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### The Goals of Marriage and Divorce in Missouri: The State's Interest in Regulating Marriage, Privatizing Dependency, and Allowing Same-Sex Divorce

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**THE GOALS OF MARRIAGE AND DIVORCE IN MISSOURI: THE STATE'S INTEREST IN REGULATING MARRIAGE, PRIVATIZING DEPENDENCY, AND ALLOWING SAME-SEX DIVORCE**

I. INTRODUCTION

As of October 2012, almost 20 percent of the United States allows same-sex marriage<sup>1</sup> and more than 150,000 same-sex couples have reported being married.<sup>2</sup> However, the majority of the United States, including Missouri,<sup>3</sup> still define marriage as the union of one man and one woman.<sup>4</sup> In theory, since it is the public policy of Missouri not to allow same-sex marriage,<sup>5</sup> Missouri should support a couples' decision to end a same-sex marriage by getting a divorce. However, granting a divorce could be seen as giving legal effect to the same-sex marriage. One concern is that recognizing a same-sex marriage, no matter the purpose, will eventually result in the legalization of same-sex marriage. Although Missouri is not required to recognize same-sex marriages granted by other states, by refusing to grant a divorce Missouri is literally requiring the same-sex couple to stay married in the nine other jurisdictions that do recognize the marriage. This paradox should compel the state of Missouri to consider adopting a policy that allows for the dissolution of same-sex marriages. Moreover, as this Note demonstrates, a public policy allowing same-sex divorce would not be incompatible with Missouri's policy to not allow same-sex marriage.

This Note proceeds in four parts. Part II looks beyond an individual's right to marriage or divorce and considers the public policy goals of marriage and divorce from the state's point of view. This part demonstrates that the state's role in regulating marriage is very different from its role in regulating divorce, but the state's goal in regulating marriage and divorce is substantially the same—to protect society by promoting family and privatizing dependency.

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1. See PETER NICOLAS & MIKE STRONG, *THE GEOGRAPHY OF LOVE: SAME-SEX MARRIAGE & RELATIONSHIP RECOGNITION IN AMERICA (THE STORY IN MAPS)* 3 (2011); see also *infra* Part III.A.

2. Press Release, U.S. Census Bureau, *Census Bureau Releases Estimates of Same-Sex Married Couples* (Sept. 27, 2011), available at [http://www.census.gov/newsroom/releases/archives/2010\\_census/cb11-cn181.html](http://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn181.html).

3. MO. CONST. art. 1, § 33 (“That to be valid and recognized in this state, a marriage shall exist only between a man and a woman.”).

4. NICOLAS & STRONG, *supra* note 1, at 3.

5. See *id.*

Part III of this Note assesses the present day status of the legal recognition of same-sex marriages throughout the country; the role of the Defense of Marriage Act, which allows states to refuse to recognize same-sex marriages legally contracted in other states; and the practical problem this creates for states that do not legally recognize same-sex marriages. This part then considers three approaches to the same-sex divorce problem: (1) complete non-recognition of same-sex relationships, (2) an equitable approach to same-sex relationships, and (3) recognizing same-sex marriage for the limited purpose of divorce. Lastly, Part IV of this Note will consider Missouri's public policy not to allow same-sex marriage and which of the three options listed *infra* is most consistent with the public policy of Missouri. In conclusion, this Note will demonstrate that recognizing a same-sex marriage for the purpose of granting a same-sex divorce would efficiently dissolve same-sex marriages in a way that optimally benefits society while protecting Missouri's interest in regulating who can enter and exit marriage. Thus, Missouri should adopt a policy that allows courts to grant same-sex divorces regardless of whether or not Missouri allows same-sex marriage.

## II. BACKGROUND: MARRIAGE AND DIVORCE

### A. *Marriage: A Social Practice, Legal Status, Civil Contract, and Institution*

In 1888, the Supreme Court defined marriage as an "institution," that is "the foundation of the family and of society, without which there would be neither civilization nor progress."<sup>6</sup> It is "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."<sup>7</sup> In Missouri, a marriage is considered both a "contract" and "status or legal condition."<sup>8</sup> But unlike other contracts, where the parties might negotiate their own terms, in a marriage contract the state sets the terms.<sup>9</sup> Likewise, marriage is more than a contract; it is the legal creation of a family.<sup>10</sup> Marriage is also a

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6. *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

7. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (stating that marriage "is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.").

8. *Nelson v. Marshall*, 869 S.W.2d 132, 134 (Mo. Ct. App. 1993).

9. *See Maynard*, 125 U.S. at 205 ("Marriage, as creating the most important relation in life, as having more to do with the morality and civilization of a people than any other institution, has always been subject to the control of the legislature. The body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.").

10. SANFORD N. KATZ, *FAMILY LAW IN AMERICA* 10 (2003).

“status,” or rather a “social practice,” that is defined by rules.<sup>11</sup> The legal duties, responsibilities, and rights that accompany marriage are based on the needs, norms, values, and beliefs of society.<sup>12</sup> In this way, the definition of marriage changes over time. For instance, in 1990 Black’s Law Dictionary defined marriage as the “legal status, condition, or relation of one man and one woman united in law for life, or until divorced.”<sup>13</sup> Yet, the 2009 edition of Black’s Law Dictionary defines marriage as “[t]he legal union of a couple as spouses.”<sup>14</sup> Also, the definition of a “family” or “marriage” varies from country to country. For instance, in some countries marriage is limited to two people, but in other countries marriages may involve more than two people.<sup>15</sup>

### 1. The Purpose of Marriage for the Individual and Benefits for Society

In the United States, people get married “in every region, every social class, every race and ethnicity,” and “every religion or non-religion.”<sup>16</sup> For an individual, the traditional purpose of marriage is to form a family.<sup>17</sup> Historically, the main function of the family unit has been survival.<sup>18</sup> Thus, the social practice of “family” revolved around having children or caring for the needs of children<sup>19</sup> because otherwise “most children would not survive their infancy.”<sup>20</sup> Still today, individuals are very dependent on their families. For instance, the legal term “dependent” describes a child, spouse, or other family member who is “not able to exist or sustain oneself without the power or aid of someone else.”<sup>21</sup> Thus, ideally, young people are dependent not on the government, but on independent family units who have the ultimate

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11. LAURENCE D. HOULGATE, *FAMILY AND STATE: THE PHILOSOPHY OF FAMILY LAW* 26 (1988).

12. *Id.*

13. BLACK’S LAW DICTIONARY 972 (6th ed. 1990).

14. BLACK’S LAW DICTIONARY 1058 (9th ed. 2009) (elaborating that a valid marriage requires “(1) parties legally capable of contracting to marry, (2) mutual consent or agreement, and (3) an actual contracting in the form prescribed by law.”).

15. This practice is known as both polygamy and bygamy, for a discussion of polygamy around the world see MIRIAM K. ZEITZEN, *POLYGAMY: A CROSS-CULTURAL ANALYSIS* 69 (2008).

16. Martha C. Nussbaum, *A Right to Marry?*, 98 CAL. L. REV. 667, 668 (2010) (exploring the meaning of marriage and the right to marry).

17. See HOULGATE, *supra* note 11, at 92–104.

18. *Id.* at 30.

19. *Id.*

20. *Id.*

21. BLACK’S LAW DICTIONARY 503 (9th ed. 2009) (noting that “a taxpayer may be able to claim a personal exemption if the taxpayer provides more than half of the person’s support during the taxable year.”).

responsibility of teaching them how to be effective and productive members of society.<sup>22</sup>

The family also serves as “a business, a school, a vocational institute, a church, house of corrections, and a welfare institution.”<sup>23</sup> Thus, “the institution of marriage serves an unbelievably important societal function, transmitting both life and culture to the next generation.”<sup>24</sup> Everyone benefits from the role marriage plays in the self-preservation of society.<sup>25</sup> In fact, there are many general health benefits related to marriage. For instance:

[M]arried adults are less likely than non-married adults to abuse alcohol, drugs, and other addictive substances. Married parties take fewer mortal and moral risks, even fewer when they have children. They live longer by several years. They are less likely to attempt or to commit suicide. They enjoy more regular, safe, and satisfying sex. They amass and transmit greater per capita wealth. They receive better personal health care and hygiene. They provide and receive more effective co-insurance and sharing of labor. They are more efficient in discharging essential domestic tasks. They enjoy greater overall satisfaction with life measured in a variety of ways. . . . Most children reared in two-parent households perform better in their socialization, education, and development than their peers reared in single- or no-parent homes.<sup>26</sup>

Of course, marriage also provides individuals with a sense of security, love, and companionship, but there are also thousands of state and federal legal benefits provided by marriage.<sup>27</sup> There are tax benefits to being married,<sup>28</sup> testimonial privileges,<sup>29</sup> immigration rights, rights in adoption, custody, and visitation, the ability to access the health and retirement benefits of a spouse, the ability to make medical decisions for an ill spouse, and the right to sue for wrongful death of a spouse, just to name a few.<sup>30</sup> The benefits are offered to

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22. See Lynn D. Wardle, *Parenthood and the Limits of Adult Autonomy*, 24 ST. LOUIS U. PUB. L. REV. 169, 172 (2005).

23. HOULGATE, *supra* note 11, at 31.

24. John Eastman, *The Constitutionality of Traditional Marriage*, SCOTUSBLOG (Aug. 24, 2011, 10:16 AM), <http://www.scotusblog.com/2011/08/the-constitutionality-of-traditional-marriage/>.

25. HOULGATE, *supra* note 11, at 17.

26. John Witte, Jr., *The Goods and Goals of Marriage*, 76 NOTRE DAME L. REV. 1019, 1019–20 (2001) (footnotes removed) (noting that “[m]en, on average, enjoy more of these health benefits of marriage than women.”).

27. ABA Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L.Q. 339, 366 (2004).

28. For discussion of federal tax of the property of married couples, and “the transfer of property from deceased spouse to surviving spouse”, see Mary M. Wenig, *Taxing Marriage*, 6 S. CAL. REV. L. & WOMEN’S STUD. 561, 561 (1997).

29. See *Trammel v. United States*, 445 U.S. 40, 53 (1980) (discussing the marital privilege of refusing to testify against a spouse).

30. See Nussbaum, *supra* note 16, at 669.

promote marriage, and encourage people to stay married, and form stable families.<sup>31</sup>

Starting a family also comes with certain legal obligations. For instance, in Missouri, before the state will provide welfare or other financial support to a family the state will first charge the father for back child support.<sup>32</sup> Also, it is a crime to physically or emotionally abuse a child or domestic partner.<sup>33</sup> Likewise, upon death it is assumed that one's entire estate will go to his or her family, and, in fact, unless an individual has specified an intention otherwise the estate automatically goes to the family.<sup>34</sup> By ensuring that dependents are supported financially, the state allows them to remain self-sufficient, thus relieving the rest of society from the burden of taking care of those individuals. When the benefits of marriage are compared with the duties and obligations that the legal system imposes on marriages and families, it seems that they both serve the same purpose—to encourage people to take care of their families.<sup>35</sup>

The concepts of “independence” and “responsible parenthood” both have deep roots in Western civilization.<sup>36</sup> Cultural anthropologists believe that all societies provide their members with “root paradigms,” meaning personal, familial, and social identities reflecting underlying assumptions about “the very nature of existence.”<sup>37</sup> In the United States, the root paradigm of “autonomy,” meaning personal independence, is especially pronounced and has strongly influenced the development of American family law.<sup>38</sup> The family is encouraged to “privately” raise children in a “self-contained and self-

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31. HOULGATE, *supra* note 11, at 7–8 (comparing the goals and purposes of types of family law policies, which confer “benefits or burdens” on members of society, to the goals and purposes behind other types of laws, for instance penal laws, which serve to punish wrongdoers and, therefore, deter bad behavior).

32. MO. REV. STAT. § 454.465 (2000) (“[A] payment of public assistance by the division of family services to or for the benefit of any dependent child . . . creates an obligation, to be called “state debt”, which is due and owing to the department by the parent, or parents, absent from the home where the dependent child resided at the time the public assistance was paid.”).

33. *See* §§ 568.045, 565.072–74 (2000 & Supp. 2011).

34. *See* § 474.010 (2000) (describing procedure for distributing property of a decedent who dies intestate—if no children, the surviving spouse receives the entire estate, if children, the surviving spouse and the children split the estate).

35. HOULGATE, *supra* note 11, at 7–8 (comparing the goals and purposes of types of family law policies, which confer “benefits or burdens” on members of society to the goals and purposes behind other types of laws, for instance penal laws, which serve to punish wrong-doers and therefore deter bad behavior).

36. Wardle, *supra* note 22, at 171.

37. *Id.* at 169–71 (citing Merlin G. Myers, The Morality of Kinship, Speech at the Virginia F. Cutler Lecture (Nov. 15, 1983), in *BYU SPEECHES OF THE YEAR, 1983–84*, at 45 (1984)).

