

# MARRIAGE AND DIVORCE CONFLICTS IN INTERNATIONAL PERSPECTIVE

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## INTRODUCTION

Transformed by the advent of globalization, and the increasing movement of individuals and families across national borders, international family law has become a significant subject, bridging the traditional boundaries of public and private international law.<sup>1</sup> In the context of cross-border children's issues, the Hague Children's Conventions have established a new system of international law, largely embraced by American courts and lawmakers and implemented in federal legislation and uniform state laws. In the context of cross-border marriage and divorce litigation, however, courts

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1. See generally ANN LAQUER ESTIN, INTERNATIONAL FAMILY LAW DESK BOOK (2d ed. 2016).

in the United States and other nations are more reliant on traditional conflict-of-laws tools and approaches. Given the enormous changes in family law over the past generation, the opportunity to update these approaches is long overdue.

At the same time that marriage and family life have become more globalized, countries around the world have made large changes to their domestic laws in ways that have reduced the scope and scale of traditional conflicts problems. For example, the shift toward no-fault divorce laws in the United States eliminated much of the forum-shopping for favorable divorce laws that preoccupied earlier generations of conflicts scholars, clearing away a thicket of rules that had complicated questions of marriage validity. Since 1971, substantive and procedural restrictions on marriage have been eased, rates of nonmarital cohabitation have increased, and new alternatives to marriage have emerged, such as the civil union and domestic partnership. As described by Mary Ann Glendon, many countries have experienced both “a progressive withdrawal of official regulation of marriage formation, dissolution, and the conduct of family life” and, at the same time, “increased regulation of the economic and child-related consequences of formal or informal cohabitation.”<sup>2</sup> The traditional conflicts problems of marriage recognition and choice of law in divorce proceedings have not disappeared, but have shifted significantly as a result of these trends.

Given these changes, it is not surprising that the *Restatement (Second) of Conflict of Laws (1971)* (“Second Restatement”) has gaps in its coverage of family law topics. The Second Restatement considers family law directly in three chapters. Chapter 3 on Jurisdiction includes provisions addressing jurisdiction over personal status questions, including divorce, separation, annulment, adoption and child custody as well as support proceedings.<sup>3</sup> Chapter 9 on Property contains rules regarding marital interests in land and moveable property.<sup>4</sup> Chapter 11 on Status sets out rules regarding marriage, legitimacy and adoption.<sup>5</sup> Beyond these chapters, the Second Restatement’s international provisions have relevance for cross-border family law, including section 98 on the Recognition of Foreign Nation Judgments, and section 136 on Notice and Proof of Foreign Law.<sup>6</sup>

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2. MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 2 (1989).

3. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 69–79 ch. 3, topic 3 (AM. LAW INST. 1971).

4. *Id.* §§ 233–34 ch. 9, topic 2 and §§ 257–59 topic 3.

5. *Id.* §§ 283–90 ch. 11.

6. The international questions raised by § 98 are treated more expansively in the Restatement of Foreign Relations Law, which includes sections on recognition of foreign country divorce decrees, child

For conflicts purposes, the most significant changes in family law since the Second Restatement are the adoption of unilateral non-fault divorce laws, and a wider embrace of property-sharing principles at the time of divorce. Although disputes regarding marital property issues are now more important in practical terms than disputes over the grounds for divorce, the Second Restatement has no jurisdictional rules for litigation of equitable distribution.<sup>7</sup> There is also very little in the Second Restatement that is relevant to the validity and enforcement of premarital, postmarital, or separation agreements in the context of divorce. Moreover, the Restatement does not address same-sex marriage, which presented the major conflicts problem of the contemporary generation until the Supreme Court decided *Obergefell v. Hodges* in 2015.<sup>8</sup> There is nothing regarding the cross-border recognition or effect of cohabitation relationships or of more formal marriage alternatives. All of these are problems that occur in both domestic and international settings, and similar issues have occupied conflicts scholars outside the United States, particularly in Europe.

Although the Second Restatement incorporated significant changes to the rules of marriage and divorce, it reflects a much older legal tradition that defined families in terms of status relationships, and resisted application of the ordinary rules for civil litigation and recognition and enforcement of judgments. As the family has been privatized over the past generation,<sup>9</sup> moving increasingly from status to contract, the time is ripe for reconsideration of this tradition. With the broad movement to allow divorce without proof of fault, states have largely yielded their interest in limiting marriage dissolution. Instead, the more important policies concern protection for the parties' due process rights at the time of divorce and their reasonable expectations regarding ongoing family rights and relationships as they travel across jurisdictional borders. Along with these changes in divorce law, statutory and case law in the United States and abroad have begun to recognize a much broader role for party autonomy in the regulation of marital or partner financial relationships.

In the context of global families, the case for allowing couples to select the law that will apply to their personal and property interests seems

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custody orders, and support orders. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 484–86 (AM. LAW INST. 1987).

7. There is also very little acknowledgment of the “divisible divorce” problem, which traces to the era of fault-based divorce laws but still complicates litigation of these cases. See *infra* notes 141 to 156 and accompanying text.

8. 576 U.S. \_\_\_, 135 S. Ct. 2584 (2015). See generally, e.g., Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215 (2005).

9. See generally Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443 (1992).

especially strong.<sup>10</sup> The challenges presented by international conflicts are especially difficult for couples and families who move between substantially different legal systems. With the shift in U.S. immigration laws starting in 1965, the diversity of our foreign-born population has increased substantially. Family law conflicts have moved far beyond the familiar distinction between common law and civil law systems, to questions of Hindu law, African customary law, or Sharia-based law. An increase in dual nationality and circular migration patterns has led many individuals and families to maintain multiple affiliations over time.

This paper begins with some of these broader questions in Part I. The following sections survey the Second Restatement's rules on marriage, divorce, and the financial incidents of divorce, focusing primarily on international cases and questions, and drawing comparisons to approaches taken in other countries and the European Union. The final section makes a series of recommendations for addressing marriage and divorce in the new Restatement project.

## I. EXCEPTIONALISM AND AUTONOMY IN FAMILY LAW

### A. Family Law Exceptionalism

In many respects, family law litigation resembles other types of civil dispute resolution. Cross-border disputes over marriage, divorce, and parental responsibilities include many of the standard problems of international civil litigation, often in circumstances in which the parties' resources are severely limited.<sup>11</sup> With family members located in different countries, lawyers may face challenges with serving process<sup>12</sup> and obtaining evidence.<sup>13</sup> In establishing the validity of a foreign marriage or divorce, issues arise regarding document authentication and pleading or proof of foreign law.<sup>14</sup> When parallel proceedings unfold in different jurisdictions, courts wrestle with issues related to forum inconvenience and injunctive relief.<sup>15</sup> Beyond and beneath all of these issues are questions of how judicial

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10. Looking beyond the law of marriage and divorce, the provisions regarding children and parental responsibilities will need to be revised to reflect the three Hague Children's Conventions that the United States has ratified, and the provisions on legitimacy and adoption will need to be expanded to address the knotty subjects of cross-border assisted reproduction and surrogacy.

11. See Estin, *supra* note 1, at 1–6.

12. See, e.g., Wood v. Wood, 647 N.Y.S.2d 830 (N.Y. App. Div. 1996); Collins v. Collins, 844 N.E.2d 910 (Ohio Ct. App. 2006); Saysavanh v. Saysavanh, 145 P.3d 1166 (Utah Ct. App. 2006).

13. See, e.g., Boatswain v. Boatswain, 778 N.Y.S.2d 850 (N.Y. Sup. Ct. 2004); *In re* Letter Rogatory from the Nedenes Dist. Ct., Norway, 216 F.R.D. 277 (S.D. N.Y. 2003).

14. See, e.g., Moustafa v. Moustafa, 888 A.2d 1230 (Md. Ct. Spec. App. 2005).

15. See *infra* notes 157 to 160 and accompanying text.

jurisdiction should be defined in international cases, and problems for recognition and enforcement of judgments.

Even as family disputes share the complexities of other international litigation, they also involve special problems tracing back to the time when marriage was understood as a status relationship that could not be freely dissolved. Conflicting approaches of different states led to a complex set of jurisdictional and conflicts rules, well known to generations of scholars. Within the United States, rules for divorce jurisdiction and recognition of judgments presented an enormously difficult problem, from the mid-nineteenth to mid-twentieth centuries.<sup>16</sup> Based on the view that states have a special interest in marriage, the Supreme Court has also treated family litigation as falling outside the scope of its diversity jurisdiction, denying a federal forum to disputes that span different states or countries.<sup>17</sup>

As states have backed away from strong public regulation of marital status, the Supreme Court has shifted toward framing conflicts issues in terms of individual rights to marry and divorce protected by the Due Process and Equal Protection Clauses, rather than state interests under the Full Faith and Credit Clause.<sup>18</sup> But the Court has not modified its divisible divorce doctrine, an amalgam of fictionalized in rem jurisdiction over marital status,<sup>19</sup> and personal jurisdiction with a modern “minimum contacts” model for the financial incidents of divorce.<sup>20</sup>

Family law exceptionalism extends to financial questions, with the Uniform Foreign-Country Money Judgments Recognition Act expressly excluding from its scope “a judgment for divorce, support, or maintenance, or other judgment rendered in connection with domestic relations.”<sup>21</sup> This leaves creditors with foreign country divorce judgments to rely on comity as a basis for recognition and enforcement.<sup>22</sup> Similarly, in the European Union,

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16. See generally Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381 (2007).

17. See *Ankenbrandt v. Richards*, 504 U.S. 689 (1992).

18. See Estin, *supra* note 16, at 423–30.

19. Tracing back at least to *Pennoy v. Neff*, 95 U.S. 714, 734–35 (1877); cf. *Williams v. North Carolina*, 317 U.S. 287, 316–20 (1942) (Jackson, J., dissenting) (arguing that personal jurisdiction over the respondent should be required in divorce cases); see generally Rhonda Wasserman, *Parents, Partners, and Personal Jurisdiction*, 1995 U. ILL. L. REV. 813 (1995); see *infra* Part III.A.

20. This is the effect of cases such as *Estin v. Estin*, 334 U.S. 541 (1948), decided under the Full Faith and Credit Clause, but the Supreme Court did not apply a minimum contacts analysis in the family law context until *Kulko v. Superior Court of California*, 436 U.S. 84 (1978). See *infra* Part IV.A.

21. UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 3(b)(3) (UNIF. LAW. COMM’N 2005). The predecessor to this statute excluded support judgments from its scope, but not other financial claims arising from a divorce. See *id.* § 1(2). Foreign country support judgments may be enforceable under the Uniform Interstate Family Support Act (“UIFSA”) (UNIF. LAW. COMM’N 2008).

