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Louis Thorson

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SAME-SEX DIVORCE AND WISCONSIN COURTS: IMPERFECT HARMONY?

I. INTRODUCTION

It is no secret that same-sex marriage is one of the most controversial issues facing both the public and private sectors.¹ In recent years state governments have come down on both sides of the issue, either creating statutes and common-law precedents that allow various forms of legal recognition for same-sex relationships² or creating statutes and constitutional amendments to ban legal unions between homosexuals.³ One of the issues

1. See, e.g., Sylvia Honig, Letter to the Editor, *Same-Sex Couples Are Making Reasonable, Decent Marriage Request*, TIMES UNION (Albany), June 30, 2007, at A8 (describing the controversy regarding same-sex marriage and the difficulties of finding a solution).

2. CAL. FAM. CODE §§ 297–299.6 (West 2004 & Supp. 2009); CONN. GEN. STAT. ANN. §§ 46b-38aa–pp (West Supp. 2008); D.C. CODE § 32-701(3)–(4) (2001); HAW. REV. STAT. ANN. §§ 572C-1–7 (LexisNexis 2005); N.H. REV. STAT. ANN. §§ 457-A:1–8 (Supp. 2008); N.J. STAT. ANN. §§ 37:1-28–36 (West Supp. 2008); VT. STAT. ANN. tit. 15, §§ 1201–07 (2002); Act of July 30, 2004, ch. 672, 2004 Me. Laws 2126, 2126–31; S.B. 566, 425th Leg., 2008 Reg. Sess. (Md. 2008); S.B. 597, 425th Leg., 2008 Reg. Sess. (Md. 2008); H.B. 2007, 74th Leg., 2007 Reg. Sess. (Or. 2007); Act of April 20, 2007, ch. 155, 2007 Wash. Sess. Laws 616, 616–19; *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *C.M. v. C.C.*, 867 N.Y.S.2d 884 (N.Y. Sup. Ct. 2008). Additionally, although Rhode Island does not currently have any laws denying or allowing legal recognition of same-sex relationships, the Rhode Island attorney general has issued an opinion that “Rhode Island will recognize same sex marriages lawfully performed in Massachusetts as marriages in Rhode Island.” Letter from Patrick C. Lynch, R.I. Att’y Gen., to Jack R. Warner, Comm’r, R.I. Bd. of Governors for Higher Educ. 6 (Feb. 20, 2007), available at <http://www.glad.org/uploads/docs/cases/ri-ag-statement.pdf>; see also Letter from Stuart Rabner, N.J. Att’y Gen., to Joseph Komosinski, State Registrar of Vital Statistics 1 (Feb. 16, 2007), available at <http://www.nj.gov/oag/newsreleases07/ag-formal-opinion-2.16.07.pdf> (stating that “government-sanctioned, same-sex relationships validly established under the laws of other States . . . will be valid in New Jersey . . . either as civil unions or domestic partnerships”). These letters were issued in response to a Massachusetts superior court judge’s ruling that “same-sex marriage is not prohibited in Rhode Island.” See *Cote-Whiteacre v. Dep’t of Pub. Health*, No. 04-2656, 2006 WL 3208758, at *4 (Mass. Sup. Ct. Sept. 29, 2006).

3. E.g., ALA. CONST. art. I, § 36.03; ALASKA CONST. art. I, § 25; ARIZ. CONST. art. XXX, § 1; ARK. CONST. amend. LXXXIII, § 1; CAL. CONST. art. I, § 7.5; COLO. CONST. art. II, § 31; FLA. CONST. art. I, § 27; GA. CONST. art. I, § 4, ¶ 1; HAW. CONST. art. I, § 23 (giving the Hawaii legislature the power to reserve marriage to opposite-sex couples, which it did in HAW. REV. STAT. ANN. § 572-1 (LexisNexis 2005)); IDAHO CONST. art. III, § 28; KAN. CONST. art. XV, § 16; KY. CONST. § 233a; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. XIV, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29, *invalidated by Citizens for Equal Protection, Inc. v. Bruning*, 368 F. Supp. 2d 980 (D. Neb. 2005); NEV. CONST. art. I, § 21; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TENN. CONST. art. XI, § 18; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13; WIS. STAT. § 765.001(2) (2007–2008); WIS. STAT. § 765.04(1) (2007–2008).

hiding behind this hot-button topic, however, is how same-sex couples, specifically those who have achieved legal recognition of their relationships, legally dissolve their unions.