38. *Id.*

sufficient unit without demanding public resources to do so.”<sup>39</sup> When the private family succeeds it is rewarded with protection and freedom from the state intervention.<sup>40</sup> And for many Americans, resorting to the state for financial support would be considered a failure.<sup>41</sup> In this way, society allocates the “inevitable dependency” of children onto the private family, thus, directing dependency away from the state and “privatizing” it.<sup>42</sup>

## 2. The State’s Interest in Marriage

Recognition of the government’s interest in promoting and regulating marriage dates back to the days of Aristotle who, seeking to ensure that marital couples would remain “bonded together for the sake of their children,” prescribed a whole series of laws relating to “the ideal ages, qualities, and duties of husband and wife to each other and to their children.”<sup>43</sup> However, it was not until 1753 that the English civil law actually took regulatory control of marriage in any effective way.<sup>44</sup> In 1877, the Supreme Court considered the now famous case of *Pennoyer v. Neff* and explained that the state has an “absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created and the causes for which it may be dissolved.”<sup>45</sup> This has to do with a state’s right to determine the status of its citizens and “to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory.”<sup>46</sup> In 1888, the Supreme Court again explained that the public was “deeply interested” in the maintenance of “the institution of marriage” as it is “the foundation of the family and of society.”<sup>47</sup> Likewise, in Missouri, marriage “is considered so important to society that the courts uniformly hold that the state is an interested party.”<sup>48</sup>

Thus, the state of Missouri “has a legitimate and rightful concern with persons domiciled within its borders in relation to marriage,”<sup>49</sup> and the state legislature is charged with regulating marriage based on promoting “the

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39. Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2205 (1995).

40. *Id.*

41. *Id.*

42. *Id.*

43. Witte, Jr., *supra* note 26, at 1024.

44. Brian H. Bix, *State Interest and Marriage-The Theoretical Perspective*, 32 HOFSTRA L. REV. 93, 95 (2003) (discussing the history of The Marriage Act of 1753 and its continued effect on the regulation of marriage).

45. *Pennoyer v. Neff*, 95 U.S. 714, 734–35 (1877) (overruled on other grounds).

46. *Id.* at 734.

47. *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

48. *Heil v. Rogers*, 329 S.W.2d 388, 392 (Mo. Ct. App. 1959).

49. *Nelson v. Marshall*, 869 S.W.2d 132, 134 (Mo. Ct. App. 1993).

general welfare of its citizens.”<sup>50</sup> As the preferences of those with direct or indirect power to influence policy change,<sup>51</sup> so does the state’s “interest” in regulating marriage. With the “general welfare of the citizens” in mind, the state of Missouri has imposed a variety of limitations on who may “enter” marriage. For example, certain types of blood relatives cannot marry;<sup>52</sup> individuals must reach a certain age before they can marry;<sup>53</sup> and a person cannot be married to more than one person at a time.<sup>54</sup> Of course, in order to regulate these restrictions couples seeking to marry are also first required to obtain a marriage license.<sup>55</sup>

Although the state has imposed many regulations regarding who may enter marriage, once a marriage is formed the state does very little to regulate family life. In fact, over the past fifty years, dominant family law policy has included the emergence of a constitutional doctrine of privacy and the enactment of unilateral, no-fault divorce laws both of which tend to encourage autonomy and self-reliance over government involvement.<sup>56</sup> This reflects the state’s interest in the privatization<sup>57</sup> of dependency in the family.<sup>58</sup> Even the Supreme Court has observed the role the institution of marriage has played in “developing the decentralized structure of our democratic society.”<sup>59</sup>

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50. JOHN D. GREGORY ET AL., UNDERSTANDING FAMILY LAW 2 (2d ed. 2001).

51. Bix, *supra* note 44, at 107–08 (explaining that the term “state’s interest” actually refers to a “judgment regarding the state’s interest made by a majority of legislators along with the governor.”).

52. MO. REV. STAT. § 451.020 (2000) (“All marriages between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of the half as well as the whole blood, between uncles and nieces, aunts and nephews, first cousins, and between persons who lack capacity to enter into a marriage contract, are presumptively void.”).

53. § 451.090 (stating that, in Missouri, no one under the age of fifteen may marry, and people under the age of eighteen need their parents’ permission).

54. § 451.030 (“All marriages, where either of the parties has a former wife or husband living, shall be void, unless the former marriage shall have been dissolved.”).

55. § 451.040 (stating marriage license applications require a valid social security number in Missouri).

56. *Id.*

57. See Brenda Cossman, *Contesting Conservatism, Family Feuds and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL’Y & L. 415, 418 (2005) (“Privatization overwhelmingly refers to the delegation of once governmental services to the private sector—specifically, to the market (private enterprise) and the voluntary sector (non-profit charitable actors.”); *but see* Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507, 1508 (2001) (“Movement from public to private is not absolutely necessary, because something may be called privatized even if it always has been private, merely because it is publicly administered in another jurisdiction.”).

58. Wardle, *supra* note 22, at 171.

59. *Lehr v. Robertson*, 463 U.S. 248, 257 (1983) (“In recognition of that role, and as part of their general overarching concern for serving the best interests of children, state laws almost universally express an appropriate preference for the formal family.”).



Still, in many ways, privatization itself is just “another form of regulation.”<sup>60</sup> Both “child support and welfare eligibility reform share a basic objective of privatizing the costs of raising families, by transferring responsibility from the state to the family.”<sup>61</sup> In 2002, President Bush's welfare reform proposals were discussed in a press release in which the President “emphasized that one of the goals would be to encourage the formation and maintenance of two parent married families and responsible fatherhood.”<sup>62</sup> In Missouri, when a woman files for Temporary Assistance for Needy Families (TANF) if she is not already receiving child support from the child's father the state will find the father and charge him with child support in the form of “state debt.”<sup>63</sup>

The state's interest in protecting families and privatizing obligations goes beyond family and domestic relations law and is enmeshed throughout all types of law. For example, in the Criminal Law context the “Castle Doctrine,” also known as “defense of habitation,”<sup>64</sup> generally states that those who are unlawfully attacked in their homes have no duty to retreat. Instead, they may lawfully stand their ground and use deadly force if necessary to prevent imminent death, great bodily injury, or the commission of a forcible felony.<sup>65</sup> Thus, “homicide may be justified as a defense of habitation.”<sup>66</sup>

As described by the Vermont Supreme Court in 1873, the idea embodied in the expression “a man's house is his castle” is not that it is his property, but that the house has a peculiar immunity because it is “sacred for the protection of his person and of his family.”<sup>67</sup> For instance, in Missouri a person can use deadly force in defense of a family member if they reasonably believe deadly force is necessary to protect that person from death, serious physical injury, or

60. Daniel A. Farber, *Whither Socialism?*, 73 DENV. U. L. REV. 1011, 1013 (1996).

61. Cossman, *supra* note 57, at 440–41.

62. Bix, *supra* note 44, at 101 (citing Press Release, The White House, Working Toward Independence 19 (Feb. 2002), <http://www.georgewbush-whitehouse.archives.gov/news/releases/2002/02/welfare-book-02.html>).

63. MO. REV. STAT. § 454.465 (2000) (“[A] payment of public assistance by the division of family services to or for the benefit of any dependent child . . . creates an obligation, to be called ‘state debt’, which is due and owing to the department by the parent, or parents, absent from the home where the dependent child resided at the time the public assistance was paid.”).

64. *See* State v. Ivicsics, 604 S.W.2d 773, 776 (Mo. Ct. App. 1980) (discussing the difference between defense of self and defense of habitation); *see also* State v. Clinch, 335 S.W.3d 579, 588 (Mo. Ct. App. 2011) (“[T]he ‘castle doctrine’ . . . merely codified that the unlawful entry into a dwelling, residence, or vehicle constitutes the act of force necessary to justify deadly force.”) (citing MO. REV. STAT. § 563.031 (Supp. 2011)).

65. Catherine L. Carpenter, *Of the Enemy Within, the Castle Doctrine, and Self-Defense*, 86 MARQ. L. REV. 653, 656–57 (2003) (emphasis added).

66. *Ivicsics*, 604 S.W.2d at 776 (emphasis added).

67. State v. Patterson, 45 Vt. 308, 320–21 (Vt. 1873) (emphasis added).

any forcible felony.<sup>68</sup> However, the use of deadly force in the defense of others has been limited to persons in familial relationships to the actor.<sup>69</sup> This suggests that the state values the duty to care for one's family so highly that ensuring the safety of one's family can justify the murder of another person.<sup>70</sup>

### 3. Exceptions to Traditional Marriage Law

The field of domestic relations is "an area that has long been regarded as a virtually exclusive province of the States."<sup>71</sup> However, a state's right to regulate marital relations is not absolute, as there are constitutional parameters to a state's ability to regulate family law.<sup>72</sup>

#### a. The Right to Marry

There are times when one state recognizes a form of marriage when another state, for public policy reasons, does not recognize that form of marriage. An "evasive marriage" is when a couple attempts to evade their home state's marriage laws by going to another state just for the purpose of marrying since they know they could not get married in their home state.<sup>73</sup> The traditional rule for recognition of out-of-state or foreign marriages is that if the marriage is valid where it was "celebrated" it will be valid everywhere.<sup>74</sup> However, states reserve the right to refuse to recognize "foreign" marriages if they are contrary to the state's strong public policy.<sup>75</sup>

68. MO. REV. STAT. § 563.031 (Supp. 2011).

69. *State v. Kennedy*, 106 S.W. 57, 58–60 (Mo. 1907) (holding that relationship of unmarried cohabitants was not close enough of a relationship to justify man committing homicide in defense of the woman).

70. *See id.* at 59–60.

71. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *see also Williams v. North Carolina*, 317 U.S. 287, 298 (1942) ("Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders.").

72. *Lehr v. Robertson*, 463 U.S. 248, 257 (1983) ("In some cases, however, this Court has held that the Federal Constitution supersedes state law and provides even greater protection for certain formal family relationships. In those cases, as in the state cases, the Court has emphasized the paramount interest in the welfare of children and has noted that the rights of the parents are a counterpart of the responsibilities they have assumed.").

73. Joanna L. Grossman, *Fear and Loathing in Massachusetts: Same-Sex Marriage and Some Lessons from the History of Marriage and Divorce*, 14 B.U. PUB. INT. L.J. 87, 111–12 (2004) (noting that evasive marriage involves "obtaining a legal status that is not and, in the opinion of many, should not be available elsewhere.").

74. *Constitutional Constraints on Interstate Same-Sex Marriage Recognition*, 116 HARV. L. REV. 2028, 2035 (2003).

75. Brian H. Bix, *State Interests in Marriage, Interstate Recognition, and Choice of Law*, 38 CREIGHTON L. REV. 337, 341 (2005) ("[U]nder traditional conflict of laws rules, states have the right to refuse to recognize marriages celebrated in another state or country, if that marriage is contrary to the forum state's strong public policy.") (citing RESTATEMENT (SECOND) OF

Historical examples of reasons for denying recognition to out-of-state or foreign marriages have included “prohibitions against bigamy and polygamy, consanguinity or affinity, nonage, miscegenation, and certain instances of remarriage after divorce.”<sup>76</sup> This so-called “public policy exception” has encouraged the formation of statutes outlining the public policy of the state by defining what relationships did or did not constitute a lawful marriage—thus, allowing courts to invalidate a foreign marriage when it violated a public policy statute.<sup>77</sup> Although the citizens of a state may feel strongly about prohibiting a certain type of marriage, there are limits to a state’s ability to ban certain types of marriage or prevent certain classes of people from marrying. For instance, in 1967 the Supreme Court held that a state could not limit an individual’s right to marry based on race.<sup>78</sup> Although the Constitution does not expressly address the right to marry, in *Loving v. Virginia*, the Court held that marriage was one of the most “basic civil rights of man” and, thus, a liberty interest protected by the Constitution.<sup>79</sup> It is noteworthy that although this case is now commonly cited as outlining a right to marry,<sup>80</sup> the case was never about the couple’s right to marry in a state. But rather the right to have the couple’s lawful out-of-state marriage recognized by the state where they lived.<sup>81</sup> In *Loving*, the state of Virginia had passed a statute banning interracial marriage—the Racial Integrity Act of 1924.<sup>82</sup> Two Virginia residents, Mildred Loving, a woman of Native American and African decent, and Richard Loving, a Caucasian, were not allowed to get married in Virginia, so they went to the District of Columbia to get married.<sup>83</sup> When the couple returned to Virginia the state not only refused to recognize their marriage, but they were arrested and charged with committing miscegenation<sup>84</sup> in violation of the Racial Integrity Act of 1924.<sup>85</sup>

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CONFLICT OF LAWS § 283(2); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 289–95 (4th ed. 2001).

76. *Constitutional Constraints on Interstate Same-Sex Marriage Recognition*, *supra* note 74, at 2035–36.

77. Michael E. Solimine, *Interstate Recognition of Same-Sex Marriage, the Public Policy Exception, and Clear Statements of Extraterritorial Effect*, 41 CAL. W. INT’L L.J. 105, 116 (2010).

78. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

79. *Id.*

80. Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2087 (2005).

81. *Loving*, 388 U.S. at 8.

82. *Id.* at 6.

83. *Id.* at 2.

84. The mixing of different racial groups through marriage, cohabitation, or sexual relations. *Miscegenation Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/miscegenation> (last visited Apr. 19, 2013).

85. *Loving*, 388 U.S. at 3, 6.

Ultimately, the Supreme Court concluded that marriage was one of the basic civil rights of man, “fundamental to our very existence and survival,” and that the equal protection clause of the Fourteenth Amendment required the freedom of choice to marry not be restricted by racial discrimination.<sup>86</sup> Although the right to marry is commonly considered from the individual’s point of view, there are also broader public policy reasons for encouraging and promoting marriage by viewing marriage as a private right.<sup>87</sup> Even the Court’s reasoning, that the ability to enter a marriage is a private, individual right, reflects an underlying belief in an individual’s independence and autonomy.<sup>88</sup>

b. Domestic Violence and Marital Privacy

Privacy within the sanctity of home is well established in the field of domestic relations. It is often said that “[n]o more confidential relation is known to the law than that of husband and wife.”<sup>89</sup> However, the home “is not just a physical place [it] is imbued with idealized characteristics. . . . It fosters intimate relationships and allows family life to flourish. It is also a place of safety and physical comfort.”<sup>90</sup> Thus, when the home is safe and family life is flourishing, the state rewards the family freedom from state intervention.<sup>91</sup> However, when the home is not safe, the state interferes based on the “high commitment of individuals and societies to the welfare of children and posterity.”<sup>92</sup> Thus, although marriage is typically considered private, domestic violence is so inconsistent with the public policy justification for respecting marital privacy (promoting stable families) that the state must intervene.<sup>93</sup> All states, including Missouri, have laws protecting children from excessive punishment and prohibiting other forms of domestic violence such as spousal abuse.<sup>94</sup> The state will not only temporarily remove a child from their family home if the family unit is not adequately providing for the child, but the state has the power to completely terminate parental rights.<sup>95</sup> Additionally, there are

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86. *Id.* at 12.

87. Martha C. Nussbaum, *A Right to Marry?*, 98 CAL. L. REV. 667, 668 (2010).

88. *Id.*

89. *See, e.g.*, *Hickman v. Link*, 10 S.W. 600, 607 (Mo. 1889).

90. Beverly Balos, *A Man’s Home is His Castle: How the Law Shelters Domestic Violence and Sexual Harassment*, 23 ST. LOUIS U. PUB. L. REV. 77, 88–89 (2004) (examining the role of privacy in domestic violence cases).

91. Fineman, *supra* note 39, at 2205.

92. Wardle, *supra* note 22, at 169.

93. *See also* Amy Haddix, *Unseen Victims: Acknowledging the Effects of Domestic Violence on Children Through Statutory Termination of Parental Rights*, 84 CAL. L. REV. 757, 786 (1996).

94. *See* MO. REV. STAT. §§ 455.005–455.549 (2012); *see also* *Mund v. Mund*, 7 S.W.3d 401, 403 n.4 (Mo. 1999) (“[D]omestic violence includes not only physical but also sexual abuse of household or family members.”).

95. *See, e.g.*, §§ 211.442–211.477 (2000); *see also* Haddix, *supra* note 93, at 786 (noting that “[t]ermination statutes, by their very nature, are prospective and predictive in nature. Their

criminal sanctions for abusing or endangering a child<sup>96</sup> or a spouse.<sup>97</sup> The court's limited involvement in marriage occurs only when necessary to ensure that the family members are properly protecting and caring for each other.

This Part has considered the overall purpose of marriage and the state's interest in marriage, specifically looking at Missouri statutes and case law. Analyzing both traditional marriage doctrine and its exceptions, Missouri's public policy is consistent with other parts of the United States in that it reflects an underlying belief in autonomy, independence, and an overall policy of privatizing dependency through the encouragement of marriage and family. Similarly, Section B of this Part will consider the state's interest in divorce, focusing on Missouri's public policy related to divorce.

### B. *Divorce: No-Fault, Equitable Distribution, and Independence*

Like any other contract or transaction, marriages do not always go as planned. Yet, unlike other contracts, which can be suspended by the parties, marriage is a "distinctive" legal relationship that may not be terminated without the consent of the State.<sup>98</sup> According to Black's Legal Dictionary, a divorce is simply "[t]he legal dissolution of a marriage by a court."<sup>99</sup> Yet, divorce law necessarily "includes principles of constitutional law, property law, contract law, tort law, civil procedure, statutory regulations, equitable remedies, and of course, marital property and support rights."<sup>100</sup>

As a matter of jurisdiction, a divorce can occur "in any state in which one of the two spouses is domiciled."<sup>101</sup> The term domicile is generally equivalent to the term residence.<sup>102</sup> To establish residency for dissolution purposes in Missouri, "a plaintiff must show actual personal presence in the new place and the intention to remain there, either permanently or for an indefinite time, without any fixed or certain purpose to return to the former place of abode."<sup>103</sup> In Missouri, a judgment of dissolution of marriage will only be granted if (1)

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purpose is not to punish parents for past behavior, but rather to prevent future harm to children by interpreting past behavior as indicative of future parental unfitness.").

96. See MO. REV. STAT. § 568.045 (2012) ("Endangering the welfare of a child . . . is a class C felony.").

97. In Missouri, first degree domestic assault is a class B felony; second degree domestic assault is a class C felony; and third degree domestic assault is a class A misdemeanor. MO. REV. STAT. §565.072-074 (2012).

98. Laurence D. Borten, *Sex, Procreation, and the State Interest in Marriage*, 102 COLUM. L. REV. 1089, 1127 (2002).

99. BLACK'S LAW DICTIONARY 549 (9th ed. 2009).

100. GREGORY ET AL., *supra* note 50, at 1.

101. Bix, *supra* note 75, at 342.

102. See MO. REV. STAT. § 452.305 (2012); see also *Lewis v. Lewis*, 930 S.W.2d 475, 477 (Mo. Ct. App. 1996) (holding that "the term 'residence' as used in § 452.305 is equivalent to the legal concept of 'domicile.'").

103. *Lewis*, 903 S.W.2d at 477.

one of the parties has been a resident of the state for ninety days prior to the proceeding; (2) the court finds that there remains no reasonable likelihood that the marriage can be preserved and that, therefore, the marriage is irretrievably broken; and (3) the court has considered and made provision for the maintenance of either spouse and the disposition of property.<sup>104</sup> Importantly, a dissolution of marriage entered in a state that neither party is domiciled will result in the decree being void for lack of subject matter jurisdiction.<sup>105</sup>

#### 1. The Purpose and Benefits of Divorce for the Individual and Society

An often overlooked benefit to having a legally recognized relationship is the right to access the courts in order to dissolve that relationship if the need arises.<sup>106</sup> From the individuals' perspective, there are numerous benefits to getting a divorce. Many of these same rights and obligations guaranteed in a divorce are considered unenforceable, under the doctrine of "family privacy", if brought by parties still in an intact marriage.<sup>107</sup> Basically, a divorce allows parties to enforce their marital rights, for instance "(1) the distribution and tax-preferential transfer of property between spouses, (2) the right to seek spousal support . . . (3) the right to seek custody and visitation rights for children of the marriage, and (4) preferential treatment for claims made under a divorce decree by former spouses in bankruptcy court."<sup>108</sup> Other legal benefits of divorce include the ability to remarry later. And since both parties need not be willing to divorce,<sup>109</sup> an individual may ask the court to exercise jurisdiction over the unwilling party.<sup>110</sup> After the divorce, parties have the right to enforce these "court orders," even if the opposing parties resists following the plan.<sup>111</sup>

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104. § 452.305.

105. *Lewis*, 903 S.W.2d at 477.

106. See Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1449 (discussing ways in which "the law traditionally privileged marriage over nonmarital intimate relationships . . . by denying unmarried cohabitants access to the judicial system for resolving financial disputes arising out of their relationship.").

107. Bix, *supra* note 44, at 104.

108. Colleen M. Ramais, *'til Death Do You Part . . . and This Time We Mean It: Denial of Access to Divorce for Same-Sex Couples*, 2010 U. ILL. L. REV. 1013, 1024 (2010).

109. Grossman, *supra* note 73, at 115.

110. As long as the other party was properly served with notice, the court will enter a default judgment. See *Hayes v. Hayes*, 671 S.W.2d 423, 425 (Mo. App. Ct. 1984) (noting that "strict rules pertaining to default judgments are less rigorously applied in dissolution cases, especially in matters involving child custody").

111. See MO. REV. STAT. § 511.340 (2000) ("When a judgment requires the performance of any other act than the payment of money . . . his obedience thereto required. If he neglect or refuse, he may be punished by the court as for a contempt, by fine or imprisonment, or both, and, if necessary, by sequestration of property.").

## 2. The State's Interest in Divorce

The National Conference on Uniform State Laws provided a model Uniform Marriage and Divorce Act in 1970.<sup>112</sup> This Act suggests the underlying purpose of dissolution laws, reflecting that the state has an interest in:

[P]romot[ing] the amicable settlement of disputes that have arisen between parties to a marriage; mitigat[ing] the potential harm to the spouses and their children caused by the process of legal dissolution of marriage; mak[ing] reasonable provision for spouse and minor children during and after litigation; and mak[ing] the law of legal dissolution of marriage effective for dealing with the realities of matrimonial experience.<sup>113</sup>

This demonstrates the fact that, unlike marriage laws that promote marriage, efforts to simplify the dissolution process were not meant to encourage or promote divorce. Rather, the State has an interest in ensuring that all members of the family are provided for throughout the divorce process.<sup>114</sup> At first look, divorce may seem very different from marriage in that marriage creates a family, whereas a divorce proceeding ends a family. However, the state's ultimate interest in divorce is to reduce the negative impact of the divorce on all members of the family.<sup>115</sup> In this way, the state's interest in regulating divorce is very similar to its interest in regulating marriage, in that the ultimate goal is to protect and promote the overall well-being of the family.<sup>116</sup> However, family members are at great risk when a marriage is ending, so the state plays an even greater role in regulating divorce than in regulating marriage. For instance, the state respects the privacy of the marriage and family home so much that it will not get involved in an intact marriage until the relationship between the parties has become physically dangerous.<sup>117</sup> However, at divorce, the veil of privacy is lifted and the state not only intervenes, but also completely delves into the personal lives of the parties. For instance, courts have gone so far as to require parties to disclose their Facebook passwords to the court!<sup>118</sup>

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112. UNIF. MARRIAGE & DIVORCE ACT §§ 101–506 (1973).

113. *Id.* § 102.

114. *See id.*

115. *See id.*

116. *See* Cossman, *supra* note 57, at 429-30.

117. *See, e.g.,* Boyd v. United States, 116 U.S. 616, 630 (1886) (describing the “sanctity of a man’s home and the privacies of life”); *but see* People v. Liberta, 474 N.E.2d 567, 574 (N.Y. 1984) (observing that the “right of privacy protects consensual acts, not violent sexual assaults.”).

118. Gallion v. Gallion, No. FA1141169555, 2011 WL 4953451, at \*1 (Conn. Super. Ct. Sept. 30, 2011) (ordering that “[c]ounsel for each party shall exchange the password(s) of their client’s Facebook and dating website passwords” in the context of a dissolution proceeding).

Next, this section will discuss how the state's interest in protecting families has influenced divorce law in the United States, specifically considering the purpose of no-fault divorce, the equitable distribution of property, and privatizing dependency.

a. No-Fault Divorce

For the past decade, the divorce rate in America has been around 50 percent.<sup>119</sup> However, historically the public policy in the United States "placed considerable value on the institution of marriage and . . . discouraged divorce except in extreme circumstances."<sup>120</sup> In fact, until the late 1960s, American law recognized no such thing as a consensual divorce.<sup>121</sup> Rather, each state had established specific grounds for terminating a marriage based on the spouse seeking a divorce proving to the court that the other spouse committed a marital offense or fault.<sup>122</sup> Thus, divorce was "a privilege granted by the state to an innocent spouse" against a guilty spouse.<sup>123</sup> This approach is known as a fault-based system of divorce.<sup>124</sup> Critics of that system felt that divorce should not be based solely on traditional fault grounds such as adultery, cruelty, or desertion. But, instead, "viewed as a regrettable, but necessary, legal definition of a marital failure."<sup>125</sup> Therefore, factors leading to the break down of the marriage were not based on the fault of one party, rather the incompatibility and irreconcilable differences of both spouses. Perhaps the most significant effect of fault-based divorce on the legal system was that unhappy couples "would have to fabricate various fault grounds for divorce and resort to perjury, often with the assistance of their legal counsel."<sup>126</sup>

With the intent of remedying these perceived shortcomings inherent in the fault-based system, no-fault divorce legislation was introduced to the United States in the 1960s and 1970s.<sup>127</sup> Widespread divorce law reform took place in the United States culminating in a "divorce revolution" and by 1985 all states had adopted some form of no-fault divorce.<sup>128</sup> This move from fault-based to no-fault divorce represented a shift in family law from public to private

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119. Press Release, U.S. Census Bureau, Most People Make Only One Trip Down the Aisle, But First Marriages Shorter (Sept. 19, 2007), available at [http://www.census.gov/newsroom/releases/archives/marital\\_status\\_living\\_arrangements/cb07-131.html](http://www.census.gov/newsroom/releases/archives/marital_status_living_arrangements/cb07-131.html).

