions already exists, which can provide critical guidance to the treatment of same-sex marriages. However, civil unions and domestic partnerships are sui generis, and are far more difficult to analyze in a full faith and credit framework.

In this paper, I explore the limits of inter-jurisdictional recognition for civil unions and domestic partnerships, with a particular focus on the scope of the public policy exception to full faith and credit in these areas. In some ways, the recognition of civil unions and domestic partnerships is less secure than that of same-sex marriage, because states would not be bound either by statutory or common law on inter-jurisdictional recognition of marriage. On the other hand, it can be argued that civil unions and domestic partnerships are more analogous to a regular contract than marriage is, so that the body of law regarding full faith and credit to contracts would be more likely to apply. This may make it more probable that civil unions and partnerships would be granted inter-jurisdictional recognition. The context in which recognition of these unions and partnerships arises also will likely impact the amount of recognition they will be given. Thus far, cases involving inter-jurisdictional recognition of civil unions have most frequently involved divorce. Since Vermont, the only state currently permitting civil unions, requires residency for divorce, but permits non-residents to enter into a civil union, two partners to a civil union may have to seek divorce in a state other than Vermont. The issue of granting divorce, or release from such unions and partnerships raises quite different policy interests, than the question of whether benefits arising from unions and partnerships must be respected in other jurisdictions.

Moreover, civil unions and domestic partnerships can differ substantially from each other, in ways meaningful to the question of inter-jurisdictional recognition. The formality with which they are entered into, the process for dissolving them and the scope of the benefits they confer, all may impact the amount of recognition required by other jurisdictions. Finally, while currently civil unions in Vermont are accessible only to same-sex partners, domestic partnerships in many jurisdictions may be entered into by both homosexual and unmarried heterosexual partners. This distinction may also impact the recognition that they are granted by other jurisdictions. In this paper, I plan to discuss these and other issues arising from inter-jurisdictional recognition of civil unions and domestic partnerships, which will also provide greater definition to the public policy exception in domestic relations law.

### An Analysis of Interjurisdictional Recognition of LesbianGay Adoptions

Lynn D. Wardle Professor of Law, J. Reuben Clark Law School, Brigham Young University

In my paper I will consider whether a state may decline to recognize a judicial decree or order for the "adoption" of a child by two "mothers" or two "fathers" – same-sex couple adoption, which I refer to as "lesbigay adoptions" (borrowing a phrase used by the well-known sociologists, Judith Stacey and Timothy Biblarz, who support "lesbigay" parenting).

I will review the issue under current law, and note a number of exceptions to the general rule of judgment recognition that exist concerning judgments regarding child-parent

relationships. I will also review the potential impact of the federal Defense of Marriage Act upon interstate judgment recognition.

It also will suggest that the social importance of parenthood requires the internal recognition or external imposition of some limitations upon the adult intimate relationships of adults who wish to be parents. Adoption is the gold standard of parenting; to preserve that quality it should provide for every child whenever possible a mother and a father, not two mothers or two fathers. Redefining adoption merely to send a signal of acceptance to same-sex couples is inappropriate; in adoption the best interests of the child should always prevail, and the adult preferences should not dictate or unduly influence the structure and requirements of adoption. Respect for adult sexual preferences does not extend to or require that children be offered less than they need for their best child development opportunity, which includes a mother and father in adoption. I suggests that responsible public policy must define and enforce limits on adult lifestyle preferences when they jeopardize the best interests of children.

#### Virginia Litigation over Recognition of Vermont Same-Sex Civil Unions

David A. Wagner, Regent University School of Law

This paper will focus on current Virginia litigation testing the applicability in Virginia of a Vermont civil union.

#### Survey of Interstate Recognition of Quasi-Marital Statuses

William C. Duncan

The question of legal recognition of same-sex unions consumes an ever-increasing amount of attention in the legal literature and case law. Much of that will now be directed to the entirely novel decision of the Massachusetts Supreme Judicial Court to announce a new definition of marriage: the voluntary union of two persons as spouses, to the exclusion of all others. There is however, another important issue receiving less attention but which as a practical matter may be significant in a number of future cases. This issue is the effect which states will give to quasi-marital statuses created by other states.

While there is a long-standing practice related to interstate marriage recognition-that a marriage valid where contracted will be treated as valid everywhere (with a long recognized public policy exception)-the entirely new phenomena of statuses created to provide the legal status of marriage to same-sex couples under a different name invokes no similar practice. Courts hearing a claim for recognition of a quasi-marital status contracted in another state are thus faced with a matter of first impression.

The impetus of this development was a Vermont Supreme Court decision issued in 1999. Even more recently, the California and New Jersey Legislatures have created domestic partnership statutes. These laws allow same-sex couples (and opposite-sex couples over 62 years old) to register as partners.

This presentation will discuss the recognition of same-sex unions in jurisdictions other than those in which they are contracted. To do so, it will first describe the handful of cases that have addressed the out-of-state effect of Vermont civil unions (since there is not yet any case law related to the statuses created by California or New Jersey). It will then address state statutes and constitutional amendments which have addressed the

effect of out-of-state quasi-marital statuses in those states. It will conclude with an analysis of questions related to the recognition of Vermont civil unions and domestic partnership statuses in other jurisdictions.

### The Framework of Full Faith and Credit and Interstate Recognition of Same Sex Marriages

William A. Reppy Jr., Duke Law School

The Full Faith and Credit Clause and implementing statutes, §§ 1738 and 1739, do not apply to conflict of laws situations when more than one state has the contacts necessary to make its law constitutionally eligible, nor do they apply to quasi-judicial determinations by a tribunal unable to make a choice of law. In each such case a tribunal has broad discretion in under rules made by the Supreme Court to choose the applicable law. In the case of a marriage records, an official has applied a law before the issue of full faith and credit arises; thus the rules concerning enforcement of judgments apply.

Marriage license clerks in Massachusetts are authorized to make a choice of law, and the clerks represent the interest of the domicile state in evasion same sex marriages. Thus both the constitutional clause and § 1739 (statute concerning records) apply. A state must give full faith and credit to the marriage unless Congress has the power to authorize, via DOMA, a state to override a record that is the equivalent of a judgment. It probably does not.

When a same sex couple from Massachusetts marry there but later change domicile, the new home state cannot impose on them what is in effect an involuntary divorce. DOMA cannot constitutionally override *Allstate Ins. Co. v. Hague*, which requires a state have substantial connections to a contract when it is made in order to apply its own law to the contract to void it.

### The Public Policy Doctrine and Interjurisdictional Recognition of Civil Unions and Domestic Partnerships

Richard S. Myers, Professor of Law

This paper considers the public policy doctrine and its implications for interjurisdictional recognition of civil unions and domestic partnerships. Although it is well established judicially, the public policy doctrine has been much-criticized by scholars who have written about the doctrine recently in discussions about the interjurisdictional recognition of same-sex marriages. As I discussed in an earlier article that dealt with this issue in the context of marriage, I think this scholarly criticism is mistaken. For similar reasons, these criticisms should have no force in the context of quasi-marital statuses. To the extent that these relationships are treated as marriages, the public policy doctrine provides adequate support for the refusal to recognize these relationships if a state chooses to adopt a policy of non-recognition. To the extent these relationships are treated as contracts, public policy similarly affords support for the refusal to recognize these relationships. This paper also discusses the possible constitutional objections to these conclusions.