As all too many couples know,⁴ such dissolutions entail numerous court dates, filings, and expenses, and they often involve quarreling and hostility between the parties. Now that same-sex couples are quickly achieving greater recognition of their relationships, they must also deal with these struggles to end them. The purpose of this Comment is to examine how legally recognized same-sex couples would, or should be able to, obtain legal dissolution in states that do not recognize same-sex marriage, particularly in Wisconsin.

Following the Introduction, Part II of this Comment examines examples of the various federal and state frameworks for same-sex marriage and divorce, to provide a frame of reference in examining how Wisconsin courts should treat same-sex divorce. To that same end, this Comment looks at recent state-court decisions in Rhode Island⁵ and New York,⁶ each of which deals with a same-sex couple's attempt to legally dissolve their relationship. After a brief history of the same-sex marriage debate in Wisconsin, including the recent prohibitory constitutional amendment,⁷ Part III of this Comment will present a detailed explanation of three possible methods of handling same-sex divorce in Wisconsin.

These three possible solutions are based on various policy and legal considerations and consist of the following: 1) barring access to the Wisconsin courts entirely for dissolution proceedings; 2) allowing the same-sex partners into court and applying Wisconsin law to adjudicate the divorce; or 3) allowing the same-sex partners into court and applying the laws of the state where the relationship was founded. Each presents its own difficulties and justifications, all of which will be explored in detail in Part III.

Interestingly, Virginia's constitutional amendment is the only one that not only bars same-sex marriage, but also excludes recognition of civil unions *and* private partnership contracts between same-sex partners. For a full list of states with anti-same-sex marriage constitutional amendments and statutes, see NAT'L CONF. OF STATE LEGS., SAME SEX MARRIAGE, CIVIL UNIONS, AND DOMESTIC PARTNERSHIPS (2008), <http://www.ncsl.org/programs/cyf/samesex.htm> (last visited Jan. 6, 2009) [hereinafter SAME SEX MARRIAGE].

4. See WIS. DEP'T OF HEALTH & FAMILY SERVS., DIV. OF PUB. HEALTH, BUREAU OF HEALTH INFO. & POLICY, WISCONSIN MARRIAGES AND DIVORCES 2006, 12 (2007), available at <http://dhfs.wisconsin.gov/stats/pdf/06mardiv.pdf> (showing that in 2006, the total number of divorces was 16,730, or 50% of the total number of marriages in the same year).

5. Chambers v. Ormiston, 935 A.2d 956 (R.I. 2007).

6. C.M. v. C.C., 867 N.Y.S.2d 884 (N.Y. Sup. Ct. 2008); Gonzalez v. Green, 831 N.Y.S.2d 856 (N.Y. Sup. Ct. 2006).

7. WIS. CONST. art. XIII, § 13.

II. FEDERAL AND STATE FRAMEWORKS

To understand the nature of the same-sex divorce question and its surrounding issues, it is helpful to first survey examples of federal and non-Wisconsin state frameworks for handling this issue. The primary federal law on point is the Defense of Marriage Act (DOMA), which was signed into law by President Bill Clinton.⁸ At the state level, thirteen states, along with the District of Columbia, have some form of legal recognition for same-sex relationships,⁹ and many also have developed legal methods for dissolving these relationships.¹⁰

Because DOMA preceded many of these states' efforts, section A of this Part examines DOMA in depth, discussing its history, purpose, and implications for Wisconsin in dealing with the issue of same-sex divorce. Section B then examines the evolution of same-sex marriage and divorce in Massachusetts, followed by an analysis of three recent cases dealing with same-sex divorce, one from Rhode Island¹¹ and two from New York.¹² These

8. See Defense of Marriage Act, Pub. L. No. 104-199, §§ 2-3, 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1738C (2006)). DOMA is a two-part statute. The Title 28 portion reads:

§ 1738C. Certain acts, records, and proceedings and the effect thereof

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

28 U.S.C. § 1738C (emphasis added).

The Title 1 portion reads:

§ 7. Definition of "marriage" and "spouse"

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, 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.