120. GREGORY ET AL., *supra* note 50, at 222.

121. Singer, *supra* note 106, at 1470.

122. *Id.*

123. *Id.* at 1470–71.

124. Peter N. Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269, 270 (1997).

125. *Id.*

126. *Id.*

127. *Id.* at 271.

128. *Id.*



through the literal “privatization of divorce and its financial consequences.”<sup>129</sup> Where the fault-based divorce system required the state to determine whether or not a couple could divorce, the no-fault system allows for divorce based on a private decision by both spouses or by one spouse acting unilaterally.<sup>130</sup> Thus, in the case of divorce, it is not the entry to marriage that is viewed as a fundamental right, rather the right to exit the marriage is considered a fundamental right.

In true no-fault jurisdictions all that needs to be shown is that the marriage is irretrievably broken.<sup>131</sup> Although the state of Missouri has not enacted “a total ‘no fault’ dissolution law. . . . [it has] adopted a ‘modified no fault’ dissolution law.”<sup>132</sup> In Missouri, the court must find that there remains no reasonable likelihood that the marriage can be preserved, and therefore the marriage is irretrievably broken.<sup>133</sup> However, proving that the marriage is in fact irretrievably broken can be established by merely showing behavior indicating financial and communication incompatibility.<sup>134</sup>

Since the rise of the no-fault divorce in the 1970’s, scholars have observed an increase in the number of divorces taking place.<sup>135</sup> While some believe that high divorce rates are attributable to no-fault divorce laws damaging the institution of marriage,<sup>136</sup> there are many persuasive arguments demonstrating that no-fault divorce has actually strengthened the institution of marriage. One scholar has hypothesized that no-fault divorce simply represents the shifting value of property rights in marriage and divorce, noting that fault-based divorce gave each spouse the property right to continued marriage whereas no-fault divorce gives each spouse a property right to divorce.<sup>137</sup> Historically, one spouse risked losing financial resources or property through divorce, thus it

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129. Singer, *supra* note 106, at 1445.

130. *Id.*

131. *Id.*

132. *In re Marriage of Mitchell*, 545 S.W.2d 313, 318 (Mo. Ct. App. 1976).

133. *See supra* note 104 and accompanying text (outlining grounds for dissolution in Missouri).

134. *See In re Marriage of McCurdy*, 233 S.W.3d 260, 262 (Mo. Ct. App. 2007) (holding that marriage was irretrievably broken based on Husband’s “brief synopsis” of financial and communication incompatibility, although Wife argued this was not sufficient evidence, the court reasoned there was “no reason . . . to delve into the parties’ incompatibility.”).

135. *See Swisher, supra* note 124, 271 (1997).

136. Lynn D. Wardle, *Divorce Violence and the No-Fault Divorce Culture*, 1994 UTAH L. REV. 741, 742 (arguing that no-fault divorce “culture has spawned a powerful ‘culture of conflict’ that fosters and produces violence.”).

137. Martin Zelder, *The Economic Analysis of the Effect of No-Fault Divorce Law on the Divorce Rate*, 16 HARV. J.L. & PUB. POL’Y 241, 247, 249 (1993) (arguing that, overtime, “[r]egardless of the law, marriage will continue when the surplus from marriage is positive, and divorce will occur when the surplus from marriage is negative.”).

may have been more valuable for the marriage to continue.<sup>138</sup> However, a modern approach to the allocation of resources at divorce recognizes contributions beyond financial ones—thus, the act of leaving a marriage is viewed as a property right.<sup>139</sup> Moreover, even if no-fault divorce law has made divorce easier, it has never discouraged marriage.<sup>140</sup> To the contrary, no fault divorce may indirectly encourage marriage by promising individuals that their sacrifices within marriage will have a substantial return.<sup>141</sup> Divorce provides both parties with the right to remarry and statistics reflect that divorcees throughout the United States are comfortable re-marrying and very likely to do so.<sup>142</sup>

b. Equitable Division of the Partnership

One goal of divorce is to equitably divide marital property and other assets.<sup>143</sup> In this sense, the marriage is treated much like a business partnership with a presumption of equal division upon divorce.<sup>144</sup> One underlying philosophy supporting the equal division of property at divorce is individualism, which “as a policy has strong roots in America's self-image as a land of opportunity in which hard work receives a just reward.”<sup>145</sup> Based on this philosophy, property is divided at dissolution with the goal of compensating each spouse for the contributions they made to the marriage.<sup>146</sup> Thus, a “spouse who made more overall contributions should receive more property, while a spouse who contributed little is entitled only to a small award.”<sup>147</sup> While the meaning of a contribution varies from state to state, it usually includes any significant expenditure of resources or time, notably including homemaker and child-rearing contributions.<sup>148</sup>

The ideal property division system would award each party a share of the marital estate that would be (1) fair in amount; (2) easy to compute; (3) predictable from the facts; and (4) consistent in similar cases.<sup>149</sup> This stems

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138. *See id.* at 246.

139. *See id.* at 249.

140. *See id.* at 242, 247–49.

141. *See id.* at 247–49.

142. Larry Bumpass et al., *Changing Patterns of Remarriage*, 52 J. MARRIAGE & FAM. 747, 750 (1990).

143. Swisher, *supra* 124, at 297.

144. Bix, *supra* note 44, at 99–100.

145. Brett R. Turner, *Equitable Distribution of Property* § 2:2, 41 A.L.R. FED. 481, 481 (2005).

146. *Id.*

147. *Id.*

148. *Id.* (noting that “there is still a tendency to place special emphasis upon direct financial contributions.”).

149. *Id.*

from the basic notion of equity implying that cases with similar facts should reach similar results.<sup>150</sup> If this goal of equity is not met, unlucky litigants resent the system and often attempt to avoid complying with the court's order.<sup>151</sup> But fair, predictable, and consistent results also provide individuals with notice of how their case might turn out.<sup>152</sup> Inconsistent results frustrate parties and can lead to an “increase in litigation, with correspondingly greater costs to both the parties and the public.” Lastly, the state has an interest in not only providing uniform results, but in creating a property division system that is easy to administer.<sup>153</sup>

c. Ensuring Self-Sufficient Status and Privatizing Dependency

Another important goal “of a dissolution decree is to place each of the former spouses in an independent self-sufficient status.”<sup>154</sup> Although alimony and maintenance awards are also options, most states “primarily rely on the division of marital property in order to satisfy the economic needs of a separating couple.”<sup>155</sup> And while courts do “not favor awards of maintenance to former spouses,” they can still provide an award of maintenance if a spouse cannot otherwise support himself or herself after the property division is complete.<sup>156</sup>

In Missouri, Revised Statute § 452.330 outlines the factors the court should consider when dividing property in a proceeding for dissolution.<sup>157</sup> These factors include the economic circumstances of each spouse at the time the property division is to become effective; contributions of each spouse to acquisition of marital property—including the contribution of a spouse as homemaker; and the value of the non-marital property set apart to each spouse.<sup>158</sup> Essentially, “[t]wo principles . . . guide marital property division. . . . [F]irst, the property division should reflect the concept of marriage as a shared enterprise similar to a partnership; second, the property division should be utilized as a means of providing future support for an economically

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150. *Id.*

151. Turner, *supra* note 145, at 481.

152. *Id.*

153. *Id.*

154. *In re Marriage of Torix*, 863 S.W.2d 935, 939 (Mo. Ct. App. 1993).

155. Mark H. Kruger & Marc J. Boxerman, *Maintenance: Rehabilitation Aid or Lifetime Annuity? Termination of Maintenance and the Obligation to Work*, 52 J. MO. B. 223, 224 (1996).

156. *See id.*

157. MO. REV. STAT. § 452.330 (2012).

158. *Id.* (noting that other factors include “[t]he conduct of the parties during the marriage; and . . . [c]ustodial arrangements for minor children.”).

dependent spouse.”<sup>159</sup> This implies that one of the main purposes of property division is to ensure that each spouse will be economically self-sufficient.

Moreover, after the division of marital property, if the court finds that one spouse “[l]acks sufficient property . . . to provide for his [or her] reasonable needs” and is “unable to support [his or her self] through appropriate employment,” the court may award maintenance or alimony.<sup>160</sup> Factors for the court to consider when determining the amount and duration of a maintenance order include: “The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment; . . . The comparative earning capacity of each spouse; . . . [And] [t]he age, and the physical and emotional condition of the spouse seeking maintenance[.]”<sup>161</sup> Notably, spousal support is viewed as a temporary measure to allow a spouse to obtain necessary education or work skills to re-enter the job market and become self-supporting.<sup>162</sup> This is evidenced by the fact that if alimony or maintenance is awarded, “the remarriage of the former spouse shall relieve the spouse obligated to pay support from further payment of alimony to the former spouse from the date of the remarriage.”<sup>163</sup> The fact that maintenance is temporary reflects the state’s interest in privatization of divorce and its financial consequences.<sup>164</sup>

### 3. Exceptions to Traditional Divorce Law

Divorce, like marriage, is part of a broad category of domestic relations regulated by the states.<sup>165</sup> However, the state’s right to regulate divorce is not absolute, as there are constitutional parameters to the state’s ability to regulate divorce.<sup>166</sup>

#### a. The Right to Divorce

Although the state regulates divorce, and it is a party to the marriage contract, there are limits to the state’s ability to prevent a couple from

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159. *Meservey v. Meservey*, 841 S.W.2d 240, 247 (Mo. Ct. App. 1992) (citing *Goller v. Goller*, 758 S.W.2d 505, 508 (Mo. Ct. App. 1988)).

160. § 452.335.

161. *Id.*

162. *Kruger & Boxerman*, *supra* note 155, at 223.

163. MO. REV. STAT. § 452.075 (2012).

164. *Singer*, *supra* note 106, at 1470.

165. *See, e.g., Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *Williams v. North Carolina*, 317 U.S. 287, 298 (1942).

166. *Lehr v. Robertson*, 463 U.S. 248, 257 (1983) (“In some cases, however, this Court has held that the Federal Constitution supersedes state law and provides even greater protection for certain formal family relationships. In those cases, as in the state cases, the Court has emphasized the paramount interest in the welfare of children and has noted that the rights of the parents are a counterpart of the responsibilities they have assumed.”).

dissolving their marriage. For instance, in *Bodie v. Connecticut* the Supreme Court held that there is a right to divorce.<sup>167</sup> The Court held that due process of law prohibits a state from denying access to courts to those seeking judicial dissolution of their marriages because they were unable to pay court fees.<sup>168</sup> Whereas the right to marry<sup>169</sup> protects an individual's right to enter a marriage, the right to divorce protects the individual's right to exit the marriage.<sup>170</sup> The right to marry has been upheld using the equal protection clause, and the right to divorce has been upheld based on due process.<sup>171</sup> Thus, the concern with marriage is access to the institution of marriage, while the concern with divorce is access to the courthouse in order to exit the institution of marriage. Therefore, the right to marry and the right to divorce must be analyzed and applied separately.

b. Recognizing a Marriage for Limited Purposes

There are times when the state and the court have opposed a form of marriage for public policy reasons, but recognized divorce for similar public policy reasons. For instance, a "putative marriage" allows a null marriage to be considered a true marriage for a limited purpose.<sup>172</sup> The putative marriage doctrine was developed to correct injustice occurring if civil effects were not allowed "to flow to a party to a null marriage who believes in good faith that he or she is validly married."<sup>173</sup> Also, polygamy is illegal in the United States.<sup>174</sup> However, in *Parker v. Parker*, a Connecticut case, a husband had remarried before his first marriage was officially dissolved, so in effect he was married to two women at the same time.<sup>175</sup> Since polygamy is illegal, technically, the second marriage could have been considered void, but the second wife sought an annulment with alimony.<sup>176</sup> The husband did not deny marrying his second wife, but argued that the second marriage was never valid, thus he felt that he should not have to pay alimony.<sup>177</sup> The court ultimately held that the second marriage was void and granted the annulment, but still provided relief to the second wife by ordering the husband to pay her alimony.<sup>178</sup> This is an example of a court successfully recognizing a marriage

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167. *Bodie v. Connecticut*, 401 U.S. 371, 383 (1971).

168. *Id.*

169. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

170. *Bodie*, 401 U.S. at 382-83.

171. *Loving*, 388 U.S. at 12.

172. Christopher L. Blakesley, *The Putative Marriage Doctrine*, 60 TUL. L. REV. 1, 6 (1985).

173. *See id.*

174. *Cleveland v. United States*, 329 U.S. 14, 18 (1946).