22. See *infra* Part IV.B.

family litigation was excluded from the Brussels Convention (and subsequent Regulation) on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters,<sup>23</sup> with a separate Brussels II Convention (and Regulation) developed more than a decade later to address litigation of divorce and parental responsibilities.<sup>24</sup>

Many state courts routinely extend comity to foreign divorce decrees and financial judgments.<sup>25</sup> However, in recent years, several states have moved in the opposite direction and enacted statutes that appear fully to reject the application of “foreign law” in the family law context.<sup>26</sup> Typically, these laws restrict the use of comity and inconvenient forum principles, and limit the enforcement of contractual choice of law and forum selection agreements. Notably, the statutes have either included exemptions for contracts entered into by business entities,<sup>27</sup> or have targeted their restrictions specifically to family law.<sup>28</sup>

The anti-foreign law statutes contravene the longstanding practice of addressing interstate and international conflicts using the same principles whenever possible.<sup>29</sup> Moreover, from a contemporary and international perspective, public policy considerations suggest that clarity and comity are particularly important in family law. In a world of no-fault divorce, there is every reason to design international conflicts rules to avoid the problems of limping marriages and divorces whenever possible, rather than raising the bar for recognition and enforcement of judgments relating to family status. These important public policy concerns are grounded in the same constitutional values embedded in our Full Faith and Credit jurisprudence, including due process, equal protection, and religious freedom. A more constructive approach to foreign family law would define rules that clearly specify and address the key norms and values that courts should consider in the case of true conflicts.<sup>30</sup>

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23. The current version is at Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (Brussels I recast), 2012 O.J. (L 351) 1.

24. The current version is Council Regulation (EC) No. 2201/2003 of 27 Nov. 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, 2003 O.J. (L 338) 1. [hereinafter Brussels IIA]. See generally MÁIRE NÍ SHÚILLEABHÁIN, CROSS-BORDER DIVORCE LAW: BRUSSELS II BIS 1–7 (2010).

25. See *infra* Parts III.B. and IV.B.

26. See, e.g., KAN. STAT. ANN. §§ 60-5102, 60-5108; see generally Ann Laquer Estin, *Foreign and Religious Family Law: Comity, Contract and the Constitution*, 41 PEPP. L. REV. 1029 (2014).

27. See, e.g., KAN. STAT. ANN. § 60-5108; TENN. CODE ANN. § 20-15-105.

28. See, e.g., N.C. GEN. STAT. § 1-87.14.

29. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 3, § 10.

30. Cf. *id.* § 10 cmt. d; see also *id.* § 98.

## B. Party Autonomy

The years since the Second Restatement was adopted have seen a significant expansion in party autonomy in family law. States in the United States have increased the scope of enforcement of premarital, post-marital and separation agreements,<sup>31</sup> often including choice-of-laws provisions. These issues have also garnered significant debate across Europe, including in the United Kingdom.<sup>32</sup> Recent EU regulations give parties some freedom to select the law that will govern their family disputes,<sup>33</sup> though there is less latitude for jurisdictional agreements.<sup>34</sup>

In the United States, choice-of-forum agreements are generally not enforced in family law proceedings where subject matter jurisdiction is carefully defined; such proceedings include divorce or child custody matters, though an agreement might be given weight in an inconvenient forum dispute. However, when questions of personal status are not in dispute—as in disputes that are primarily financial and subject to ordinary rules of personal jurisdiction—there should be general acceptance of choice-of-law and forum selection agreements.

## II. MARRIAGE VALIDITY AND RECOGNITION

The principle of marriage validation (“*favor matrimonii*”) applies almost universally in conflict of laws and is particularly powerful in the United States. Many family law doctrines reflect these policies, including the recognition of “common law marriage” in many states. The U.S. Supreme Court has found a fundamental right to marry, protected by the Due Process and Equal Protection clauses.<sup>35</sup> Broad recognition for marriage is important

31. For an early example, see *Posner v. Posner*, 233 So.2d 381 (Fla. 1970).

32. See Toni Marzal Yetano, *The Constitutionalisation of Party Autonomy in European Family Law*, 6 J. PRIV. INT’L L. 155–93 (2010); see also Patrick Wautelet, *Party Autonomy in International Family Relationships: A Research Agenda*, in *THE CITIZEN IN EUROPEAN PRIVATE LAW* 17–43 (C. Cauffman & J. Smits eds., 2015); E. Jayme, *Party Autonomy in International Family and Succession Law: New Tendencies*, 11 Y.B. PRIV. INT’L L. 1 (2009).

33. For examples relating to the EU, see the EU Maintenance Regulation, Council Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, 2009 O.J. (L 006) 1–79 (incorporating the 2007 Hague Protocol on the Law Applicable to Maintenance Obligations art. 8); Rome III Regulation, Council Regulation (EU) 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, art. 5, 2010 O.J. (L 343) 10.

34. See Ní SHÚILLEABHÁIN, *supra* note 24, at 137–41; see also Linda J. Silberman, *Rethinking Rules of Conflict of Laws in Marriage and Divorce in the United States: What Can We Learn from Europe?*, 82 TUL. L. REV. 1999, 2009–13 (2008) (describing the role of party autonomy under proposed Rome III Regulation).

35. See *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015); *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967).

because of the many legal rights and obligations that flow from marital status.

As reporter for the Second Restatement, Willis L.M. Reese believed in a flexible approach: one in which the validity of a marriage would be determined with reference to the particular issues or incidents of the marriage at issue.<sup>36</sup> This is reflected in the Second Restatement's distinction between section 283 regarding validity of a marriage, and section 284 regarding the incidents of a foreign marriage.<sup>37</sup> Although Professor Reese acknowledged that the weight of existing law supported the view that "a marriage is either good or bad for any and all purposes,"<sup>38</sup> he drafted rules that furthered marriage validation policies and highlighted cases consistent with his approach. Following the general test under section 6 for determining which state has the "most significant interest" in a particular question, Reese identified four basic values of relevance: a state's interest in not having its domiciliaries contract marriages of which it disapproves; a general policy favoring validation of marriages; protection of the parties' expectation that their marriage is a valid one; and furtherance of the objectives of any statutes governing the particular matter in which the question of marriage validity arises, such as succession or support laws.<sup>39</sup> This was a step forward from the older approach, which referred exclusively to the law of the place of celebration, unless recognition of the marriage would violate the "strong public policy" of the state in which recognition was sought.<sup>40</sup>

Professor Hans Baade observed, shortly after completion of the Second Restatement, that its family law provisions were "much more laden with First Restatement atavisms" than chapters on subjects such as torts and contracts,<sup>41</sup> noting that the "strong public policy" concept had been brought forward into section 283(2). Professor Baade further argued that in true conflicts cases, the most important considerations were the "purposes, policies, aims and objectives of each of the competing local law rules,"<sup>42</sup> and his critique of section 283(2) made extensive reference to marriage validity

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36. See generally Willis L.M. Reese, *Marriage in American Conflict of Laws*, 26 INT'L & COMP. L.Q. 952 (1977).

37. See generally David E. Engdahl, *Proposal for a Benign Revolution in Marriage Law and Marriage Conflicts Law*, 55 IOWA L. REV. 56 (1969).

38. Reese, *supra* note 36, at 954.

39. *Id.* at 965.

40. RESTATEMENT OF CONFLICT OF LAWS §§ 121, 122, 132 (AM. LAW INST. 1934) (hereinafter FIRST RESTATEMENT).

41. Hans W. Baade, *Marriage and Divorce in American Conflicts Law: Governmental Interests Analysis and the Restatement (Second)*, 72 COLUM. L. REV. 329, 330 (1972).

42. *Id.* at 378 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS, explanatory notes § 6 cmt. c).

questions in international cases, pointing out that these were more likely to present true conflicts in law and policy.<sup>43</sup> Baade also incorporated decisions by the U.S. immigration authorities into his analysis of the marriage validity rules, noting that these cases had been ignored by the Restatement.<sup>44</sup>

Looking beyond the United States, the 1978 Hague Convention on Celebration and Recognition of the Validity of Marriages<sup>45</sup> generally extends recognition to marriages that are valid in the place of celebration. Although the Marriage Convention recognizes diplomatic or consular marriages, it does not extend to informal marriages, or those conducted by proxy, posthumously, under military authority, or onboard ships or aircraft.<sup>46</sup> Under Article 12, the Convention's recognition rules apply even when marriage validity is incidental to another legal question; however, the rules need not be applied when that other question, "under the choice of law rules of the forum, is governed by the law of a non-Contracting State."<sup>47</sup> Marriage recognition may be denied only under either Article 11 on grounds of bigamy, a close family relationship, nonage, lack of mental capacity or consent,<sup>48</sup> or under Article 14, which provides that a "Contracting State may refuse to recognize the validity of a marriage where such recognition is manifestly incompatible with its public policy (*'ordre public'*)."<sup>49</sup> The phrase "manifestly incompatible" signals the drafters' intent that Article 14's exception should be narrowly limited.<sup>49</sup> Based on the principle of *favor matrimonii*, however, non-recognition is never required: Article 13 specifies that Contracting States may apply "rules of law more favourable to the

43. *Id.* at 364–78.

44. *Id.* at 368–70.

45. *Reprinted in* 16 I.L.M. 18-21 (1977), 25 AM. J. COMP. L. 399 (1977) (hereinafter Hague Marriage Convention). The convention includes separate provisions on Celebration of Marriage (Chapter I) and Recognition of the Validity of Marriages (Chapter II). The Preliminary Draft included a third section on Recognition of Decisions Relating to Marriage, but this was dropped from the project early in the process. *See* HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, EXPLANATORY REPORT ON THE 1978 MARRIAGE CONVENTION 291 (1978) (hereinafter EXPLANATORY REPORT).

46. Hague Marriage Convention, *supra* note 45, at arts. 8 and 9.

47. Reese thought this was an ingenious means of avoiding treating marriage as an all-or-nothing concept, but that it would ultimately mean that the convention would not apply to the majority of incidental question cases. Willis L.M. Reese, *The Hague Convention on Celebration and Recognition of the Validity of Marriages*, 20 VA. J. INT'L L. 25, 33, 36 (1979); *see also* EXPLANATORY REPORT, *supra* note 45, at 306.

48. The ground of bigamy is not available if the marriage has subsequently become valid by reason a dissolution or annulment of the prior marriage, and the only disqualifying family relationships are those "by blood or by adoption, in the direct line or as brother and sister."

49. EXPLANATORY REPORT, *supra* note 45, at 310–11. The two examples discussed during the proceedings were the U.K. rule against recognition of potentially polygamous marriages contracted in another country, and the Czechoslovakian rule requiring that Czech citizens marry in civil rather than religious form. *Id.*

recognition of foreign marriages.”<sup>50</sup>

The Convention was adopted in only three jurisdictions, and does not appear to have had a significant impact on the evolution of marriage recognition rules.<sup>51</sup> Within a few decades, the more important questions for private international law had shifted to cross-border recognition of same-sex marriages and to the recognition of marriage alternatives, such as registered partnership or civil union regimes, which fall outside the scope of the Marriage Convention.<sup>52</sup> Additionally, migration and multiculturalism have focused new attention on marriages from legal traditions beyond the European civil and common law world.