1 U.S.C. § 7 (emphasis added).

9. See sources cited *supra* note 2 and accompanying text.

10. *E.g.*, MASS. GEN. LAWS ANN. ch. 208, § 4 (West 2007) (detailing divorce procedures for both heterosexual and homosexual married couples); VT. STAT. ANN. tit. 15, § 1206 (2002) ("The dissolution of civil unions shall follow the same procedure and be subject to the same substantive rights and obligations that are involved with the dissolution of marriage . . .").

11. *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007).

12. *C.M. v. C.C.*, 867 N.Y.S.2d 884 (N.Y. Sup. Ct. 2008); *Gonzalez v. Green*, 831 N.Y.S.2d

three non-Wisconsin examples all will shed light on Wisconsin's options for handling same-sex divorce when the need to do so arises.

A. *The Defense of Marriage Act*

1. Historical Background

Congress passed DOMA, in part, in response to the Hawaii case *Baehr v. Lewin*.¹³ This case began in 1991, when three Hawaiian homosexual couples filed a civil lawsuit in state court challenging the Hawaii Department of Health's denial of their applications for marriage licenses.¹⁴ Specifically, the plaintiffs claimed that their equal protection rights under the Hawaii Constitution were being violated, in that they were being discriminated against on the basis of sex.¹⁵ The trial court granted judgment on the pleadings to the Department, but the Hawaii Supreme Court reversed, holding that the plaintiffs were entitled to an evidentiary hearing on their equal protection claim.¹⁶ The court further held that sex qualified as a "suspect category" under the Hawaii Constitution, and therefore, any law that discriminated on that basis would be subject "to some form of heightened [judicial] scrutiny" when challenged on equal protection grounds.¹⁷

The federal House Committee on the Judiciary responded directly to the Hawaii Supreme Court's *Baehr* decision in its report to the House of Representatives, where it stated in no uncertain terms that H.R. 3396, the bill proposing DOMA, was a "response to a very particular development in the State of Hawaii," specifically the fact that Hawaii "appear[ed] to be on the verge of requiring that State to issue marriage licenses to same-sex couples."¹⁸ In light of the *Baehr* case, and what the Committee on the Judiciary termed "[t]he legal assault against traditional heterosexual marriage laws,"¹⁹ Congress passed DOMA on September 21, 1996.²⁰

2. DOMA's Dual Purposes

The House Committee on the Judiciary set forth two primary purposes for DOMA: 1) "to defend the institution of traditional heterosexual marriage" and

856 (N.Y. Sup. Ct. 2006).

13. 852 P.2d 44, 48-52 (Haw. 1993); see also H.R. REP. NO. 104-664, at 4-6 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2908-10.

14. *Baehr*, 852 P.2d at 48-49.

15. *Id.*

16. *Id.* at 68.

17. *Id.* at 65, 67 (internal quotations omitted).

18. H.R. REP. NO. 104-664, at 2.

19. *Id.* at 4.

20. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419, 2420 (1996).

2) “to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses.”²¹ Public Law 104-199, DOMA’s enacting legislation, further states that DOMA is “[a]n Act to define and protect the institution of marriage.”²² Essentially, DOMA was enacted to prevent one state’s recognition of same-sex marriage from forcing recognition of such marriages on other states through the Full Faith and Credit Clause of the United States Constitution.²³

3. Implications for Wisconsin

On the state level, the passage of DOMA represents a congressional delegation to the individual states of the decision whether to recognize out-of-state, same-sex unions. Thus, Congress presumably also has left the decision of how to deal with the dissolution of these out-of-state unions to the individual states. This delegation of authority seems particularly likely because regulation of the family historically and presumptively has been reserved to state governments.²⁴ Given this presumption and DOMA’s historical background, it seems clear that there is no federal standard for handling the issue of same-sex divorce, meaning Wisconsin must look to its own laws, policies, and courts in deciding how to deal with this situation.