175. *Parker v. Parker*, 270 A.2d 94 (Conn. Super. Ct. 1970).

176. *See id.* at 96.

177. *Id.*

178. *Id.*

for the limited purpose of applying divorce law. This case implies that although a form of marriage, like polygamy, may be against public policy and considered harmful to families, applying divorce law to the dispute and requiring the husband to pay alimony to the wife did not hurt the family, but rather reduced the overall harm to the family. If the court had not ordered the husband to pay alimony, the wife would likely not have been economically self-sufficient.

Also, although the state of Missouri does not recognize common-law marriages,<sup>179</sup> the state makes several public policy exceptions to this rule. First, Missouri courts will recognize a common-law marriage if it was given legal effect by another state.<sup>180</sup> Also, if a spouse is awarded alimony or maintenance during a divorce proceeding, the remarriage of that spouse “relieve[s] the spouse obligated to pay support from further payment of alimony to the former spouse from the date of the remarriage.”<sup>181</sup> The reason for this public policy exception is that maintenance is designed to be temporary.<sup>182</sup> Importantly, although the state of Missouri does not allow common-law marriages, if the spouse receiving maintenance enters into a marriage-like relationship, the court will recognize this as a common-law marriage for the sole purpose of terminating the maintenance order.<sup>183</sup> This further illustrates the state’s underlying belief in independence and autonomy.

Here, Part II has considered the overall goals of divorce and has demonstrated that the state has a strong interest in providing efficient, effective, and consistent relief to parties seeking dissolution. Overall, Missouri’s divorce law reflects an overarching belief in not only providing equitable relief to couples as they divide their assets, but also in privatizing the financial consequences of divorce.

### III. SAME-SEX RELATIONSHIPS & FAMILY LAW

This section will briefly consider the legality of same-sex marriage throughout the United States, specifically focusing on the interstate recognition of same-sex marriages and the problem of same-sex divorce when it is the public policy of a state not to allow same-sex marriages.

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179. See MO. REV. STAT. § 451.040 (2000) (“Common-law marriages shall be null and void.”).

180. *Pope v. Pope*, 520 S.W.2d 634, 635 (Mo. Ct. App. 1975) (affirming a divorce granted by a trial court where the parties were not formally married, but, since the state of Kansas recognized their common law marriage, the state of Missouri did also since the parties were now Missouri residents).

181. § 452.075.

182. See § 452.335.

183. *Lombardo v. Lombardo*, 120 S.W.3d 232, 237 (Mo. Ct. App. 2003) (noting that a wife entering a common-law marriage could result in the termination of maintenance; however, the case was dismissed for lack of appellate jurisdiction).

A. *Legal Recognition of Same-Sex Marriage in the United States*<sup>184</sup>

Historically, in the United States at least, marriage has included one man and one woman.<sup>185</sup> Thus, when Richard Baker and James McConnell, a same-sex couple, applied for a marriage license in Hennepin County, Minnesota on May 18, 1970,<sup>186</sup> the state of Minnesota denied their application.<sup>187</sup> Although their constitutional challenge was also ultimately rejected, *Baker v. Nelson*<sup>188</sup> made history by becoming the first reported judicial challenge to a state law limiting marriage to a male and a female.<sup>189</sup> Since then, there has been extensive same-sex debate and litigation over the past forty years.<sup>190</sup> As of February 2012, nine jurisdictions now permit same-sex marriage, including: Massachusetts,<sup>191</sup> Connecticut,<sup>192</sup> Vermont,<sup>193</sup> New Hampshire,<sup>194</sup> Iowa,<sup>195</sup> Washington, D.C.,<sup>196</sup> New York,<sup>197</sup> Washington,<sup>198</sup> and California.<sup>199</sup>

184. For a history of same-sex marriage in other cultures see William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1422 (1993) (“Same-sex unions have been a valuable institution for most of human history and in most known cultures.”).

185. See *supra* Part II.A. for discussion of purposes and benefits of marriage.

186. *Baker v. Nelson*, 191 N.W.2d 185, 185 (Minn. 1971) (upholding the denial of an application for a marriage license because both applicants were male).

187. *Id.*

188. *Baker v. Nelson*, 409 U.S. 810, 810 (1972) (dismissing the appeal on the grounds that the case failed to raise a substantial federal question).

189. NICOLAS & STRONG, *supra* note 1, at 3.

190. *Id.*

191. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969–70 (Mass. 2003) (holding that the state’s ban on same-sex marriage violated Massachusetts’s constitution and giving state legislature 180 days to comply with its ruling).

192. See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 411–12 (Conn. 2008) (holding that law restricting marriage to heterosexual couples violated same-sex couples’ state constitutional equal protection rights); see also Robert D. McFadden, *Gay Marriage is Ruled Legal in Connecticut*, N.Y. TIMES, Oct. 11, 2008, at A1.

193. See VT. STAT. ANN. tit. 15, § 8 (Supp. 2009) (“Marriage is the legally recognized union of two people.”).

194. See N.H. REV. STAT. ANN. § 457:1-a (Supp. 2012) (“Marriage is the legally recognized union of 2 people. Any person who otherwise meets the eligibility requirements of this chapter may marry any other eligible person regardless of gender.”); see also Abby Goodnough, *New Hampshire Approves Same-Sex Marriage*, N.Y. TIMES, June 4, 2009, at A19.

195. See *Varnum v. Brien*, 763 N.W.2d 862, 872 (Iowa 2009) (holding that an Iowa statute denying gay and lesbian people the right to marry violated the equal protection law promised by the Iowa Constitution); see also Keith B. Richburg, *Iowa Legalizes Same-Sex Marriage—Ban Violated Constitutional Rights*, *State Supreme Court Rules*, WASH. POST, Apr. 4, 2009, at A3.

196. D.C. CODE § 46-401 (2001) (“Any person may enter into a marriage in the District of Columbia with another person, regardless of gender . . .”); see also Ian Urbina, *District of Columbia Backs Same-Sex Marriage*, N.Y. TIMES, Dec. 16, 2009, at A28.

197. N.Y. DOM. REL. LAW § 10-a (McKinney 2011) (“A marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex.”); see

However, the majority of the United States only recognizes marriage between a male and a female.<sup>200</sup>

### B. *The Ban on Same-Sex Marriages in the United States*

The main argument against same-sex marriage is that the State has an interest in preserving the “traditional” institution of marriage.<sup>201</sup> This traditional marriage argument includes the assertion that “marriage is uniquely and crucially the legal site for procreation” and that heterosexual unions are optimal for procreation “since same-sex couples cannot have procreative sexual intercourse.”<sup>202</sup> Consequently, same-sex marriage has been viewed as a threat to the entire institution of traditional marriage.<sup>203</sup>

#### 1. The Defense of Marriage Act (“DOMA”)

In 1996, the federal government responded to the growing demand for legal recognition of same-sex marriages by affecting the Defense of Marriage Act (“DOMA”), which defined marriage, for the purposes of federal law, as a union between one man and one woman.<sup>204</sup> Although the United States Constitution, in the Full Faith and Credit Clause, establishes that states must recognize other state’s “public Acts, Records, and judicial Proceedings,”<sup>205</sup> DOMA explicitly addresses this constitutional requirement by excluding same-sex marriages from the acts that other states must recognize.<sup>206</sup> Thus, not only does DOMA prevent any sort of federal recognition of same-sex relationships,

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*also* Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, June 25, 2011, at A1.

198. Same Sex Marriage, 2011–2012 Wash. Sess. Laws 199–200 (codified as amended at WASH. REV. CODE § 26.04.010). *See also* William Yardley, *Washington State Senate Passes Gay Marriage Bill*, N.Y. TIMES, Feb. 2, 2012, at A13.

199. *See In re Marriage Cases*, 183 P.3d 384, 433–34 (Cal. 2008) (holding that the California Constitution “guarantees same-sex couples the same substantive constitutional rights as opposite-sex couples” including the right to marry); *but see* CAL. CONST. art. I, § 7.5 (amended 2008) (defining marriage as “between a man and a woman” only); *but see* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010) (holding that Constitutional Amendment violates the Equal Protection Clause by excluding same-sex couples from marriage), *aff’d*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012).

200. NICOLAS & STRONG, *supra* note 1, at 2–3.

201. Patrick Busch, *Is Same-Sex Marriage a Threat to Traditional Marriages?: How Courts Struggle with the Question*, 10 WASH. U. GLOBAL STUD. L. REV. 143, 143–44 (2011).

202. Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1438 (2010).

203. Busch, *supra* note 201, at 144.

204. The Defense of Marriage Act of 1996, 1 U.S.C. § 7 (2006) (stating that “the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”).

205. U.S. CONST. art IV, § 1.

206. 1 U.S.C. § 7.



but it also allows states to refuse to recognize legal status that same-sex couples received from another state.<sup>207</sup> Since its enactment, legal scholars have criticized the constitutionality of DOMA.<sup>208</sup>

## 2. Mini-DOMAs Enacted by the States

Although DOMA allows states to refuse to recognize same-sex marriages, it does not prevent each state from enacting legislation legalizing same-sex marriage or recognizing out-of-state same-sex marriages.<sup>209</sup> In response, twenty-eight states<sup>210</sup> adopted amendments to their constitutions limiting marriage to opposite-sex couples, while twelve states adopted similar statutes prohibiting same-sex marriage.<sup>211</sup> Also, New Mexico, New Jersey, and Rhode Island did not pass legislation, but have otherwise interpreted marriage to mean a man and a woman only.<sup>212</sup> The wording of each “mini-DOMA” changes from state to state. Some mini-DOMAs simply define “marriage” as being between a man and a woman, thus prohibiting same-sex couples to marry.<sup>213</sup> However, many mini-DOMAs indicate that same-sex marriages contracted out of state will not be “recognized.”<sup>214</sup> Others require non-recognition of all

207. NICOLAS & STRONG, *supra* note 1, at 11.

208. *See, e.g.*, Andrew Koppelman, *Dumb and Doma: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1 (1997); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 2007 (1997); Mark P. Strasser, *Doma and the Constitution*, 58 DRAKE L. REV. 1011 (2010).

209. NICOLAS & STRONG, *supra* note 1, at 4.

210. *Id.* (outlining the number of states that originally adopted mini-DOMAs though some of these were subsequently overturned by state supreme courts).

211. *Id.*

212. *See* N.M. Op. Att’y Gen. No. 11-01 (2011) (stating that in New Mexico the term marriage means that between man and woman); *Lewis v. Harris*, 908 A.2d 196, 200, 224 (N.J. 2006) (holding in New Jersey same-sex marriage is not a “fundamental right” protected under the Constitution, but giving state legislature 180 days to provide “committed same-sex couples, on equal terms, the full rights and benefits enjoyed by heterosexual married couples”); *Chambers v. Ormiston*, 935 A.2d 956, 964 (R.I. 2007) (reasoning that in Rhode Island the meaning of the term “marriage” only includes opposite-sex couples).

213. *See, e.g.*, ALASKA CONST. art. I, § 25 (“[M]arriage may exist only between one man and one woman.”); ARK. CONST. amend. LXXXIII, § 1; DEL. CODE ANN. tit. 13, § 202 (2011); HAW. REV. STAT. § 572-3 (2011); 750 ILL. COMP. STAT. 5/212 (2011); LA. CONST. art. XII, § 15; N.D. CONST. art. XI, § 28; OKLA. CONST. art. II, § 35; TEX. CONST. art. I, § 32; WYO. STAT. ANN. § 20-1-101 (2011).

214. *See, e.g.*, ARIZ. CONST. art. XXX, § 1 (“Only a union of one man and one woman shall be valid or recognized as a marriage.”); COLO. CONST. art. II, § 31; KY. CONST. § 233A; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; OHIO CONST. art. XV, § 11; OR. CONST. art. XV, § 5a; S.D. CONST. art. XXI, § 9; GA. CONST. art. I, § 4, cl. 1; KAN. CONST. art. XV, § 16; MO. CONST. art. I, § 33; MISS. CONST. art. XIV, § 263-A; TENN. CONST. art. XI, § 18; VA. CONST. art. I, § 15-A; IND. CODE § 31-11-1-1 (2011); ME. REV. STAT. tit. 19-A, § 701 (2011); N.C. GEN. STAT. § 51-1.2 (2011); 23 PA. CONS. STAT. § 1704 (2011); W. VA. CODE. § 48-2-603 (2011).

same-sex relationships for any purpose.<sup>215</sup> Mini-DOMAs successfully prevent evasive marriages, where citizens know same-sex marriage is prohibited by their home state, but obtain a same-sex marriage in another state and return home immediately after.<sup>216</sup> However, nearly 150,000 same-sex couples reported being married in 2010.<sup>217</sup> Not all circumstances involving interstate marriage recognition involve evasive marriages. For instance, an employer might transfer a same-sex spouse to a state that does not recognize their same-sex marriage. This would result in a “migratory” same-sex marriage, which, although lawfully obtained and not “evasive,” would still not be recognized.<sup>218</sup> Equally worrisome, a married same-sex couple might be traveling through a state that does not recognize their same-sex marriage when they get in a car accident, resulting in a same-sex spouse not being able to be with their spouse in the hospital. Thus, “mini-DOMAs” not only prohibit same-sex marriage from occurring in a state, but they also deny legal effect to valid same-sex marriages contracted in other states for any purpose.<sup>219</sup>

### C. Same-Sex Divorce

It should come as no surprise that, like opposite-sex couples, same-sex couples break up.<sup>220</sup> Same-sex couples seeking dissolution “do not say that they want to marry so that if they split up the property division and support rules that accompany divorce will apply to them.”<sup>221</sup> Rather, like most couples that marry, they do not expect to divorce.<sup>222</sup> Yet, “the different rules for

215. See, e.g., ALA. CONST. art. I, § 36.03 (Any “union replicating marriage between persons of the same sex” shall be “considered and treated in all respects as having no legal force or effect” in the state of Alabama); FLA. CONST. art. I, § 27; IDAHO CONST. art. III, § 28; MICH. CONST. art. I, § 25; S.C. CONST. art. XVII, § 15; UTAH CONST. art. I, § 29; WIS. CONST. art. XIII, § 13.