### A. Marriage and Human Rights

Public policies with respect to marriage have been a concern of international human rights law since at least 1948, when the Universal Declaration of Human Rights was adopted, including this language in Article 16: “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage, and at its dissolution.”<sup>53</sup> The Declaration also stated that “[m]arriages shall be entered into only with the free and full consent of the intending spouses.”<sup>54</sup> These principles were carried forward and elaborated in the 1962 United Nations Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages,<sup>55</sup> the International Covenant on Civil and Political Rights (“ICCPR”),<sup>56</sup> and the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”).<sup>57</sup> International conflict-of-laws principles, including the Hague Marriage Convention, clearly authorize states to implement these policies by denying recognition of marriages entered into without consent or by a party who has not reached the minimum age.<sup>58</sup>

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50. Hague Marriage Convention, *supra* note 45.

51. These are Australia, Luxembourg, and the Netherlands.

52. *See infra* Part II.B.

53. Art. 16, G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), at 71 [hereinafter UDHR].

54. *Id.*

55. Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriage, 521 U.N.T.S. 231 (Dec. 10, 1962).

56. *See* International Covenant on Civil and Political Rights, art. 23, 999 U.N.T.S. 171 (Dec. 10, 1966) (ratified by the United States in 1992) [hereinafter ICCPR].

57. *See* Convention on the Elimination of All Forms of Discrimination Against Women, art. 16, 1249 U.N.T.S. 13 (Dec. 18, 1979).

58. The U.N. recommends that fifteen should be the minimum legal age of marriage. *See* G.A. Res. 2018, Recommendation on Consent to Marriage, Minimum Age for Marriage, and Registration of

In terms of the right to marry, the Supreme Court’s 1967 decision in *Loving v. Virginia*<sup>59</sup> brought U.S. law into compliance with this international human rights norm. *Loving* rendered obsolete a century of conflicts laws dealing with restrictions on interracial marriage, in time to remove these issues from the Second Restatement.<sup>60</sup> However, the leading human rights instruments do not directly address two topics that have generated more public controversy and academic commentary in recent years: polygamous marriage and same-sex marriage. Strong arguments exist in support of the view that polygamous marriage violates principles of gender equality, and should be prohibited on that basis.<sup>61</sup> At the same time, international human rights instruments prohibit discrimination on grounds such as race, religion or national origin,<sup>62</sup> and extend protection to members of minority groups including the right “to enjoy their own culture” and “to profess and practise their own religion.”<sup>63</sup>

Prohibitions on polygamous marriage are deeply ingrained in U.S. law, including federal immigration law and various criminal laws; such prohibitions therefore remain a “strong public policy” for many conflicts purposes. The Hague Marriage Convention allows for non-recognition of marriages that are actually—and not just potentially—polygamous,<sup>64</sup> but it does not prohibit recognition. Conflicts authorities, including the Second Restatement, suggest that recognition may be appropriate, particularly when the issue appears as an incidental question in, for example, an inheritance or worker’s compensation dispute.<sup>65</sup> Although there are small indications of a more tolerant attitude toward polygamy in the law,<sup>66</sup> it appears certain that states may decline to recognize polygamous marriages.<sup>67</sup>

Marriages (1965) at 36.

59. 388 U.S. 1 (1967).

60. See FIRST RESTATEMENT, *supra* note 40, § 132(c); see generally Albert A. Ehrenzweig, *Miscegenation in the Conflict of Laws: Law and Reason Versus the Restatement Second*, 45 CORNELL L.Q. 659 (1960) (criticizing early draft of Second Restatement that did not protect validity of interracial marriages contracted outside the parties’ state of domicile).

61. See U.N. Committee on the Elimination of Discrimination Against Women, General Recommendation No. 2, par. 14 (13th Sess. 1994); see also generally Martha Bailey & Amy J. Kaufman, *POLYGAMY IN THE MONOGAMOUS WORLD: MULTICULTURAL CHALLENGES FOR WESTERN LAW AND POLICY* (2010).

62. *E.g.*, UDHR, *supra* note 53, at art. 2; ICCPR, *supra* note 56, at art. 2(1).

63. ICCPR, *supra* note 56, at art. 27.

64. Hague Marriage Convention, *supra* note 45, at art. 11(1).

65. The textbook cases, cited in the Reporters’ Notes for § 284, are *In re Dalip Singh Bir’s Estate*, 188 P.2d 499 (Cal. Ct. App. 1949) (allowing a decedent’s two wives to share in distribution of his estate) and *Royal v. Cudahy Packing Co.*, 190 N.W. 427 (Iowa 1922).

66. *Brown v. Buhman*, 822 F.3d 1151 (10th Cir. 2016).

67. Until 1995, British law treated “potentially polygamous” marriages as invalid, but that rule no longer applies. Private International Law (Miscellaneous Provisions) Act 1995, ch. 42 (amending section

In the United States, the Supreme Court's ruling in *Obergefell v. Hodges*<sup>68</sup> has taken the conflicts issues involving same-sex marriage off the table, much as *Loving* did before the Second Restatement was completed.<sup>69</sup> Authorities such as the European Court of Human Rights have not concluded that there is a right to same-sex marriage, but a 2015 ruling concluded that same-sex couples must have access to some type of legal recognition of their status.<sup>70</sup> Under *Obergefell* and the principle of *favor matrimonii*, recognition within the United States of same-sex marriages celebrated abroad should not present serious conflict of laws difficulties.

International human rights instruments including CEDAW and the ICCPR also seek to prevent coerced marriages and child marriage.<sup>71</sup> The same principle is reflected in state family laws, which set minimum marriage ages and allow for annulment of marriages entered into under duress. But forced marriage remains a significant global problem and could present conflicts questions with recognition or annulment of foreign marriages.<sup>72</sup>

Beyond the right to marry, the U.S. Constitution and international human rights principles also recognize and protect ongoing family life; this recognition is often framed in terms of privacy rights. In the United States, the leading case is *Griswold v. Connecticut*<sup>73</sup> and the principle is elaborated in a range of other cases concerning reproductive decision-making and parental autonomy. Similarly, Article 23(1) of the ICCPR provides that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”<sup>74</sup> A number of judgments from the European Court of Human Rights, relying on the family privacy rights of the European Convention on Human Rights, have required recognition and protection for family relationships.<sup>75</sup> These principles should

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11(d) of the Matrimonial Causes Act 1973).

68. 576 U.S. \_\_\_, 135 S. Ct. 2584 (2015).

69. There may be lingering effects from marriage evasion statutes enacted with the goal of blocking recognition of same-sex marriages. For example, Iowa enacted IOWA CODE § 598.20 in 1998 to provide that a marriage solemnized in another jurisdiction that is valid in that jurisdiction is valid in Iowa, “if the marriage would not otherwise be declared void.” When read in combination with IOWA CODE § 598.19, the new statute created a bar on recognition of first-cousin marriages, which are void in Iowa but fully valid in many U.S. states.

70. *Oliari and Others v. Italy*, 2015 App. No. 18766/11 and 36030/11, Eur. Ct. H.R.

71. See ICCPR, *supra* note 56, art. 23; CEDAW, *supra* note 57, art. 16(1)(b) and 16(2); see also G.A. Res. 2018, at 36, U.N. Recommendation on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages (1965).

72. See, e.g., *B. v. L.*, 168 A.2d 90 (N.J. Super. Ct. Ch. Div. 1961); cf. *Wilkins v. Zelichowski*, 140 A.2d 65 (N.J. 1958).

73. 381 U.S. 479 (1965).

74. ICCPR, *supra* note 56, at art. 23(1); see also *infra* Part II.B.

75. See, e.g., *Oliari*, discussed *infra* at note 91 and accompanying text.

be understood to mandate a broad and generous approach to recognition of marriage and partner relationships in the conflict of laws, analogous to the traditional policy of *favor matrimonii*.

## B. Globalized Marriage

With increasing and diversified patterns of global migration over the past fifty years, the United States, Canada, and many countries throughout Europe have experienced much greater ethnic, racial, and religious diversity. These changes have introduced a range of new family practices and traditions, as well as new challenges for family law. For example, the American case law reflects the application of state marriage statutes to weddings solemnized in Hindu or Muslim ceremonies, with courts noting that First Amendment principles protect the free exercise of religion and require government neutrality to the extent that religious officials are permitted to officiate at wedding ceremonies.<sup>76</sup> As in other domestic contexts, traditional marriage validation policies may lead courts to uphold religious marriages despite the couple's failure to comply with licensing or formalization requirements.<sup>77</sup> This was not the outcome of *Farah v. Farah*,<sup>78</sup> however, in which the marriage was celebrated in three stages, in three different countries. The couple at issue in *Farah* signed a marital agreement known as a *nikah* in Virginia, the marriage was concluded pursuant to the *nikah* by their proxies in the United Kingdom, and the wedding was subsequently celebrated with a large reception in Pakistan. Although there was no doubt that the couple intended to be married, the Virginia court concluded that the marriage could not be upheld under the law of the United Kingdom, rejecting the argument that the marriage would be treated as valid under the law of Pakistan. The result in *Farah* can be explained under the *lex loci* rule, but the court could clearly have taken a more flexible approach to the choice of law question, particularly since there appeared to be no countervailing public or private interest aside from the husband's interest in avoiding the financial consequences of divorce.

Courts (and immigration authorities) in the United States routinely consider the validity of marriages concluded abroad. These cases begin with a presumption of validity based on proof that a marriage ceremony was

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76. *E.g.*, *Persad v. Balram*, 724 N.Y.S.2d 560 (N.Y. Sup. Ct. 2001); *Aghili v. Saadatnejadi*, 958 S.W.2d 784 (Tenn. Ct. App. 1997).

77. *See, e.g.*, *Estate of Farraj*, 2009 WL 997481 (N.Y. Surr. Ct. 2009) (unpublished) (applying § 283 and upholding unlicensed marriage of a New York couple in an Islamic ceremony in New Jersey followed by a reception in New York). *But see generally* *Farah v. Farah*, 429 S.E.2d 626 (Va. Ct. App. 1993).

78. 429 S.E.2d 626 (Va. Ct. App. 1993).

performed<sup>79</sup> and recognize common law or proxy marriages that take place in a state or foreign country that permits those marriages,<sup>80</sup> as well as marriages under customary law.<sup>81</sup> The results are divided when there is evidence that the foreign marriage did not comply with the law of the place of celebration, particularly in “destination wedding” cases.<sup>82</sup>

For cases involving a marriage concluded abroad, followed by long-term cohabitation as a married couple, courts may uphold the marriage even when there are questions about its validity under the local law. For example, in *Xiong v. Xiong*<sup>83</sup> the court treated as valid the marriage of a couple in a traditional Hmong ceremony in Laos near the end of the Vietnam War that did not conform to the requirements of Laotian law—a fact pattern that echoes a number of marriage validation cases decided after World War II.<sup>84</sup> Ironically, although upholding a marriage is often important in such a situation to protect parties’ justified expectations, the family in *Xiong* argued against the validity of the marriage, and the court’s ruling precluded the couple’s children from bringing a wrongful death action after their mother’s death in a car accident where their father was driving.