This same-sex divorce policy decision is especially difficult (or perhaps especially easy²⁵) for states such as Wisconsin that have prohibited same-sex

21. H.R. REP. NO. 104-664, at 2.

22. Defense of Marriage Act, 110 Stat. at 2419.

23. Article IV, Section 1 of the U.S. Constitution reads: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” Congress apparently used the second sentence of this Section to justify enacting DOMA, stating in the House Report that this Section logically suggests that “[w]hile full faith and credit is the rule—that is, while States are generally obligated to treat laws of other States as they would their own—Congress retains a discretionary power to carve out such exceptions as it deems appropriate.” H.R. REP. NO. 104-664, at 25-26 (footnote omitted). When DOMA was initially passed, many critics wondered whether it could pass constitutional muster, i.e., whether Congress had the power it claimed to override the Full Faith and Credit Clause. For an analysis of this question concluding that Congress does indeed have such power, see Lynn D. Wardle, *Non-Recognition of Same-Sex Marriage Judgments Under DOMA and the Constitution*, 38 CREIGHTON L. REV. 365, 386-420 (2005). *But see* Heather Hamilton, *The Defense of Marriage Act: A Critical Analysis of Its Constitutionality Under the Full Faith and Credit Clause*, 47 DEPAUL L. REV. 943, 973-87 (1998) (analyzing DOMA and concluding that Congress violated the Full Faith and Credit Clause).

24. *See, e.g.*, *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001) (“There is indeed a presumption against [federal law] pre-emption in areas of traditional state regulation such as family law.”).

25. Given the multitude of states that have enacted either statutes or constitutional amendments banning same-sex legal unions, *see supra* note 3, it is likely that many states would choose to

marriage by statute, constitutional amendment, or common-law decision.²⁶ These states already have taken a large step away from the legal recognition of same-sex couples, and the decision whether to open the courtroom doors to same-sex couples seeking divorce could either reinforce or undercut that position. For example, if Wisconsin were to allow court access for same-sex divorces, in whatever form, people may construe this as an implied recognition of the legal existence of the relationship, contrary to the public policies embodied by Wisconsin's prohibitory statutes and constitutional amendment.²⁷ By denying access for same-sex couples, however, Wisconsin courts would impose hardships on those individuals by forcing them to seek divorces in their state of union and would further alienate the State of Wisconsin from the homosexual community.²⁸

Because of these concerns and potential consequences, Wisconsin courts must carefully consider their options in handling the same-sex divorce question. To aid this consideration, it is helpful to examine how states that have chosen to recognize same-sex unions have dealt with the dissolution of such relationships, as this will reveal Wisconsin's options for handling same-sex divorce, including an outright ban. From these examples, perhaps Wisconsin courts can formulate a method for handling same-sex divorce that will serve the interests of all those involved. To that end, the next section is

effectively ignore the question by banning same-sex couples from the courtroom for divorce proceedings. *See, e.g.*, *Chambers v. Ormiston*, 935 A.2d 956, 958 (R.I. 2007) (finding that a same-sex couple married in Massachusetts could not seek a divorce from the Rhode Island courts); *see also* discussion *infra* Part III.A (examining the justifications and effects of denying same-sex couples access to divorce proceedings).

26. *See supra* note 3.

27. *See* WIS. CONST. art. XIII, § 13; WIS. STAT. § 765.001(2) (2007–2008); WIS. STAT. § 765.04(1) (2007–2008) (prohibiting, collectively, both same-sex marriage and civil unions).

28. Forcing homosexual couples to return to their state of legal union is far from the only hardship imposed by denying these couples legal divorces. These couples must also deal with various ancillary problems, many of which are a direct result of DOMA's limited definition of marriage. Tax deductions for alimony payments, for example, are typically available for divorced spouses. In the case of same-sex marriage, however, this federal right is denied. Matt Carroll, *The Gay Divorcees: First Came Gay Marriage. Now Comes the Inevitable—and a Slew of Unprecedented Legal Questions*, BOSTON GLOBE, Jan. 29, 2006, at E4, available at http://www.boston.com/news/globe/ideas/articles/2006/01/29/the_gay_divorcees; *see also* Anthony C. Infanti, *Deconstructing the Duty to the Tax System: Unfettering Zealous Advocacy on Behalf of Lesbian and Gay Taxpayers*, 61 TAX LAW. 407, 422–36 (2008) (discussing the various discriminatory impacts of the federal tax system on homosexual individuals and same-sex couples).