216. See Melissa Meinzer, *Same-sex Couples in St. Louis Can Get Married in Iowa. They Just Can't Ever Get Divorced.*, RIVERFRONT TIMES (Dec. 2, 2010), <http://www.riverfronttimes.com/2010-12-02/news/same-sex-divorce-st-louis-missouri/> (noting that “[s]ince 2009, when an Iowa Supreme Court ruling extended marriage rights to all unrelated adults, with no residency requirement, nearly ninety couples [from St. Louis] have taken the long bus ride from St. Louis to Iowa City with Show Me No Hate, [a] St. Louis-based marriage-equity group”).

217. Census Bureau Releases Estimates of Same-Sex Married Couples, *supra* note 2.

218. Considering that about 3 percent of Americans move to a different state each year, this could mean that as many as 4,500 individuals with same-sex marriages will migrate this year. See Paul Overberg, *Millions More Americans Move to New States*, USA TODAY (Nov. 30, 2007, 10:23AM), [http://www.usatoday.com/news/nation/2007-11-29-Mobility\\_N.htm](http://www.usatoday.com/news/nation/2007-11-29-Mobility_N.htm).

219. See Andrew Koppelman, *The Difference the Mini-DOMAs Make*, in SAME-SEX DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES 137, 144 (2006).

220. See Clyde Haberman, *After Same-Sex Marriage, Same-Sex Divorce*, N.Y. TIMES (June 27, 2011, 8:34 AM), <http://cityroom.blogs.nytimes.com/2011/06/27/after-same-sex-marriage-same-sex-divorce/>.

221. NANCY POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 175 (2008).

222. *Id.*

settling money issues at the end of a marriage versus an unmarried relationship can cause indefensible hardship.”<sup>223</sup> Although the American Law Institute recommends the inclusion of same-sex couples and includes “domestic partnerships” in its Principles of the Law of Family Dissolution,<sup>224</sup> states with mini-DOMAs do not have to dissolve same-sex marriages or other domestic partnerships.<sup>225</sup> These states, that do not allow same-sex marriages, have been handling same-sex divorce with one of three possible approaches.

### 1. Complete Non-Recognition of Same-Sex Relationships

Although, “[y]ou would think that people who are against gay marriage would love nothing more than to help a gay, married couple divorce,”<sup>226</sup> some states have already made it clear that they will, under no circumstance, recognize a same-sex marriage—even if the purpose of recognizing the marriage is to dissolve it—specifically Texas,<sup>227</sup> Rhode Island,<sup>228</sup> Oklahoma,<sup>229</sup> Pennsylvania,<sup>230</sup> and Georgia.<sup>231</sup> Thus, when a legally married same-sex couple moves to one of these states, technically they are no longer married because that state considers their original marriage to be void—even if it was legally contracted in another state.<sup>232</sup> Since they do not “recognize” the

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223. *Id.*

224. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03 (2000).

225. See Koppelman, *supra* note 219, at 105.

226. *Forget About Gay Marriage, What About Gay Divorce?*, POL. IRONY (Oct. 16, 2009, 12:27 AM), <http://politicalirony.com/2009/10/16/forget-about-gay-marriage-what-about-gay-divorce/>.

227. *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 665 (Tex. Ct. App. 2010) (holding that Texas state court did not have subject-matter jurisdiction required to adjudicate same-sex divorce petition).

228. *Chambers v. Ormiston*, 935 A.2d 956, 974 (R.I. 2007) (holding that Rhode Island state court was without jurisdiction to entertain divorce petition involving same sex couple married in Massachusetts).

229. *O’Darling v. O’Darling*, 188 P.3d 137, 139 (Ok. 2008) (vacating Oklahoma trial court’s grant of dissolution because same-sex couple identified themselves with their initials only and “failed to disclose controlling legal authority regarding same-sex marriage in Oklahoma.”).

230. *Kern v. Taney*, 11 Pa. D. & C. 5th 558, 563 (Pa. Com. Pl. 2010) (“[B]ased on the law in Pennsylvania as it currently exists, [we] cannot grant a divorce to [this same-sex couple]. Their marriage, perhaps considered valid in Massachusetts and some other states, is not recognized in Pennsylvania. Without a legally recognizable marriage, relief under the Divorce Code is simply not available.”).

231. GA. CONST. art. I, § 4 (“The courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties’ respective rights arising as a result of or in connection with such relationship.”).

232. *See id.*

marriage, it does not exist.<sup>233</sup> Ultimately, these states are concerned with the consequences of giving legal effect to same-sex marriage for any reason.<sup>234</sup> However, a couple cannot just rely on the state's Constitution or statute making their marriage void for all purposes in that state, because the marriage would not be void in the other nine jurisdiction that legally recognize the marriage. For instance, Lisa Lunt married her wife in Massachusetts in 2008, they later moved to Rhode Island, where they cannot get a divorce.<sup>235</sup> Lunt is now concerned that if she is not able to get a divorce, her ex-wife could move to a state that recognizes same-sex marriage and claim half of her retirement.<sup>236</sup> Thus, she argues that the state should at least grant an annulment stating that her marriage is over.

Some couples have the option of returning to the state that married them to request a divorce. For instance, the state of California allows same-sex couples that were married in California to divorce in California without establishing residency, as long as they can prove that their state of residence will not dissolve the marriage.<sup>237</sup> Although California law typically requires that at least one of the parties be a resident of the state for six months and of a county for three months prior to filing petition,<sup>238</sup> there is an exception for same-sex couples.<sup>239</sup>

Importantly, other states that allow same-sex marriage have yet to pass a law like California's. Thus, the domicile requirements in New York,<sup>240</sup> Iowa,<sup>241</sup> Connecticut,<sup>242</sup> Massachusetts,<sup>243</sup> New Hampshire,<sup>244</sup> Vermont,<sup>245</sup>

233. *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 665 (Tex. App. 2010). (“[S]ame-sex marriages have no legal effect in Texas.”).

234. Because “a divorce proceeding would ‘give effect’ to a same-sex marriage.” *Id.* at 666.

235. Tovia Smith, *Gay Divorce Higher Hurdle than Marriage*, NAT’L PUB. RADIO (July 20, 2011), <http://www.npr.org/2011/07/20/137674268/gay-divorce-a-higher-hurdle-than-marriage>.

236. *Id.*

237. See CAL. FAM. CODE § 2320 (2011) (“A judgment for dissolution, nullity, or legal separation of a marriage between persons of the same sex may be entered, even if *neither* spouse is a resident . . . if [t]he marriage was entered in California” and “[n]either party to the marriage resides in a jurisdiction that will dissolve the marriage.”).

238. See *id.* (“[A] judgment of dissolution of marriage may not be entered unless one of the parties to the marriage has been a resident of this state for six months.”).

239. See *id.*

240. Although New York has no residency requirement for obtaining a marriage, there is a ninety-day residency requirement for obtaining a divorce. See Haberman, *supra* note 220.

241. Meinzer, *supra* note 216 (noting that “[a]ny two non-related adults—regardless of gender—can marry in Iowa, with no waiting period to establish residency . . . . Yet in Missouri, same-sex couples are expressly prohibited from marrying. Nor does the state recognize same-sex marriages performed in other states.”).

242. See CONN. GEN. STAT. § 46b-44 (2011) (requiring that before divorce will be granted one of the parties must have been a resident of Connecticut for at least twelve months, or if one of the parties was domiciled in Connecticut at the time of the marriage and returned to the state “with the intention of permanently remaining”).

Washington,<sup>246</sup> and Washington, D.C.<sup>247</sup> would prevent a same-sex couple from returning to the state for the sole purpose of divorcing.

For instance, when Massachusetts became the first state to legalize same-sex marriage,<sup>248</sup> there was concern that Massachusetts would become the go-to state for quick same-sex marriages and divorces.<sup>249</sup> So, to avoid becoming “the Las Vegas”<sup>250</sup> of same-sex marriage and divorce, the state decided to limit the ability of out-of-state couples to marry and divorce in Massachusetts without first establishing domicile.<sup>251</sup> This means a couple who gets married in Massachusetts and subsequently moves to another state that does not recognize same-sex marriage, cannot go back to Massachusetts for the purpose of getting a divorce.<sup>252</sup>

## 2. Equitable Remedies for Unmarried Cohabitants

Another approach, popularly explored by legal scholars, is to provide an equitable remedy to the legally married couple without recognizing the same-sex marriage or applying traditional family law.<sup>253</sup> For instance, a state might

243. See MASS. GEN. LAWS ch. 208, § 4–5 (2003) (limiting divorce to a Plaintiff who has lived in Massachusetts for one year at time of divorce, “unless it appears that Plaintiff has removed into this commonwealth for the purpose of obtaining a divorce.”).

244. N.H. REV. STAT. § 458:5 (2011) (requiring both parties to be domiciled in New Hampshire or one to be domiciled in New Hampshire for at least a year before commencing divorce action).

245. VT. STAT. ANN. tit. 15, § 592 (2011) (requiring six month residency before action for divorce may be filed and twelve month residency before divorce will be granted).

246. WASH. REV. CODE § 26.09.030 (2011) (requiring twelve month residency before complaint for dissolution may be filed).

247. *But see Same-Sex Divorce Bill Advances in D.C. Council*, THE HUFFINGTON POST (Jan. 12, 2012, 9:54 AM), [http://www.huffingtonpost.com/2012/01/12/same-sex-divorce-bill-adv\\_n\\_1201592.html?view=print&comm\\_ref=false](http://www.huffingtonpost.com/2012/01/12/same-sex-divorce-bill-adv_n_1201592.html?view=print&comm_ref=false) (“Supporters say the bill, the Civil Marriage Dissolution Equality Amendment Act of 2011, is needed because states that don’t recognize same-sex marriage have no legal mechanism to issue a divorce to gay or lesbian couples who wish to dissolve their D.C. marriage through a divorce.”).

248. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969–70 (Mass. 2003).

249. See Grossman, *supra* note 73, at 87.

250. See *id.*

251. MASS. GEN. LAWS ch. 208, § 4–5 (2003).

252. See *Kern v. Taney*, 11 Pa. D. & C. 5th 558, 560 n.2 (Pa. Com. Pl. 2010) (“Apparently, the parties are not permitted to obtain a divorce in Massachusetts for failure to qualify under the residency requirements, although the parties were permitted to be married there.”); Grossman, *supra* note 73, at 89–100 (discussing the history of migratory divorce).

253. See, e.g., Barbara J. Cox, *Using an “Incidents of Marriage” Analysis When Considering Interstate Recognition of Same-Sex Couples’ Marriages, Civil Unions, and Domestic Partnerships*, 13 WIDENER L. SYMP. J. 699, 738–39 (2004); William A. Reppy, Jr., *Choice of Law Problems Arising when Unmarried Cohabitants Change Domicile*, 55 SMU L. REV. 273, 274–75 (2002) (examining “five theoretical bases for recognizing or precluding property claims

refuse to admit that a legal marriage occurred, but admit that a binding contract to live together and divide property in a certain way occurred. Thus, the state may enforce that marriage contract by applying contract law.<sup>254</sup> This approach allows the state to divide the couple's property without granting a traditional divorce, and therefore not legally acknowledge or address the validity of the marriage.<sup>255</sup> Likewise, if a couple's marriage is not recognized by the state, the relationship might be described in legal terms as unmarried cohabitants. However, it is well-established that "legal rights and obligations may arise from the conduct of the parties with respect to one another, even though they have created no formal document or agreement setting forth such an undertaking."<sup>256</sup> The development of cohabitation rights can be traced back to *Marvin v. Marvin*, where the California Supreme Court considered the possibility of applying implied contract theory to property division of unmarried cohabitation relationships.<sup>257</sup> In fact, courts have applied both express and implied contract remedies to "resolve disputes about property and financial arrangements arising out of cohabitation relationships."<sup>258</sup> Another approach is to "utilize contract law and principles of unjust enrichment to enforce written and oral express contracts, validate implied contracts, impose constructive and resulting trusts, and award quantum meruit."<sup>259</sup> By recognizing a valid contract, courts can enforce the private agreements of parties without public policy objections to same-sex marriage. Some states use restitution to settle claims under the doctrine of unjust enrichment, however this would limit recovery to the actual amount contributed.<sup>260</sup> Other "states use multiple doctrines to form their approach to the dissolution of cohabitation relationships."<sup>261</sup> For instance, "Texas and Minnesota fold cohabitating couples' agreements to share property into their statute of frauds, requiring such agreements to be in writing."<sup>262</sup>

It is also possible that in the case of same-sex marriages courts may go beyond cohabitation contracts for cohabitation disputes and apply principles of

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by one cohabitant against the other: express contract, implied-in-fact contract, negative status, positive status not founded on a contract, and positive status arising out of contract.").