Following the recommendations of Hans Baade, and the principle reflected in Article 13 of the Hague Marriage Convention, the challenge going forward is to craft marriage recognition rules that can travel well across international borders. There are strong arguments for extending comity to foreign marriage celebrations, to protect parties’ reasonable expectations and limit the circumstances in which a marriage is valid in some places and invalid in others.

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79. *E.g.*, *James v. James*, 45 S.W.3d 458 (Mo. Ct. App. 2001); *see also, e.g.*, CAL. EVID. CODE § 663 (1967).

80. *E.g.*, *Tshiani v. Tshiani*, 81 A.3d 414 (Md. 2013).

81. *See, e.g.*, *Marriage of Akon*, 248 P.3d 94 (Wash. Ct. App. 2011).

82. *See, e.g.*, *Ponorovskaya v. Stecklow*, 987 N.Y.S.2d 543 (Sup. Ct. 2014) (declining to recognize “a license-less marriage supposedly solemnized in what can only be described as a “pseudo-Jewish” wedding ceremony conducted at a Mexican beach resort by a New York dentist who became a Universal Life Church minister on the internet solely for the purpose of performing weddings for friends and relatives”); *see also Hudson Trail Outfitters v. D.C. Dep’t of Emp’t Servs.*, 801 A.2d 987 (D.C. 2002) (holding that couple’s exchange of religious vows during trip to Nicaragua was not valid marriage; note that finding of marriage validity would have terminated widow’s right to continue receiving benefits). *But see Donlann v. Macgurn*, 55 P.3d 74 (Ariz. Ct. App. 2002) (applying § 283 and upholding marriage obtained by an Arizona couple on vacation in Mexico that would have been valid under Arizona law); *Amsellem v. Amsellem*, 730 N.Y.S.2d 212 (N.Y. Sup. Ct. 2001).

83. 648 N.W.2d 900 (Wis. Ct. App. 2002).

84. *E.g.*, *Taczanowska v. Taczanowski* (1957) 3 W.L.R. 141 (Court of Appeal) (England).

### C. Marriage Alternatives

During the long debate over same-sex marriage in the United States, several states instituted alternative forms of recognition for couples who could not or chose not to marry. Some of these have remained legally valid after the ruling in *Obergefell*.<sup>85</sup> A substantial number of foreign jurisdictions have civil union or registered partnership laws in force, offering couples an opportunity to formalize their relationship, but without the rights and benefits of marriage.<sup>86</sup> As in the United States, some foreign countries that established alternative forms of recognition have maintained those even after extending full marriage rights to same-sex couples. In France, for example, the contractual alternative known as “le PACS” or Civil Solidarity Pacts, available to both same-sex and opposite sex couples, has remained in place following legislation to allow same-sex marriage enacted in 2013.

Jurisdictions that authorize civil union or registered partnership generally extend recognition to similar forms of partnership contracted in other states or foreign countries, but this question is complicated by the many different forms of these marriage alternatives.<sup>87</sup> The British civil partnership legislation extends recognition to various overseas unions that it deems to be the equivalent of civil union; this list of unions has been regularly updated.<sup>88</sup> States that do not have these parallel institutions in place have not given legal effect or recognition to registered partnerships, even when the issue arises as an incidental question.<sup>89</sup> One exception that helps to point the way forward is *Hunter v. Rose*, in which the Massachusetts courts recognized a California registered partnership on the basis of comity.<sup>90</sup>

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85. As of 2015, civil union or domestic partner registration was still available in California, Colorado, Hawaii, Illinois, Nevada, New Jersey, Oregon, Washington, Wisconsin and the District of Columbia.

86. Countries authorizing civil union or registered partnership at the national level include: Andorra (since 2014), Austria (2010), Chile (2015), Croatia (2014), Czech Republic (2006), Ecuador (2015), Estonia (2016), Germany (2001), Greece (2015), Hungary (2009), Italy (2016), Liechtenstein (2011), Malta (2014), and Switzerland (2007). Registration is available at the state or provincial level in parts of Australia, Japan, Mexico, Taiwan, and the United Kingdom (Northern Ireland). See ESTIN, *supra* note 1, at 33. Additional information based on the author’s research; current as of Nov. 2016.

87. *E.g.*, CAL. FAM. CODE § 299.2; CONN. GEN. STAT. § 46b-28a; N.J. STAT. § 26:8A-6(c).

88. Civil Partnership Act 2004, c. 33 (Eng). The list is codified in Schedule 20, which is entitled the “meaning of overseas relationship: specified relationship.” See also Civil Partnership Act 2004 (Overseas Relationships) Order 2012 (U.K.), No. 2976, <http://www.legislation.gov.uk/ukxi/2012/2976/made>.

89. *E.g.*, *Rosengarten v. Downes*, 802 A.2d 170 (Conn. App. Ct. 2002); *Langan v. St. Vincent’s Hosp. of N.Y.*, 802 N.Y.S.2d 476 (N.Y. App. Div. 2005); *B.S. v. F.B.*, 883 N.Y.S.2d 458 (N.Y. Sup. Ct. 2009).

90. 975 N.E.2d 857 (Mass. 2012); see also *Neyman v. Buckley*, 153 A.3d 1010 (Pa. Super. Ct. 2016) (ruling that the principle of comity mandates treatment of civil union as the legal equivalent of marriage for purposes of divorce jurisdiction).

Within Europe, this has been a difficult problem, because different nations have taken quite distinct approaches to the question. At least seventeen countries have registration schemes available to same-sex couples, and sometimes also to opposite-sex couples. These schemes are mandatory for countries that do not allow same-sex marriage in the aftermath of the European Court of Human Rights' 2015 ruling in *Oliari v. Italy*.<sup>91</sup> *Oliari* concluded that failure to extend some form of legal recognition to same-sex couple relationships violated the right to respect for private and family life under Article 8 of the European Convention on Human Rights.

Despite this diversity, there is no European convention or regulation addressing the cross-border recognition of civil union and domestic partner relationships. England, Wales, Scotland, and Northern Ireland recognize certain "overseas relationships" under the Civil Partnership Act 2004, but this type of legislation is unusual.<sup>92</sup> This topic has been under consideration by the Hague Conference, but the organization has not moved toward developing a convention on recognition of cohabitation or registered partner relationships.<sup>93</sup> In its study documents, the Permanent Bureau has reviewed statistical and legal developments around the world and considered the private international law aspects of forming and dissolving registered partnerships, their legal effects, and cross-border recognition of registered partnerships.

Without addressing the broader recognition problem, a group of eighteen European Union countries has recently agreed to implement a system of enhanced cooperation with respect to the property consequences of registered partnerships.<sup>94</sup> The regulation is designed to harmonize conflict of laws rules in relation to the daily management of partners' property and the liquidation of their shared property interests upon separation or death.<sup>95</sup> The basic principle is that property consequences should be governed by the law of the place where their partnership is registered, even if this is not the law of an EU member state.<sup>96</sup> In the case of partnership annulment or

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91. 2015 App. No. 18766/11 and 36030/11, Eur. Ct. H.R.

92. See generally LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS IN EUROPE: NATIONAL, CROSS-BORDER AND EUROPEAN PERSPECTIVES (Katharina Boele Woelki & Angelika Fuchs eds., 2d ed. 2012).

93. See, e.g., HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, UPDATE ON THE DEVELOPMENTS IN INTERNAL LAW AND PRIVATE INTERNATIONAL LAW CONCERNING COHABITATION OUTSIDE MARRIAGE, INCLUDING REGISTERED PARTNERSHIPS (Mar. 2015), <https://assets.hcch.net/upload/wop/gap2015pd05en.pdf>.

94. See Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions in Matters of the Property Consequences of Registered Partnerships.

95. *Id.* at Recital 11.

96. *Id.* at Recital 18, arts. 15 and 16.

dissolution or succession proceedings, jurisdiction over partnership property matters is assigned to the court where the proceedings at issue are being heard.<sup>97</sup> In other cases, jurisdiction is assigned with reference to the couple's common habitual residence.<sup>98</sup> The regulation is designed so that an EU member state can participate in it even if does not otherwise recognize registered partnerships.<sup>99</sup> The proposed EU regulation does not apply to couples in *de facto*, unregistered cohabitation relationships, even in those countries that extend legal effect to *de facto* unions.<sup>100</sup> It does not define the “personal effects” of registered partnerships, or apply to questions of capacity, or maintenance obligations, gifts, or succession rights of a surviving partner.<sup>101</sup>

Within the United States, some of the work of the new EU regulation is accomplished by ordinary rules of personal jurisdiction and full faith and credit. Other aspects could be addressed as matters of contract law. To the extent that registered partners—or other cohabitants—have entered into property agreements, courts generally enforce such agreements under the principles announced in cases such as *Marvin v. Marvin*.<sup>102</sup> Contracts of this type should be enforceable on the same basis as marital agreements.<sup>103</sup>

### III. DIVORCE

Jurisdiction for divorce or legal separation proceedings in the United States is based on the domicile or residence of the petitioner. Although a respondent is constitutionally entitled to notice and an opportunity for a hearing,<sup>104</sup> there is no requirement that the court have a basis for exercising full personal jurisdiction.<sup>105</sup> The court may not enter orders concerning the financial incidents of marriage, however, including spousal support and equitable division of marital property, unless it has personal jurisdiction over both partners.<sup>106</sup> The fact that divorce jurisdiction is “divisible” has created significant complexity, forcing courts and practitioners to think separately about these two phases of divorce litigation. And, though the doctrine evolved in the context of interstate conflicts and the Full Faith and Credit

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97. *Id.* at arts. 3 and 4.

98. *Id.* at art. 5.

99. *Cf. id.* at arts. 18(2) and 24.

100. *Id.* at Recital 9.

101. *Id.*

102. 557 P.2d 106 (Cal. 1976).

103. *See infra* Part IV(C).

104. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 3, § 69.

105. Note that subject matter jurisdiction is conferred by state statutes.

106. *See infra* notes 152–156 and accompanying text.

Clause, courts apply the same rules to recognition of foreign judgments as a matter of comity.