In addition to the loss of federal rights, same-sex couples may also face difficulties with seemingly basic aspects of divorce, such as relationship length. Carroll, *supra*. Because many courts use this as a factor when determining asset division, courts are forced to decide how long a same-sex couple has been married. *Id.* If the couple's legal marriage has existed only for a year because of state laws, however, the court may be forced to look beyond the legal relationship to determine its length, which may lead to messy balancing tests of highly subjective factors that heterosexual couples are not forced to endure. *Id.*

devoted to discussion of same-sex unions and divorces in Massachusetts, Rhode Island, and New York, all of which have some form of legal recognition for same-sex relationships.

B. Same-Sex Marriage and Divorce Outside Wisconsin

There are currently thirteen states, along with the District of Columbia, that recognize a range of rights for same-sex couples.²⁹ These states are California, Connecticut, Hawaii, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Oregon,³⁰ Rhode Island, Vermont, and Washington.³¹ Each state has varying forms of legal recognition for same-sex unions, starting with the lesser forms that grant “some state-level spousal rights to unmarried couples,” moving all the way up to forms that allow legal marriages between same-sex partners.³² The next three sections focus on

29. See sources cited *supra* note 2 and accompanying text.

30. Interestingly, one Oregon county (Multnomah) actually authorized same-sex marriages for six weeks in early 2004 until a judge “ordered the county to stop issuing marriage licenses to same sex-couples” pending the outcome of a lawsuit challenging the constitutionality of banning same-sex marriage. Or. Dep’t of Human Servs., Ctr. for Health Statistics, Current Status: Same-Sex Marriage, <http://www.oregon.gov/DHS/ph/chs/order/samesex.shtml> (last visited Jan. 6, 2009). In that lawsuit, the Oregon Supreme Court ultimately held that Oregon statutory law “limit[s] the right to obtain marriage licenses to opposite-sex couples” and that “marriage licenses issued to same-sex couples in Multnomah County . . . were issued without authority and were void at the time that they were issued.” *Li v. State*, 110 P.3d 91, 102 (Or. 2005). Thus, although Oregon has passed a domestic partnership law, see H.B. 2007, 74th Leg., 2007 Reg. Sess. (Or. 2007), it also has outlawed same-sex marriages, see OR. CONST. art. XV, § 5a.

31. Legislatures in four of these thirteen states, Maine, New Jersey, New York, and Vermont, are currently considering legislation that would legalize same-sex marriage within the state. Judy Harrison, *Maine Gay Marriage Law Proposed*, BANGOR DAILY NEWS, Jan. 14, 2009, at 1; General Assemb. 2978, 2008 Leg., 213th Sess. (N.J. 2008); Jeremy W. Peters, *For Supporters of Gay Marriage, a Dashing of Great Expectations*, N.Y. TIMES, Feb. 9, 2009, at A16; H.R. 178, 2009–2010 Leg. Sess. (Vt. 2009).

32. SAME SEX MARRIAGE, *supra* note 3. Until May 2008, Massachusetts was the only state to grant legal marriages to same-sex couples. On May 16, 2008, however, the California Supreme Court held that “in view of the substance and significance of the fundamental constitutional right to form a family relationship, the California Constitution properly must be interpreted to guarantee this basic civil right to all Californians, whether gay or heterosexual, and to same-sex couples as well as to opposite-sex couples.” *In re Marriage Cases*, 183 P.3d 384, 400 (Cal. 2008). The victory was short-lived, however, as California voters passed Proposition 8 in the November 2008 elections, which amended the California Constitution to read: “Only marriage between a man and a woman is valid or recognized in California.” CAL. CONST. art. I, § 7.5; Howard Mintz, *Another Wave of Legal Arguments Filed over California’s Proposition 8*, SAN JOSE MERCURY NEWS, Jan. 6, 2009, at 2B. As of this Comment’s printing, state government officials were vigorously challenging Proposition 8, alleging that the voters lacked the authority to overturn the California Supreme Court’s holding in *Marriage Cases* that the right to marry is a fundamental right. Mintz, *supra*; *Marriage Cases*, 183 P.3d at 400. California was not the only other state to follow Massachusetts’s lead and recognize same-sex marriages: in October 2008 the Connecticut Supreme Court held that “under the equal protection provisions of the [Connecticut] constitution, our statutory scheme governing marriage cannot stand insofar as it bars same sex couples from marrying.” *Kerrigan v. Comm’r of Pub.*

states at the higher end of this spectrum, namely Massachusetts, Rhode Island, and New York.