254. John M. Yarwood, *Breaking Up is Hard to Do: Mini-Doma States, Migratory Same-Sex Marriage, Divorce, and a Practical Solution to Property Division*, 89 B.U. L. REV. 1355, 1356–57 (2009) (addressing the division of property upon the dissolution of a same-sex marriage, focusing on married same-sex couples who have migrated to a state that clearly defines marriage as between a man and a woman).

255. *Id.* at 1387.

256. AM. LAW INST., *supra* note 224, at § 6.02.

257. *Marvin v. Marvin*, 18 Cal.3d 660, 672 (1976).

258. Singer, *supra* note 106, 1450–51.

259. Yarwood, *supra* note 254, at 1371–72.

260. *Id.* at 1376.

261. *Id.* at 1372.

262. *Id.* at 1373.

business or partnership law.<sup>263</sup> For instance, in the case of *Ah Leong v. Ah Leong*, a man and woman were living together as husband and wife, but they had not married.<sup>264</sup> The court reasoned that the couple had “in effect entered a joint adventure for mutual benefit of themselves and their family,” creating a quasi partnership.<sup>265</sup> As a result of this partnership, the court held that the wife was entitled to legal property accumulated as a result of their joint venture.<sup>266</sup>

### 3. Recognizing a “Marriage” for a Limited Purpose

More and more states seem to be recognizing the need for same-sex divorce, even if they do not allow same-sex marriage. For instance, in *Christiansen v. Christiansen*<sup>267</sup> a Wyoming court held that the trial court had subject matter jurisdiction to dissolve a same-sex marriage that was lawfully entered into in Canada.<sup>268</sup> In making this decision, the court began by noting, “district courts are endowed with broad subject-matter jurisdiction.”<sup>269</sup> Although the Wyoming law defines marriage as a contract between a male and a female,<sup>270</sup> another Wyoming statute states that “[a]ll marriage contracts which are valid by the laws of the country in which contracted are valid in this state.”<sup>271</sup> The court reasoned that one statute related to the creation of marriage, while the other related to the recognition of marriage.<sup>272</sup> The court emphasized that:

[R]ecognizing a valid foreign same-sex marriage for the limited purpose of entertaining a divorce proceeding does not lessen the law or policy in Wyoming against allowing the creation of same-sex marriages. A divorce proceeding does not involve recognition of a marriage as an ongoing relationship. Indeed, accepting that a valid marriage exists plays no role except as a condition precedent to granting a divorce. After the condition precedent is met, the laws regarding divorce apply. Laws regarding marriage play no role.<sup>273</sup>

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263. Singer, *supra* note 106, 1450–51.

264. See *Ah Leong v. Ah Leong*, 28 Haw. 581, 585 (1925).

265. *Id.* at 586.

266. *Id.*

267. *Christiansen v. Christiansen*, 253 P.3d 153 (Wyo. 2011).

268. *Id.* at 157; see also Frederick Hertz, *Wyoming Opens the Doors to Same-Sex Divorce*, THE HUFFINGTON POST (June 9, 2011, 5:49 PM), [http://www.huffingtonpost.com/frederick-hertz/wyoming-opens-the-doors-t\\_b\\_874365.html](http://www.huffingtonpost.com/frederick-hertz/wyoming-opens-the-doors-t_b_874365.html).

269. *Christiansen*, 253 P.3d at 155.

270. *Id.* at 155 (citing WYO. STAT. ANN. § 20-1-101 (2011)).

271. *Id.* (citing WYO. STAT. ANN. § 20-1-111 (2011)).

272. *Id.* at 156 (noting that the statute defining marriage between a man and a woman did not speak to recognizing same-sex marriages).

273. *Id.* (noting that the women seeking to dissolve their marriage were not seeking “to enforce any right incident to the status of being married.”).

Similarly, in New Jersey, in *Hammond v. Hammond*,<sup>274</sup> the court applied New Jersey divorce law to dissolution of a same-sex marriage obtained in Canada. It is worth noting that granting a same-sex dissolution is not as easy for states with mini-DOMAs expressly prohibiting recognition of same-sex marriage for any purpose. In that case, to avoid ruling on these constitutional questions, “a judge would have to find that an expansive mini-DOMA did not operate to deny the divorce.”<sup>275</sup> This would mean interpreting a mini-DOMA banning the recognition of out-of-state same-sex marriages for any purpose, to still allow “the recognition of such a marriage for the sole purpose of divorce.”<sup>276</sup> However, there is more room for interpretation in states with mini-DOMAs simply defining marriage as between a man and a woman.

For instance, West Virginia has applied divorce law to a civil union.<sup>277</sup> In one case, the parties entered a civil union in Vermont and sought dissolution in a West Virginia family court.<sup>278</sup> Before deciding to apply traditional dissolution laws, the court looked to the Vermont Statute outlining the couple’s union which stated that when two eligible persons had established a relationship pursuant to that statute they could “receive the benefits and protections and be subject to the responsibilities of spouses.”<sup>279</sup> Although West Virginia has a mini-DOMA stating that any act of another state that treats members of the same-sex as married should not be given effect in West Virginia, the court noted that in Vermont a civil union is not a marriage.<sup>280</sup> Therefore, the mini-DOMA did not prevent the court from applying dissolution laws to the civil union.<sup>281</sup>

Similarly, the Supreme Court of New York has held that a trial court had “equity jurisdiction” to grant a dissolution in the case of a same-sex couple who were not married but entered into a civil union in Vermont.<sup>282</sup> Although same-sex marriage is recognized in New York, there was no legislative

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274. See *ACLU-NJ Wins Case Allowing Same-Sex Couple to Divorce in NJ*, AM. CIV. LIBERTIES UNION N. J., <http://www.aclu-nj.org/news/2009/02/05/aclu-nj-wins-case-allowing-same-sex-couple-to-divorce-in-nj> (last visited Apr. 19, 2013); Arthur S. Leonard, *New Jersey Marriage Recognition Ruling*, LEONARD LINK, <http://newyorklawschool.typepad.com/leonard-link/2009/02/new-jersey.html> (last visited Apr. 19, 2013).

275. Elisabeth Oppenheimer, *No Exit: The Problem of Same-Sex Divorce*, 90 N.C. L. REV. 73, 105, 121 (2011) (concluding that “the legislature is in a better position to make divorce available to same-sex couples than a court.”).

276. *Id.*

277. *In re Marriage of Gorman and Gump*, No. 02-D-292, at 22 (W.Va. Jan. 3, 2003) (applying divorce law to dissolve a civil union where the parties were “citizens of West Virginia in need of a judicial remedy to dissolve a legal relationship created by the laws of another state.”).

278. Cox, *supra* note 253, at 738–39 (discussing facts of case).

279. *Id.* at 739.

280. *Id.* at 739–40.

281. *Id.*

282. *Dickerson v. Thompson*, 88 A.D.3d 121, 123–24 (N.Y. App. Div. 2011).



mechanism outlined allowing a court to dissolve a civil union created in another state.<sup>283</sup> The court reasoned that there was no remedy at law in New York or in Vermont since residency requirements prevented the Plaintiff from getting a dissolution in Vermont.<sup>284</sup> Since there would be no court competent to provide plaintiff the requested relief, she would therefore be left without a remedy.

#### IV. SAME-SEX COUPLES IN MISSOURI

##### A. *The Status of Same-Sex Relationships in Missouri*

In 2004, the Missouri General Assembly submitted to Missouri voters a constitutional amendment to amend Missouri's Bill of Rights to define marriage in the Missouri Constitution<sup>285</sup> as existing "only between a man and a woman."<sup>286</sup> Thus, it is the "public policy of this state [Missouri] to recognize marriage only between a man and a woman. . . . Any purported marriage not between a man and a woman is invalid."<sup>287</sup> Thus, Missouri will not recognize a marriage between persons of the same sex even if the marriage was valid where it was contracted. Although Missouri does not allow same-sex marriage, there are situations involving domestic relations when Missouri does recognize the rights of partners in same-sex relationships. For instance, the Adult Abuse Act outlines the rights of a victim of domestic violence and defines the terms "family" and "household member" as any "adult who is or has been in a continuing social relationship of a romantic or intimate nature with the victim."<sup>288</sup> Until 1992, the statute contained opposite-sex language, which meant that same-sex couples were not covered. However, since the 1993 amendment the act has been interpreted to include same-sex partners.<sup>289</sup>

This Note now discusses three approaches taken by states in other jurisdictions and considers which would best fit Missouri's public policy to limit marriage to opposite-sex partners.

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283. *Id.*

284. *Id.* at 124.

285. Alan Cooperman, *Gay Marriage Ban in Mo. May Resonate Nationwide*, WASH. POST, Aug. 5, 2004, at A2 (noting that "Missouri's referendum was the first opportunity for voters anywhere in the country to take a stand on the issue.").

286. MO. CONST. art. I, § 33 ("That to be valid and recognized in this state, a marriage shall exist only between a man and a woman.").

287. MO. REV. STAT. § 451.022 (2000).

288. § 455.010.

289. See David H. Dunlap, *Trends in Adult Abuse and Child Protection*, 66 UMKC L. REV. 1, 3 (1997) (explaining the significance of a 1993 amendment which, among other things, removed the "opposite sex" restriction for all purposes). However, many states, such as Louisiana, still define "household members" as "any person of the *opposite sex* presently or formerly living in the same residence." See, e.g., LA. REV. STAT. ANN. § 46:2132 (2011) (emphasis added).

## 1. Complete Non-Recognition

### a. "Return to Divorce" Clauses

Indeed, some scholars believe that lifting domicile requirements, like California has done,<sup>290</sup> is the solution to the same-sex divorce problem.<sup>291</sup> However, there are several glaring problems with relying on the state that granted the legal union to provide a means for dissolving it when the couple no longer lives there. First, simply lifting domicile requirements only helps individuals whose divorce is uncontested, meaning both parties must agree to return to that state to get a divorce. This overlooks the possibility that one party may be unwilling to return to the state. Also, domicile laws historically stem from the state's need to have jurisdiction over the individuals and their property in order to enter judgments against them.<sup>292</sup> The state or country of domicile has the closest real public interest in a marriage<sup>293</sup> because the "[r]ules governing the inheritance of property, adoption, and child custody are generally specified in statutory enactments that vary from State to State."<sup>294</sup>

Moreover, even "if same-sex couples obtain judgments in the context of divorce or dissolution proceedings, other states would be constitutionally compelled to award them recognition. . . . 'DOMA purports to relieve the states of a duty to enforce judgments related to same-sex marriages.'"<sup>295</sup> Even long before DOMA, in 1945, the Supreme Court held that the state of North Carolina was not required to yield its policy because the state of Nevada granted divorce decrees to North Carolina residents.<sup>296</sup> In that case, a North Carolina resident obtained a divorce in Nevada, which was known for having

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290. See Frederick Hertz, *Gay Divorce: SB651 Opens California Divorce Courts to Non-Residents*, THE HUFFINGTON POST (Oct. 13, 2011, 12:05 AM), [http://www.huffingtonpost.com/frederick-hertz/gay-divorce-california\\_b\\_1008002.html](http://www.huffingtonpost.com/frederick-hertz/gay-divorce-california_b_1008002.html).

291. Charles P. Kindregan, Jr. & Monroe L. Inker, *Same-Sex Marriage and Divorce Jurisdiction*, 16 DIVORCE LITIG. 96, 101 (2004) (concluding that the best solution would be for the state authorizing the marriage to alter their domicile requirements so that same-sex couples who got married and moved away could come back briefly to dissolve the union).

292. Oppenheimer, *supra* note 275, at 82 (noting that "[e]ven if a same-sex couple succeeds in divorcing in a state that recognizes their marriage, other states may not enforce divorce obligations, such as alimony.").

293. Brian H. Bix, *State of the Union: The States' Interest in the Marital Status of Their Citizens*, 55 U. MIAMI L. REV. 1, 21 (2000).

294. *Lehr v. Robertson*, 463 U.S. 248, 256 (1983).