#### A. Jurisdiction and Choice of Law

Under the principles in sections 70 and 71 of the Second Restatement, a state has power to exercise judicial jurisdiction to dissolve a marriage when either or both of the spouses are domiciled in the state. Section 72 takes a step beyond the domicile rule, providing that a state may exercise this power when neither spouse is domiciled in the state, “if either spouse has such a relationship to the state as would make it reasonable for the state to dissolve the marriage.”<sup>107</sup> The comments indicate that residence for a substantial period would be sufficient, but that the fact that the couple was married in a state “should not of itself provide an adequate jurisdictional basis.”<sup>108</sup> There is also a cautious suggestion that “[a] distinction may ultimately be drawn between situations where both spouses are subject to the personal jurisdiction of the divorce court and where there is jurisdiction over only one spouse.”<sup>109</sup>

In terms of the law to be applied, section 285 states that “the local law of the domiciliary state in which the action is brought will be applied to determine the right to divorce,” and the official comments state that this rule is based on the “peculiar interest which a state has in the marriage status of its domiciliaries.”<sup>110</sup> In the case of proceedings brought in a non-domiciliary state, the official comments conclude it is “uncertain whether it would be appropriate for the courts of a state where neither spouse is domiciled but which does have jurisdiction to grant a divorce to apply their own local law in determining whether a divorce should be granted.”<sup>111</sup>

Many nations with civil law traditions recognize nationality as an appropriate basis for exercising jurisdiction over matters of personal status, including divorce. Numerous courts have been presented with situations where couples with foreign citizenship have established their residence in the United States before one member returns to their country of citizenship to obtain a divorce.<sup>112</sup> Even those nations with which the United States shares a common law heritage, and which apply a domicile test for purposes of divorce jurisdiction, may understand the concept differently. The American

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107. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 3, § 72.

108. *Id.* at cmt. b. *But see* David-Zieseniss v. Zieseniss, 129 N.Y.S.2d 649 (N.Y. Sup. Ct. 1954).

109. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 3, § 72 cmt. b.

110. *Id.*, *supra* note 3, § 285 cmt. a.

111. *Id.* § 285 Reporters' Note cmt. d (noting the discussion of this issue in *Alton v. Alton*, 207 F.2d 667 (3d Cir. 1953) (Hastie, J., dissenting)).

112. *See infra* text accompanying note 120.

version of domicile tends to be more fluid than its British counterpart, and more closely aligned with the European concept of habitual residence. In the words of Friedrich Juenger: “Usually a person’s habitual residence will be the same as his domicile in the American sense. Roughly speaking, one might say it equals domicile minus esoterics.”<sup>113</sup>

Within the European Union, jurisdiction to enter a divorce decree is governed by the Brussels IIA Regulation.<sup>114</sup> Under Brussels IIA, courts of EU member states have jurisdiction over divorce, legal separation, or marriage annulment when both spouses have been habitually resident within the territory of the state. In addition, a court in the state where both parties have their nationality or domicile may exercise jurisdiction on that basis. Beyond the question of jurisdiction, the European Union implemented an enhanced cooperation approach in 2010, known as the Rome III Regulation, to define the law applicable to divorces and legal separations.<sup>115</sup> A total of fifteen EU nations currently participate in this regime.<sup>116</sup>

## B. Recognition of Divorce Decrees

Although there are no specific rules in the Second Restatement governing the recognition of judgments dissolving marriages, some of the comments and illustrations to the general provisions in sections 92 to 97 address divorce judgments.<sup>117</sup> A long series of decisions by the U.S. Supreme Court discussed the obligations of states to give full faith and credit to the divorce decrees of sister states, and the Court has not revisited those issues for the past fifty years. With respect to foreign nation judgments, section 98 provides that: “A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying claim are concerned.”<sup>118</sup> The comity principle is more fully elaborated in the *Restatement (Third) of Foreign Relations Law (1987)*, which addresses Recognition of Foreign Divorce Decrees in section 484.

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113. Friedrich Juenger, *Recognition of Foreign Divorces- British and American Perspectives*, 20 AM. J. COMP. L. 1, 31 (1972).

114. See generally Brussels IIA, *supra* note 24.

115. Rome III Regulation, *supra* note 33.

116. The participating EU member states at the time of this writing are Austria, Belgium, Bulgaria, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain.

117. E.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 3, § 97 cmt. c (citing *Sherrer v. Sherrer*, 334 U.S. 343 (1948)).

118. As modified in 1988. See generally Courtland H. Peterson, *Foreign Country Judgments and the Second Restatement of Conflicts of Laws*, 72 COLUM. L. REV. 220 (1972).

Significantly, the rule in the Restatement of Foreign Relations Law defines jurisdiction for divorce purposes more broadly than the rules of the Second Restatement, incorporating the concept of habitual residence and making extensive references to the 1970 Hague Convention on the Recognition of Divorces and Legal Separations (“Hague Divorce Convention”).<sup>119</sup> This is a forward-looking approach, but the comments and illustrations make it clear that this section was drafted during a time when individuals living in states with strict divorce rules would travel outside the United States to places such as Haiti or the Dominican Republic to obtain a divorce. This is a very different reality from the experience of globalized families today with complex ties and affiliations to multiple countries.

Under section 484(1) of the Hague Divorce Convention, a court in the United States is not bound to recognize a foreign divorce granted in a country that was not the domicile or habitual residence of both spouses at the time of divorce, even when one or both spouses are nationals of that country. Section 484(2) permits recognition on a wider basis, however, including (a) a divorce granted in the country of domicile or residence of one of the parties, or (b) a divorce granted by a court with personal jurisdiction over both parties where at least one spouse appeared in person.<sup>120</sup>

In these cases, when considering whether to extend comity to a foreign country divorce, United States courts rely on the same principles of jurisdiction and due process that are applied in domestic divorce proceedings. This has led to nonrecognition in cases involving couples who are citizens or nationals of another country but also residents of the United States. For example, a foreign court may be prepared to exercise divorce jurisdiction on the basis of nationality, but if neither of the parties reside in that country the foreign divorce will not be recognized in the United States.<sup>121</sup>

There are also comity questions raised by non-judicial or religious divorce procedures, particularly divorces by *get* in Jewish law or by *talaq* in

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119. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 484 (AM. LAW INST. 1965) (incorporating Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations (June 1, 1970)).

120. The provision in § 484(2)(b) reflected the rule in New York and several other states. *See id.* § 484 cmt. b. The Reporters’ Notes, however, make clear that states do not recognize *ex parte* foreign divorces when neither party has a domicile or habitual residence in that place. Section § 484(3) provides that a court that would not ordinarily recognize a divorce within the scope of § 484(2)(a) or (b) may do so if it would be recognized by the state where the parties were domiciled or had their habitual residence at the time of the divorce.

121. *See, e.g.,* Juma v. Aomo, 68 A.3d 148 (Conn. Ct. App. 2013); Matter of Ramadan, 891 A.2d 1186 (N.H. 2006); Farag v. Farag, 772 N.Y.S.2d 368 (N.Y. App. Div. 2004); *see generally* ESTIN, *supra* note 1, at 59–61.

Islamic legal systems.<sup>122</sup> Several cases have declined to recognize *talaq* divorces pronounced in foreign consulates in the United States.<sup>123</sup> To the extent that a non-judicial or religious divorce occurs in a country where such divorces are fully valid, and both members of the couple are living in that country, recognition is routinely extended as a matter of comity.<sup>124</sup> In *ex parte* foreign proceedings, however, concerns regarding jurisdiction and notice often lead courts in the United States to refuse recognition.<sup>125</sup> Foreign divorces may also draw objections if the law of the foreign country extends different rights to men and women.<sup>126</sup> Because the comity rule allows for exceptions based on a strong public policy, courts should feel free to weigh important principles of equality and nondiscrimination into their determination of whether to extend recognition to a foreign divorce.

Viewed in this context, the anti-foreign law statutes noted above could be understood as an extension of the traditional policies embedded in the comity rule.<sup>127</sup> Foreign divorce judgments that violate our constitutional norms of due process and equal protection should not be enforced when recognition would harm the interests of a spouse who did not initiate the proceedings at issue. Given the fact that unilateral no-fault divorce is universally available in the United States, however, there appears very little reason for states to resist giving effect to foreign decrees or procedures that terminate a marriage, unless the result would prejudice the financial rights of a partner.

Within the European Union, divorce recognition is governed by the Brussels IIA Regulation.<sup>128</sup> Twenty nations have joined the 1970 Hague Divorce Convention, which requires that member states give effect to divorce and separations decrees obtained in officially recognized proceedings in any contracting state if those proceedings were based on one

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122. See generally Alan Reed, *Transnational Non-Judicial Divorces: A Comparative Analysis of Recognition Under English and U.S. Jurisprudence*, 18 LOY. L.A. INT'L & COMP. L.J. 311 (1996).

123. E.g., *Shikoh v. Murff*, 257 F.2d 306 (2d Cir. 1958); *Aleem v. Aleem*, 947 A.2d 489 (Md. 2008).

124. See generally, e.g., *Shapiro v. Shapiro*, 442 N.Y.S.2d 928 (N.Y. Sup. Ct. 1981); *Ashfaq v. Ashfaq*, 467 S.W.3d 539 (Tex. App. 2015); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 6, § 484(1).

125. E.g., *Basiouny v. Basiouny*, 445 So.2d 916 (Ala. Civ. App. 1984); *Juma v. Aomo*, 68 A.3d 148 (Conn. App. Ct. 2013); *Matter of Ramadan*, 891 A.2d 1186, 1190 (N.H. 2006); *Farag v. Farag*, 772 N.Y.S.2d 368, 371 (N.Y. App. Div. 2004); *Atassi v. Atassi*, 451 S.E.2d 371, 375 (N.C. Ct. App. 1995); *Tal v. Tal*, 601 N.Y.S.2d 530, 533–34 (N.Y. Sup. Ct. 1993).

126. Compare the discussion in *Aleem v. Aleem*, 931 A.2d 1123, 1123 (Md. Ct. Spec. App. 2007) with *Hosain v. Malik*, 671 A.2d 988, 1066 (Md. Ct. Spec. App. 1996); see also David Rosettenstein, *Comity, Family Finances, Autonomy, and Transnational Legal Regimes*, 23 INT'L J. L. POL'Y & FAM. 192–210 (2009).

127. See *supra* notes 26–28 and accompanying text.

128. See *supra* note 24.

of the jurisdictional grounds listed in the Convention.<sup>129</sup> The enumerated grounds include nationality and habitual residence. The Divorce Convention applies only to recognition of divorce and separation decrees and not to ancillary orders such as “orders relating to pecuniary obligations or to the custody of children.” The United States participated in negotiations for the Divorce Convention, but has not ratified it. In Britain, the Divorce Convention was implemented in the Family Law Act 1986.<sup>130</sup>

#### IV. FINANCIAL INCIDENTS OF MARITAL AND PARTNER RELATIONSHIPS

The no-fault “divorce revolution” of the 1960s and 1970s was accompanied by a fundamental shift in the law applied to the financial consequences of marriage. Reformers argued that in a no-fault system, equitable division of the couple’s property under a “marital partnership” theory should replace alimony as the primary financial remedy upon dissolution of marriage.<sup>131</sup> This norm was incorporated into the 1970 Uniform Marriage and Divorce Act (“UMDA”),<sup>132</sup> and many states with a common law approach to property rights enacted new equitable distribution statutes, borrowing heavily from the rules applied in community property states. The rationale for post-divorce support shifted away from the earlier conception of alimony—as a continuation of a husband’s duty to support his wife if she were not at fault in the breakdown of their marriage—to a means of providing transitional support for a former spouse who does not have the means to be self-sufficient. These trends were well-established when the American Law Institute adopted the Principles of the Law of Family Dissolution in 2002.<sup>133</sup>

With the new importance and scope of property remedies, and the slow demise of fault-based divorce laws, forum shopping has shifted from the grounds for dissolution of marriage to the potential financial consequences of a divorce.<sup>134</sup> At the same time, marital contracting regarding the financial incidents of divorce has become much more important, with the law shifting

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129. See *supra* note 119.

130. Family Law Act of 1986 (Part II) (U.K.).

131. See generally Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York’s Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 627–32 (1991).

132. See UNIFORM MARRIAGE AND DIVORCE ACT OF 1970, §§ 307 (Disposition of Property), 308 (Maintenance) (UNIF. LAW. COMM’N 1970) [hereinafter UMDA].

133. Chapter 4 addresses the division of property upon dissolution, and Chapter 5 considers compensatory spousal payments.

134. See generally J. Thomas Oldham, *Why a Uniform Equitable Distribution Act is Needed to Reduce Forum Shopping in Divorce Litigation*, 49 FAM. L.Q. 359 (2015); J. Thomas Oldham, *Everything is Bigger in Texas, Except the Community Property Estate*, 44 FAM. L.Q. 293 (2010).

to encourage private dispute resolution through separation agreements<sup>135</sup> as well as agreements both before or during a marriage regarding financial rights. These trends were addressed with the 1983 Uniform Premarital Agreement Act (“UPAA”), and its successor, the 2012 Uniform Premarital and Marital Agreements Act (“UPMAA”).<sup>136</sup>

In contrast to the United States’ experience, the law governing divorce and its financial incidents did not shift as dramatically in the United Kingdom. Although the U.K. added a no-fault basis for divorce to its statutes with the Divorce Reform Act 1969 (based on living separate and apart for at least five years, or two years if both members of the couple agree), it has never adopted unilateral divorce based on a marriage breakdown standard as is typical in the United States.<sup>137</sup> Financial provision and “property adjustment” orders remain highly discretionary without the norm of equal division that is common in the United States,<sup>138</sup> and British courts do not enforce premarital or separation agreements without reconsidering their terms.<sup>139</sup> There has been substantial debate over these questions in recent years, largely because the British approach is significantly different from the rest of Europe.<sup>140</sup>

Another distinction can be drawn between the financial incidents of divorce in the United States and the remedies available in countries with legal systems, often based on religious law, that give a husband the right to obtain a unilateral divorce and very limited obligations for financial support or sharing afterward. These differences appear as a backdrop in many recent divorce recognition disputes.

#### A. Litigating Financial Matters

Section 77 of the Second Restatement provides a rule for jurisdiction over actions for spousal support. Based on a number of Supreme Court decisions that address spousal support orders in the context of full faith and

135. See UMDA, *supra* note 132, § 306 (Separation Agreement).

136. The 1983 UPAA was adopted in some form in twenty-six states and the District of Columbia; the 2012 UPMAA has been adopted in two states as of the time of this writing. Both versions specifically authorize parties to choose the law to govern construction of their agreement, with a more elaborate provision in the 2012 Act. Compare UPAA § 3(a)(7) with UPMAA § 4.

137. See Matrimonial Causes Act 1973 § 1 (as amended); see generally NIGEL LOWE & GILLIAN DOUGLAS, *BROMELY’S FAMILY LAW* (11th ed. 2015); see also GLENDON, *supra* note 2, at 149–59.

138. NIGEL LOWE & GILLIAN DOUGLAS, *BROMLEY’S FAMILY LAW* 867–925 (10th ed. 2006). Some of these differences are discussed in J. Thomas Oldham, *What if the Beckhams Move to L.A. and Divorce?*, 42 FAM. L.Q. 263 (2008).

139. See LOWE & DOUGLAS, *supra* note 138, at 779–86.

140. *Id.* at 925–33; see also MARITAL AGREEMENTS AND PRIVATE AUTONOMY IN COMPARATIVE PERSPECTIVE (Jens M. Scherpe ed., 2012) [hereinafter MARITAL AGREEMENTS].

credit disputes, this section requires that a state have either personal jurisdiction over the respondent spouse or jurisdiction over the respondent spouse's property, to the extent of that property. The Supreme Court took a similar approach to the question of jurisdiction to order child support under the Due Process Clause in *Kulko v. Superior Court*.<sup>141</sup>

Neither the Second Restatement nor the Supreme Court have addressed the question of jurisdiction over equitable distribution matters incident to a divorce. State courts considering this problem have taken the same approach used for support orders, requiring full personal jurisdiction,<sup>142</sup> or have proceeded *in rem* with respect to property present within the state.<sup>143</sup> Once a state court has full personal jurisdiction, its orders regarding the spouses' property—even property located in another state—must be given full faith and credit within the United States. Courts have also entered orders directing spouses to take action with respect to property located outside the United States.<sup>144</sup>

Courts discuss personal jurisdiction for purposes of marital and family financial orders in largely the same terms used in other situations. Although there is some variation among state long-arm statutes, courts generally agree on the types of minimum contacts required as a matter of due process.<sup>145</sup> Based on the decision in *Kulko*, the fact that a couple was married in a state may not be a sufficient basis for jurisdiction. Having a matrimonial domicile in a state at some point during the marriage is generally deemed sufficient to confer personal jurisdiction over a spouse who no longer lives in the state, however, even when that spouse resides in another country.<sup>146</sup> Personal

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141. 436 U.S. 84 (1978); *see also generally* UNIFORM INTERSTATE FAMILY SUPPORT ACT (“UIFSA”), *supra* note 21.

142. *See generally, e.g.*, *Miller v. Miller*, 861 N.E.2d 393 (Mass. 2007); *cf. Von Schack v. Von Schack*, 893 A.2d 1004 (Me. 2006).

143. *E.g.*, *Abernathy v. Abernathy*, 482 S.E.2d 265, 268–69 (Ga. 1997); *Searles v. Searles*, 420 N.W.2d 581, 584 (Minn. 1988); *McCasland v. McCasland*, 497 N.E.2d 696, 697 (N.Y. 1986); *Weller v. Weller*, 988 P.2d 921, 926–27 (Or. Ct. App. 1999); *see also generally* *Marshall v. Marshall*, 988 So.2d 644 (Fla. Dist. Ct. App. 2008) (hearing partition action regarding real property located within the state).

144. *E.g.*, *Roberts v. Locke*, 304 P.3d 116, 121–22 (Wyo. 2013) (spouse ordered to sell property in Costa Rica to fund equitable distribution award); *see also* *In re Marriage of Ben-Yehoshua*, 154 Cal. Rptr. 80, 87 (Cal. Ct. App. 1979); *Marriage of Kowaleski*, 182 P.3d 959, 963 (Wash. 2008).

145. For spousal support issues, § 201(a) of the Uniform Interstate Family Support Act (“UIFSA”), which is in force in every state, extends jurisdiction to the full extent permitted by the Constitution.

146. *See generally, e.g.*, *Cooke v. Cooke*, 594 S.E.2d 370, 372–73 (Ga. 2004); *Farah v. Farah*, 323 N.E.2d 361, 365 (Ill. App. Ct. 1975); *Venizelos v. Venizelos*, 216 A.D. 206 (N.Y. App. Div. 1995); *cf. Harris v. Harris*, 922 N.E.2d 626 (Ind. Ct. App. 2010) (finding no personal jurisdiction over husband living in Germany who had never lived in the state).

service within the state—“tag jurisdiction”—would also provide a basis for personal jurisdiction under *Burnham v. Superior Court*.<sup>147</sup>

These jurisdictional rules are pushed almost to the breaking point in international cases.<sup>148</sup> For internationally mobile couples with United States citizenship, it is often difficult to identify a forum in the United States that can take jurisdiction over the financial incidents of divorce.<sup>149</sup> A few courts have exercised personal jurisdiction based upon relatively thin personal and financial ties—such as maintaining bank accounts or drivers’ licenses—especially when there is no alternative forum within the United States.<sup>150</sup>

It is this contrast between the jurisdictional rule for proceedings to dissolve a marriage<sup>151</sup> and the rules for jurisdiction over financial matters that has made divorce proceedings divisible.<sup>152</sup> A person who obtains a divorce in a court that lacks full personal jurisdiction over the spouse may need to bring a second proceeding in another forum where it is possible to obtain jurisdiction.<sup>153</sup> In some cases, these proceedings follow a divorce granted by a foreign court in circumstances that do not conform to United States norms of jurisdiction and due process.<sup>154</sup> For similar reasons, statutes in the United Kingdom explicitly authorize courts to order financial relief after a foreign divorce.<sup>155</sup> The U.K. statute is not limited to situations in which the foreign divorce court did not have jurisdiction over both parties,

147. 495 U.S. 604 (1990). International divorce cases upholding tag jurisdiction include *MacLeod v. MacLeod*, 383 A.2d 39, 43 (Me. 1978), and *Vazifdar v. Vazifdar*, 547 A.2d 249, 251–52 (N.H. 1988).

148. *E.g.*, *Oytan v. David-Oytan*, 288 P.3d 57, 66–68 (Wash. Ct. App. 2012).

149. *E.g.*, *Perry v. Perry*, 623 P.2d 513, 515–16 (Kan. Ct. App. 1981) (allowing husband in military service to obtain divorce in state from which he entered service; ruling that court has no personal jurisdiction over wife who never lived in a marital relationship in the state).

150. *E.g.*, *Sherlock v. Sherlock*, 545 S.E.2d 757, 762 (N.C. Ct. App. 2001) (noting that this result might not be proper in an “ordinary divorce case”); *see also Ex parte Brislawn*, 443 So.2d 32, 34 (Ala. 1983); *Goodenbour v. Goodenbour*, 64 S.W.3d 69, 76–81 (Tex. App. Austin 2001); *cf. Forrest v. Forrest*, 839 So.2d 839, 840–41 (Fla. Dist. Ct. App. 4th Dist. 2003) (explaining that opening bank account and purchasing home during one-week visit to state not sufficient to establish matrimonial domicile).

151. *See supra* Part III(A).

152. *See Estin v. Estin*, 334 U.S. 541, 549 (1948).