295. Alexander V. Mauerer, *The Missing Ingredient: How Oft-Overlooked Modern Conflict of Laws Principles Will Dictate the Reach of Same-Sex Marriage in America*, 30 ST. LOUIS U. PUB. L. REV. 325, 374 (2011) (noting that even "if same-sex couples obtain judgments in the context of divorce or dissolution proceedings . . . DOMA purports to relieve the states of a duty to enforce judgments related to same-sex marriages.").

296. *Williams v. North Carolina*, 325 U.S. 226, 239 (1945).

more lenient domicile requirements at the time.<sup>297</sup> According to the Court, “North Carolina was entitled to find . . . that they did not acquire domicils in Nevada and that the Nevada court was therefore without power to liberate the petitioners from amenability to the laws of North Carolina governing domestic relations.”<sup>298</sup>

Under our federal law system, divorce judgments are subject to full faith and credit, however, judicial power to grant a divorce, as in personal jurisdiction over parties, is based on the domicile of the parties. Thus, if a resident seeks a divorce from another state, the home state could simply refuse to enforce the dissolution order based on lack of jurisdiction over its citizen.<sup>299</sup> And “[b]y refusing to recognize these marriages, states allow parties to flee in order to avoid obligations arising from their divorce,” thus a spouse “could dissolve a marriage in one state and avoid obligations to account for marital assets by residing in another.”<sup>300</sup>

b. Voidness

Likewise, Missouri cannot simply rely on the fact that it does not recognize same-sex marriage to effectively invalidate a same-sex marriage contracted elsewhere.<sup>301</sup> For instance, if a Missouri resident entered a legal same-sex marriage in another state, but that relationship ended without obtaining a legal divorce the other party living in a state that recognizes same-sex marriage could exercise their marital rights over the Missouri resident’s property.<sup>302</sup> Although Missouri may have decided not to recognize certain contracts legally entered into in other states, this does not protect Missouri citizens from the enforcement of those valid contracts by the other states. Moreover, declarations of voidness do not provide any of the substantive benefits of divorce, which, as discussed above, are more than beneficial to the individual party to the marriage, but beneficial to society as a whole.<sup>303</sup> Fortunately, Missouri courts do not seem to be headed in the direction of complete non-recognition.

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297. *Id.* at 236.

298. *Id.* at 239. “A judgment in one State is conclusive upon the merits in every other State, but only if the court of the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment.” *Id.* at 229.

299. Oppenheimer, *supra* note 275, at 113.

300. Danielle Johnson, *Same-Sex Divorce Jurisdiction: A Critical Analysis of Chambers v. Ormiston and Why Divorce is an Incident of Marriage That Should Be Uniformly Recognized Throughout the States*, 50 SANTA CLARA L. REV. 225, 244 (2010).

301. MO. CONST. art. I, § 33 (“That to be valid and recognized in this state, a marriage shall exist only between a man and a woman.”).

302. Oppenheimer, *supra* note 275, at 107.

303. *Id.*

c. Annulment

In 2008, a same-sex couple was granted an annulment in Buchanan County, Missouri.<sup>304</sup> In that case, Charisse Sparks and Janet Sparks were married in Massachusetts in 2005.<sup>305</sup> On October 29, 2007, Charisse Sparks filed for an annulment in the state of Missouri, where she lived.<sup>306</sup> On April 1, 2008, Senator Delbert Scott filed an amicus brief asking the court not to recognize the marriage for the purpose of granting an annulment because recognizing the same-sex marriage for any reason would give legal effect to the marriage.<sup>307</sup> Notwithstanding, Judge Daniel Kellogg went through with the annulment and on June 11, 2008 entered a simple order purporting that the “marriage between Charisse Sparks and Janet Yolanda Sparks is hereby annulled.”<sup>308</sup> Although the filing of Senators Scott’s amicus brief was briefly observed in the press, the outcome of the case received very little attention overall.<sup>309</sup> Regardless, this is a step in the direction of recognizing that Missouri’s public policy of banning same-sex marriage does not preclude Missouri from providing a forum for same-sex dissolution. Interestingly, Missouri does not have a statute specifically addressing annulment.<sup>310</sup> This means that Missouri courts could consider incorporating equitable remedies with annulments to provide some of the benefits of divorce to same-sex couples.

2. Apply Other Law and Place An Undue Burden on the Courts

Without legalizing same-sex marriage, Missouri could instead apply other types of law to equitably split up property acquired in a same-sex “partnership.” In a way, Missouri could recognize its obligation to provide a forum for dissolution of marriages and civil unions contracted elsewhere<sup>311</sup> by viewing same-sex marriage contracts as creating a “quasi-partnership” instead of a marriage.<sup>312</sup> Also, a court could reason that a marriage contract has the same effect as a cohabitation contract, and apply contract law or treat the marriage contract like a business partnership or joint venture and apply partnership law.

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304. Sparks v. Sparks, No. 07BU-CV04904 (Mo. Civ. Ct. June 11, 2008), available at <https://www.courts.mo.gov>.

305. Meinzer, *supra* note 216.

306. Sparks, No. 07BU-CV04904.

307. Brief as Amici Curiae of Senator Delbert Scott at 3, Sparks v. Sparks, No. 07BU-CV04904 (Mo. Civ. Ct. Apr. 1, 2008) (on file with author).

308. Sparks, No. 07BU-CV04904.

309. Meinzer, *supra* note 216.

310. *But see* MO. REV. STAT. § 452.300 (2006) (referring to a petition requesting “declaration of invalidity of marriage,” thus implying that annulment is possible).

311. Ramais, *supra* note 108, at 1043.

312. *See supra* Part III.C.2.

However, there are limitations on property division claims based on agreements to share property.<sup>313</sup> First, couples are not likely to plan to break-up or form express contracts concerning property division in case they do break-up. Even if they intend to share their property, they may never expressly determine the details of the division, which would be necessary to establish a contract.<sup>314</sup> The broader problem with applying other doctrines of law to marriage is that a marriage is more than a business or a contract.<sup>315</sup> By providing relief at equity, the court must consider the facts of each marriage and could decide each case differently—leading to unpredictable results.<sup>316</sup> This approach would make it hard for parties, and their attorneys, to anticipate how the court would interpret each incident of marriage.<sup>317</sup>

Most importantly, this approach would reinvent the wheel. The extensive development of the field of family law already includes the application of contract law and business law, as well as “constitutional law, property law, tort law, civil procedure, statutory regulations, equitable remedies, and, of course, marital property and support rights.”<sup>318</sup> The entire field of family law has developed to relieve the court from the burdensome task of coming up with an individualized equitable remedy for each case-by-case situation.<sup>319</sup> Not only would this waste the court’s time, but the results would also be inconsistent.

Also, contract law and business law were not created with the same goals and purposes of divorce law, though divorce law already incorporates many elements of each of these fields. As discussed in Parts I and II, the public policy goals of marriage and divorce law are to promote and protect the family, whereas legal doctrines related to business or contract law may focus on other factors, such as the market or encouraging new businesses.<sup>320</sup> Of course these approaches do overlap, and over time they have developed, through appeals, and the kinks have been worked out. Thus, applying business law or contract law to a same-sex divorce would not only be less effective than family law at achieving Missouri’s public policy goals for divorce, but it would also be less efficient for Missouri and unnecessarily burden the judicial system.<sup>321</sup>

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313. Yarwood, *supra* note 254, at 1375.

314. *Id.*

315. GREGORY ET AL., *supra* note 50, at 14 (discussing the ways in which marriage is “more than a mere contractual relationship.”).

316. Johnson, *supra* note 300, at 234–35.

317. See Andrew Koppelman, *Choice of Law Rules: The Options*, in SAME-SEX DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES 82, 94 (2006).

318. GREGORY ET AL., *supra* note 50, at 1.

319. *Id.*

320. See *supra* Parts I & II.

321. See Yarwood, *supra* note 254, at 1387.

### 3. Recognize Same-Sex Marriage for a Limited Purpose

As far back as 1877, the Supreme Court recognized that the state has an “absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.”<sup>322</sup> Thus, an individual’s home state rightfully bears the burden of resolving problems “arising when one of its residents seeks to dissolve a marriage considered void or invalid under the laws of that state” by providing a forum for dissolution.<sup>323</sup>

It has been said that “[m]arriage carries with it a huge array of incidents.”<sup>324</sup> For instance, there are “more than a thousand federal statutes in which marital status is a factor,” and state law has a broad range of marital rights and responsibilities including “family dissolution, adoption, domestic violence, liability for family expenses, taxation, healthcare decision-making, inheritance, the right to sue for wrongful death, eligibility for welfare benefits, [and] health insurance.”<sup>325</sup> Historically, in the case of divorce, “uniform marriage acts were designed to mimic some of the benefits of uniformity without fully achieving it.”<sup>326</sup> Thus, uniformity was sought in the form of marriage recognition, not marriage per se.<sup>327</sup> The “purpose was to limit the impact of one state’s marriage laws on any other state.”<sup>328</sup> This approach is described as using “choice of law rules for marriage.”<sup>329</sup> The court is charged with considering the facts of each particular case, considering possible legal remedies, and analyzing the policies behind each remedy before deciding whether the couple should be viewed as married for that purpose.<sup>330</sup> “If the state’s interest is in prohibiting ongoing offensive marriages, such limited recognition makes sense.”<sup>331</sup>

Also, “[p]arties that are domiciled in a state generally own property in that state; so, the state will have proper jurisdiction over both parties, such that child or spousal support may be awarded.”<sup>332</sup> Undoubtedly, the Missouri legislature may be anxious about the idea of allowing same-sex divorce, perhaps for fear that anything related to the legal recognition of same-sex marriages is a “slippery slope” that will inevitably lead to the legalization of same-sex marriage. However, if the state has different public policy reasons

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322. *Pennoyer v. Neff*, 95 U.S. 714, 734–35 (1877).

323. *Ramais*, *supra* note 108, at 1038.

324. *See Koppelman*, *supra* note 317, at 93.

325. *Id.* at 93–94.

326. *Grossman*, *supra* note 73, at 103.

327. *Id.*

328. *Id.*

329. *Johnson*, *supra* note 300, at 233–35.

330. *Id.* at 233.

331. *Oppenheimer*, *supra* note 275, at 105.

332. *Johnson*, *supra* note 300, at 247.

related to the “right to divorce” and the “right to marry,” then these rights must be analyzed separately. It is claimed that the policy behind banning same-sex marriage is not intended to impede on the civil rights of individuals who are homosexual, but rather the public policy against same-sex marriage is simply about ensuring the preservation of society through the promotion of opposite-sex marriage, which supports procreation.<sup>333</sup> Even assuming, *arguendo*, that this was a valid state interest, denying a person who is homosexual the right to divorce does not serve the same public policy objective. Rather, Missouri’s family law doctrine reflects the state’s interest in protecting individuals during the divorce process by equitably dividing property and privatizing dependency.<sup>334</sup> None of the traditional goals of divorce can be achieved by refusing to dissolve same-sex marriages. Instead of focusing on whether the individual has a “right to divorce,” Missouri courts should instead focus on the state’s interest in divorce and the public policy objectives that are overlooked in refusing to grant same-sex divorces.

If Missouri allowed same-sex divorce, Missouri could continue to control who may enter into a marriage, while simply allowing same-sex couples to exit marriages. As discussed in Part II, there are times when jurisdictions with similar public policy beliefs have recognized a marriage for the purpose of dissolution without recognizing the validity of that type of marriage.<sup>335</sup> Likewise, if same-sex marriage was recognized for the limited purpose of divorce, “the court can confine its consideration of the relationship so as to avoid addressing the validity of the underlying marriage.”<sup>336</sup> Moreover, recognition of same-sex marriages “for the limited purpose of issuing a divorce does not necessarily advance the cause for broader recognition of such relationships in other contexts.”<sup>337</sup>

## V. CONCLUSION

Recognizing a same-sex marriage for the limited purpose of granting a same-sex divorce would efficiently dissolve same-sex marriages in a way that optimally benefits society, while protecting Missouri’s interest in regulating who may enter and exit marriage. The goal of Missouri’s ban on same-sex marriage is to promote opposite-sex marriage, which supports procreation and the privatization of dependency. Likewise, the goal of divorce in Missouri is to ensure the equitable division of the family unit and promote self-sufficiency,

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333. Busch, *supra* note 201, at 144.

334. *See supra* Part II.B.2.

335. *See supra* Part II.B.2.

336. Johnson, *supra* note 300, at 246 (“The ability to legally end a marriage validly performed in another state is an incident of that marriage that should be available uniformly across the states, regardless of whether that state disagrees with the underlying marriage.”).

337. Ramais, *supra* note 108, at 1043.

which also privatizes dependency. These goals are consistent, thus a public policy allowing same-sex divorce would be consistent with Missouri's public policy not to allow same-sex marriage. Therefore, Missouri should adopt a policy that allows courts to grant same-sex divorces regardless of whether or not the state allows same-sex marriage.

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