153. If the initial court had full jurisdiction, these claims are generally precluded as a matter of collateral estoppel or *res judicata*. *See, e.g.*, *Akinci-Unal v. Unal*, 832 N.E.2d 1, 6–7 (Mass. App. Ct. 2005). Several U.S. states have statutes on point. *See, e.g.*, GA. CODE ANN. § 19-6-17 (2010); MD. CODE ANN., FAM. L. §§ 8-212, 11-105 (LexisNexis 2017); MASS. GEN. LAWS ch. 208 § 34 (2017); N.J. STAT. ANN. § 2A-34-24.1 (2017); and N.Y. DOM. REL. L. § 236(B) (Consol. 2017).

154. *E.g.*, *Pawley v. Pawley*, 46 So.2d 464 (Fla. 1950) (holding that Cuban divorce did not preclude subsequent action for support); *In re Marriage of Lasota*, 17 N.E.3d 690 (Ill. App. Ct. 2014) (allowing support action following Polish divorce); *Nikrooz v. Nikrooz*, 561 N.Y.S.2d 301 (N.Y. App. Div. 1990) (allowing property division action following divorce in England).

155. Matrimonial and Family Proceedings Act 1984, Part III (Eng) (1984). *See* LOWE & DOUGLAS, *supra* note 138.

but litigants who have already obtained financial orders in another proceeding cannot use this procedure to re-litigate these issues.

If spouses have an opportunity to bring a subsequent action to resolve outstanding property and support issues, divisible divorce is a reasonable solution to the jurisdictional dilemmas of divorce. But divisible divorce presents a serious problem for spouses in the small group of states that do not allow post-divorce proceedings to determine financial rights, either because state law holds that the right to spousal support is terminated by an out-of-state *ex parte* divorce or because state courts have concluded that they lack subject matter jurisdiction over these claims apart from a proceeding for divorce or separation.<sup>156</sup>

These rules give rise to many situations in which there is concurrent jurisdiction in courts of different states or nations, raising questions of how and when a court in the United States may respond to foreign proceedings. Numerous U.S. cases have considered the inconvenient forum question in this setting.<sup>157</sup>

Other common law countries also use the inconvenient forum doctrine, but it is not available within the European Union for cases within the scope of the Brussels IIA Regulation, where the first court seized with jurisdiction in a divorce matter is required to proceed. Courts in the U.K. have concluded, however, that they have discretion to stay divorce proceedings in deference to litigation commenced in a non-EU jurisdiction.<sup>158</sup> Litigants sometimes seek an injunction restraining the other party from filing proceedings or continuing to litigate in another forum, but this relief is relatively rarely granted in the United States.<sup>159</sup> Injunctive relief may be appropriate to protect a spouse whose support or property rights would be extinguished by a foreign *ex parte* divorce, or when one party has filed multiple proceedings or refused to comply with the court's orders.<sup>160</sup>

The Second Restatement addresses the law applicable to definition of marital property interests. Sections 233 and 234 provide that the law of the *situs* governs marital interests in immovable property, and sections 257 to

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156. See, e.g., *Loeb v. Loeb*, 114 A.2d 518, 526 (Vt. 1955); see generally ESTIN, *supra* note 1, at 84, 87; HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 17.4 (Practitioner's 2d ed. 1987).

157. E.g., *In re Marriage of Muruges*, 993 N.E.2d 1109 (Ill. App. Ct. 2013); see generally ESTIN, *supra* note 1, at 3–4, 89–90.

158. See *Mittal v. Mittal* (2013) EWCA Civ. 1255 (U.K.); *JKN v. JCN* [2010] EWHC 843 (Fam) (U.K.)

159. See *Arpels v. Arpels*, 170 N.E.2d 670, 671 (N.Y. 1960); RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 3, § 53; see also ESTIN, *supra* note 1, at 3.

160. E.g., *Meyer v. Meyer*, 68 A.3d 571, 587 (R.I. 2013); *Jewell v. Jewell*, 751 A.2d 735, 739 (R.I. 2000).

259 set out more complex rules regarding marital interests in moveable property.<sup>161</sup> In general, the rules regarding moveable property point to the local law of the state that has the most significant relationship to the spouses and the property, under the general principles of section 6.

Choice-of-law principles regarding marital property interests can be important in settings other than divorce, such as in inheritance and tax disputes.<sup>162</sup> In divorce cases, however, courts often avoid this complexity by applying their own law to all property owned by a couple over which the court has full personal jurisdiction.<sup>163</sup> In community property states, this result has been accomplished through the enactment of quasi-community property statutes, providing that property acquired by either spouse outside of the state is deemed to be community property if it would have been community property if acquired in the forum state.<sup>164</sup> Though there are now substantial similarities in the marital or community property law of different states, the potential for conflict is greater when international cases are added to the equation.<sup>165</sup>

The choice-of-law question has been more elaborately addressed in Europe, where courts in civil law countries are more prepared to apply the law of another nation to these issues. Under the 1978 Hague Convention on the Law Applicable to Matrimonial Property Regimes, the spouses' matrimonial property regime is governed by the internal law designated by the spouses before marriage, within a limited range of choices,<sup>166</sup> with the possibility of a new designation at some point after the marriage.<sup>167</sup> If the spouses have not made a designation, the Convention stipulates that the internal law of the place where "both spouses establish their first habitual residence after marriage" will govern, with a series of additional rules that

161. See generally CLARK, JR., *supra* note 156, § 16.7; PETER HAY ET AL., *CONFLICT OF LAWS* §§ 14.1–14.5 (5th ed. 2010).

162. E.g., *Estate of Charania v. Shulman*, 608 F.3d 67 (1st Cir. 2010); *Nationwide Res. Corp. v. Massabni*, 694 P.2d 290, 293–95 (Ariz. Ct. App. 1984).

163. See, e.g., *Ismail v. Ismail*, 702 S.W.2d 216, 221 (Tex. App. 1985) *reh'g den.* (applying Texas quasi-community property statute to property of Egyptian couple).

164. E.g., CAL. FAM. CODE § 125 (West 2017); ARIZ. REV. STAT. § 25–318 (LexisNexis 2017); TEX. FAM. CODE ANN. § 7.002 (West 2017).

165. Cf. Michael Davie, *Matrimonial Property in English and American Conflict of Laws*, 42 INT'L & COMP. L.Q. 855 (1993); Friedrich K. Juenger, *Marital Property and the Conflict of Laws: A Tale of Two Countries*, 81 COLUM. L. REV. 1061 (1981).

166. Hague Convention on the Law Applicable to Matrimonial Property Regimes, art. 3. The spouses may designate only "(1) the law of any State of which either spouse is a national at the time of designation; (2) the law of the State in which either spouse has his habitual residence at the time of designation; [or] (3) the law of the first State where one of the spouses establishes a new habitual residence after marriage." *Id.*

167. *Id.* at art. 6.

may apply to spouses who share a common nationality.<sup>168</sup> The Convention has only three contracting states, but more recent attempts to harmonize these rules across Europe have been more successful. Property and support issues were not included within the EU's 2010 enhanced cooperation regime for the law applicable to divorce and legal separation,<sup>169</sup> but a group of eighteen EU countries agreed in 2016 to enhanced cooperation to define jurisdiction and applicable law with respect to matrimonial property regimes for married couples and registered partners in cross-border situations.<sup>170</sup>

## B. Recognition of Financial Judgments

The broad comity rule set out in section 98 of the Second Restatement governs recognition of foreign judgments, including divorce decrees and financial judgments.<sup>171</sup> In addition, the *Restatement (Third) of Foreign Relations Law* addresses recognition of foreign judgments in section 482, and enforcement of foreign support orders in section 486. Neither Restatement addresses the enforceability of foreign judgments relating to marital property, however. The same omission is evident in the uniform laws that address foreign financial judgments: foreign country spousal support orders can be registered and enforced in the United States under the Uniform Interstate Family Support Act (“UIFSA”)<sup>172</sup> and the Hague Family Maintenance Convention,<sup>173</sup> but there is no uniform law that provides for enforcement of foreign country orders regarding marital property.<sup>174</sup>

In proceedings under UIFSA and the Hague Maintenance Convention, a party opposing registration or enforcement of a foreign country spousal

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168. *Id.* at art. 4.

169. See Rome III Regulation, *supra* note 33.

170. Council Decision (EU) 2016/954 of 9 June 2016, authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships. The initial eighteen participating states are Belgium, Bulgaria, Cyprus, the Czech Republic, Germany, Greece, Spain, France, Croatia, Italia, Luxembourg, Malta, Netherlands, Austria, Portugal, Slovenia, Finland and Sweden. See Council of the EU, Press Release 320/16, 18 EU Countries Agree to Clarify Rules on Property Regimes for International Couples (June 9, 2016), <http://www.consilium.europa.eu/en/press/press-releases/2016/06/09-property-regimes-for-international-couples/>.

171. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 117 and accompanying text.

172. See UIFSA, *supra* note 21, at § 601. UIFSA § 105 provides for applicability of the act to residents of foreign countries and foreign support proceedings. Note that “Foreign country” is defined for purposes of UIFSA in § 102(5), and not all foreign nations will fall within that definition. The statute allows for enforcement on the basis of comity if the other nation involved is not a “Foreign country.” See UIFSA, *supra* note 21, § 104(a); *cf.* *Kalia v. Kalia*, 783 N.E.2d 623, 631 (Ohio Ct. App. 2002) (enforcing support order from India on the basis of comity).

173. See generally ESTIN, *supra* note 1, at 94–100.

174. See generally UIFSA, *supra* note 21.

support order may show, as an affirmative defense, that the issuing tribunal lacked jurisdiction over the contesting party. For these purposes jurisdiction is determined based on U.S. standards.<sup>175</sup> Courts have refused to enforce foreign support orders that do not conform to constitutional standards of due process.<sup>176</sup> Provided that these standards are met, however, U.S. courts routinely recognize and enforce these orders.<sup>177</sup> This is true even when there are substantive differences between the support laws of the foreign country and the state where enforcement is sought.<sup>178</sup>

Comity also affords a basis for recognition of foreign country marital property orders.<sup>179</sup> In this context, courts deny recognition on due process grounds, or when there is another strong public policy objection to the foreign judgment.<sup>180</sup> For example, although comity rules would seem to provide state courts the tools necessary to protect the property and financial rights of parties appearing before them, a number of states have enacted statutes that appear to prohibit the use of the comity doctrine in family law proceedings.<sup>181</sup> Just as a valid foreign court order governing marital property and support rights is generally enforceable on the basis of comity, a separation agreement entered into abroad may be enforced by a court in the United States.<sup>182</sup>

### C. Marital Agreements

At the time of the Second Restatement, the scope of marital contracting was largely limited to inheritance planning and agreements regarding the law that would govern the couple's real and personal property acquired during the marriage. This is reflected in the Second Restatement's choice-of-law provisions regarding marital property interests.<sup>183</sup> In the context of real property, the drafters intended that the law of the *situs* would govern the

175. *Id.* § 607(a)(1).

176. *E.g.*, *Marriage of Lohman*, 361 P.3d 1110, 1115–17 (Colo. Ct. App. 2015); *Southern v. Southern*, 258 S.E.2d 422, 425 (N.C. Ct. App. 1979).

177. *See generally* ESTIN, *supra* note 1, at 92–93.

178. *See, e.g.*, *Leitch v. Leitch*, 382 N.W.2d 448, 450–51 (Iowa 1986); *cf. Dart v. Dart*, 597 N.W.2d 82 (Mich. 1999).

179. *E.g.*, *Dart*, *supra* note 178; *S.B. v. W.A.*, 959 N.Y.S.2d 802, 832–33 (N.Y. Sup. Ct. 2012) (enforcing Abu Dhabi judgment for \$250,000 *mahr* payment based on comity); *Downs v. Yuen*, 748 N.Y.S.2d 131, 132 (N.Y. App. Div. 2002) (enforcing Hong Kong judgment for \$10 million lump sum); *DeGanay v. DeGanay*, 689 N.Y.S.2d 501, 502–03 (N.Y. App. Div. 1999).

180. *E.g.*, *Aleem v. Aleem*, 947 A.2d 489, 501–02 (Md. 2008); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 3, §§ 98 cmt. g, 117 cmt. c; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 6, § 482(2)(d).

181. *See supra* notes 26 and 122 and accompanying text.

182. *E.g.*, *Untersteiner v. Untersteiner*, 650 P.2d 256, 258–59 (Wash. Ct. App. 1982).

183. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 3 § 234 cmt. b, § 258 cmt. d.

effect of a marital agreement on the spouses' interests in the land, referring to the general rules in sections 187 and 188 "for ascertaining the law governing the contract itself."<sup>184</sup>

The Second Restatement does not address the broader use of marital agreements that has developed since 1970.<sup>185</sup> With respect to contracts more generally, section 188(1) provides that courts decide what law governs the rights and duties of the parties by determining, with respect to a particular issue, which state has the most significant relationship to the transaction and the parties under the principles in section 6. Section 187 defines when the parties' own choice of law will be applied, and section 188(2) provides guidance in the absence of an effective choice of law.<sup>186</sup> Courts have followed this approach with marital and premarital agreements.

Many marital and premarital agreements include choice-of-law provisions, which are clearly important in light of the significant variation among laws governing marital agreements and marital property rights in different jurisdictions. Generally, these provisions are given effect when a court is asked to determine the validity of or to interpret an agreement.<sup>187</sup> Both the Uniform Premarital Agreement Act ("UPAA") (1983)<sup>188</sup> and the Uniform Premarital and Marital Agreements Act (2012) ("UPMAA")<sup>189</sup> provide for choice of law agreements. Following the principle in section 187(2) of the Second Restatement, the UPMAA provision specifies that parties must select a jurisdiction with a significant relationship to the agreement or either party, and that the designated law must not be contrary to a fundamental public policy of the forum state. In the absence of an effective choice of law, courts are likely to apply the law of the forum, on

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184. *Id.* § 234, cmt. b.

185. *See supra* note 3.

186. Under § 188(2), courts too are directed to consider the place of contracting, the place of negotiation of the contract, the place of performance, and the parties' domicile, residence, and nationality. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 3, §188(2).

187. *E.g.*, *Nanini v. Nanini*, 802 P.2d 438, 441 (Ariz. Ct. App. 1990); *Norris v. Norris*, 419 A.2d 982, 984 (D.C. 1980); *see also* *Fernandez v. Fernandez*, 15 Cal. Rptr. 374 (Cal. Ct. App. 1961) (upholding validity of Mexican premarital agreement in California divorce).

188. UPAA § 3(a)(7) provides that "[p]arties to a premarital agreement may contract with respect to . . . the choice of law governing the construction of the agreement."

189. UPMAA (2012) § 4 provides:

The validity, enforceability, interpretation, and construction of a premarital agreement or marital agreement are determined:

- (1) by the law of the jurisdiction designated in the agreement if the jurisdiction has a significant relationship to the agreement or either party and the designated law is not contrary to a fundamental public policy of this state; or
- (2) absent an effective designation described in paragraph (1), by the law of this state, including the choice-of-law rules of this state.

the basis that the forum has the most significant contacts with the parties.<sup>190</sup> Courts have applied the same principles to marriage contracts executed in foreign countries.<sup>191</sup>

Public policies regarding marriage play a very significant role here. Parties who are married or planning to be married are understood to stand in a confidential relationship, with higher duties of fair dealing, including obligations of financial disclosure. Beyond this general principle, however, these rules vary among the states. In California, for example, statutes impose fairly detailed procedural requirements for marital agreements,<sup>192</sup> and in Iowa, marital agreements with respect to property interests are enforceable but agreements may not affect rights to spousal support.<sup>193</sup> Seen in a broader comparative perspective, the differences are much wider. Marital agreements have a long history in the civil law tradition, but are only treated as a factor that the court may consider in the context of divorce proceedings in the United Kingdom.<sup>194</sup>

As with religious divorce decrees, marital agreements based on religious law have presented a range of special difficulties for courts in the United States.<sup>195</sup> To the extent that a Jewish *ketuba* or Muslim *nikah* contract can be interpreted and enforced using the same legal principles applied to other marital agreements, the religious context surrounding the agreement should not present an obstacle to enforcement. But it is often not apparent that the couple intended a religious agreement to have secular legal effect, and agreements designed for a different purpose are not likely to satisfy the tests of validity ordinarily applied in the United States.

Marital agreements that move with couples across international borders present additional questions. Some cases have concluded that the parties abandoned their agreement or their initial choice of law after moving to the United States.<sup>196</sup> This may, in fact, correspond with the parties' intentions.

190. *E.g.*, *Lewis v. Lewis*, 748 P.2d 1362, 1365 (Haw. 1988) (applying Hawaii law to a New York prenuptial agreement); *Estate of Davis*, 184 S.W.3d 231, 236–37 (Tenn. Ct. App. 2004) (applying Tennessee law to Florida prenuptial agreement; Florida law does not require disclosure of assets for enforcement in the estate context, but this violates Tennessee public policy). *But see Auten v. Auten*, 124 N.E.2d 99, 101–02 (N.Y. 1954) (separation agreement executed in New York but parties' most significant contacts were to England).

191. *See, e.g.*, *Van Kipnis v. Van Kipnis*, 900 N.E.2d 977, 978 (N.Y. 2008); *Stawski v. Stawski*, 843 N.Y.S.2d 544, 545–46 (N.Y. App. Div. 2007).

192. *See* CAL. FAM. CODE § 1615 (West 2017).

193. IOWA CODE § 596.5(2) (2017).

194. *See Radmacher v. Granatino*, [2010] UKSC 42; *see also generally* MARITAL AGREEMENTS, *supra* note 140.

195. *See generally* ESTIN, *supra* note 1, at 82–83; *see also* Rosettenstein, *supra* note 126.

196. *E.g.*, *Gustafson v. Jensen*, 515 So.2d 1298, 1300-01 (Fla. Dist. Ct. App. 1987) (finding Danish agreement abandoned after parties moved to Florida); *Shaheen v. Khan*, 142 So.3d 257 (La. Ct. App.

But what about transnational couples with ongoing ties to multiple legal systems? In these cases, choice-of-law agreements seem especially useful, but it is unclear how far party autonomy has penetrated this area of the law.<sup>197</sup> Choice-of-forum agreements have not been addressed in the case law, most likely because jurisdiction for divorce purposes requires that one of the parties reside in the forum state. When there are a number of courts with a basis for exercising divorce jurisdiction, however, a forum selection clause could be useful in resolving inconvenient forum disputes.<sup>198</sup>

## CONCLUSIONS

With preparation of the *Third Restatement of Conflict of Laws* now underway, the trends and changes in family law discussed here suggest some new approaches to the conflicts issues surrounding marriage and divorce. As a starting point, the movement toward broader recognition of foreign marriages that began with the Second Restatement<sup>199</sup> should continue into the Third. Globalization has heightened the importance of a durable and portable family status, and the steady demise of strict rules governing access to marriage and divorce has eliminated many state policies or interests that once operated in this area. Going forward, concerns regarding technical defects in formalization are much less important, even as greater vigilance might be necessary to effectuate the protective policies that are reflected in rules regarding the requirement of free consent and minimum age for marriage. International human rights norms provide a useful reference point,<sup>200</sup> both to emphasize the importance of full and free consent to enter into a marriage, and also to underline the respect due to marriage and family relationships. For the same reasons, creative approaches to foster cross-border recognition for alternative statuses such as civil union or registered partnership should also be a priority.

These policies also support broad recognition of divorce judgments. Divorce rules around the world have changed radically since the Second Restatement was drafted,<sup>201</sup> and divorce validity has important consequences for the validity of a later marriage and for all of the legal consequences that

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2014); *Brandt v. Brandt*, 427 N.W.2d 126, 134 (Wis. Ct. App. 1988) (finding German postnuptial agreement abandoned by comingling of assets after move to Wisconsin); *see also* ESTIN, *supra* note 1, at 103 n.45.

197. Note that the United Kingdom, which allows a very high level of party autonomy in the commercial setting, does not allow enforcement of prenuptial agreements.

198. *Cf. Alamir v. Callen*, 750 F. Supp. 2d 465 (S.D.N.Y. 2010) (dismissing divorce action involving a French marital agreement on inconvenient forum grounds).

199. *See supra* notes 36–44 and accompanying text.

200. *See supra* notes 53–75 and accompanying text.

201. *See* GLENDON, *supra* note 2 and accompanying text.

flow from marriage. For this reason, the limping divorce—valid in some places and invalid in others—has the potential to cause enormous difficulty for families. With unilateral no-fault divorce universally available in the United States, the multitude of gatekeeping rules that once defined state interests in divorce have either disappeared or lost most of their meaning. Within those rules, however, are the traditional due process concerns that lie at the heart of any comity analysis. These concerns deserve to be carried forward and strengthened to deal with the new world of migratory divorce among globalized families. Procedural protections are particularly important when the foreign proceedings have the potential to affect the parties' financial interests.<sup>202</sup>

With respect to the financial and property interests of married couples and couples in formal or informal partnerships, the Third Restatement should reflect the trend toward greater recognition of party autonomy in defining the economic consequences of family relationships. Conflict-of-laws approaches in this area are based on contract principles, but there are important differences that flow from the confidential relationship between the partners. Just as marital agreements are appropriately subject to greater scrutiny than commercial contracts, this is an area in which states may continue to be cautious in their choice-of-law analysis.<sup>203</sup>

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202. This reflects the Supreme Court's longstanding "divisible divorce" rule. *See supra* notes 152–156 and accompanying text.

203. *See supra* notes 192–198 and accompanying text.