1. Massachusetts

Anyone familiar with the same-sex marriage debate is aware of its origins in Massachusetts, where in 2003 the Massachusetts Supreme Judicial Court held that the denial of marriage licenses to same-sex couples violated the Massachusetts Constitution's due process and equal protection provisions.³³ In 2004, the same court issued an advisory opinion to the Massachusetts Legislature regarding a potential bill to ban such licenses, and it stated again that such a ban would violate the state due process and equal protection clauses and would therefore be unconstitutional.³⁴

The landmark case of *Goodridge v. Department of Public Health*, which ultimately gave same-sex couples in Massachusetts the right to marry, was decided in November 2003.³⁵ After several homosexual couples were denied marriage licenses by the Department, they sued the State on the grounds that the denial constituted a violation of several provisions of the Massachusetts Constitution.³⁶ The Massachusetts Supreme Judicial Court sided with the homosexual couples and held:

[T]he absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual.³⁷

A few months later, the Massachusetts Legislature sought the opinion of the Massachusetts Supreme Judicial Court as to the constitutionality of Senate Bill 2175, entitled "An Act relative to civil unions."³⁸ If enacted, this bill

Health, 957 A.2d 407, 481 (Conn. 2008). As of this Comment's printing, this decision remains unchallenged. Because Connecticut's recognition of same-sex marriage is so recent, however, there are no reported cases involving actions for same-sex divorce in the Connecticut courts, meaning it is more valuable to examine the laws of Massachusetts where there are established procedures for such actions. See 2 CHARLES P. KINDREGAN, JR. & MONROE L. INKER, MASSACHUSETTS PRACTICE SERIES, FAMILY LAW AND PRACTICE §§ 26–27 (2007) (discussing same-sex divorce procedures).

33. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961, 969 (Mass. 2003).

34. *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 572 (Mass. 2004).

35. *Goodridge*, 798 N.E.2d at 941.

36. *Id.* at 950.

37. *Id.* at 968.

38. *Opinions*, 802 N.E.2d at 566.

would have denied same-sex couples the right to marry, but would have granted them access to civil unions with all the “benefits, protections, rights and responsibilities” of marriage.”³⁹ In its 2004 opinion to the Senate, the Massachusetts Supreme Judicial Court echoed its *Goodridge* decision and stated that this bill, as written, would violate the Massachusetts Constitution’s due process and equal protection provisions.⁴⁰ The court recommended that it not be enacted, and the legislature followed the court’s advice.⁴¹ Thus, as a result of the *Goodridge* decision, same-sex couples were granted the right to marry in Massachusetts, and they applied for marriage licenses in droves.⁴²

Inevitably, the recognition of same-sex marriage in Massachusetts led to the advent of same-sex divorces within that state. One news article postulated that of the estimated 10,000 homosexual couples that have taken advantage of the change in Massachusetts marriage law, dozens have attempted to dissolve their relationships through the court system.⁴³ To achieve such dissolution, current Massachusetts law provides that homosexual couples, just like heterosexuals, must establish domicile within Massachusetts to grant the courts subject-matter jurisdiction over the divorce.⁴⁴ In addition, new residents of Massachusetts are required to comply with a “durational residency requirement,” under which they must live in Massachusetts for one year before applying for divorce.⁴⁵

39. *Id.*

40. *Id.* at 572.

41. *Id.*

42. Pam Belluck, *Same-Sex Marriage: The Overview; Hundreds of Same-Sex Couples Wed in Massachusetts*, N.Y. TIMES, May 18, 2004, at A1. Because the decision to grant same-sex marriages in the first place was made by the Massachusetts Supreme Court and not the legislature, it is not surprising that lawmakers attempted to have their say by working to place a constitutional amendment to ban gay marriage on the 2008 ballot. Frank Phillips & Lisa Wangsness, *Same-Sex Marriage Ban Advances*, BOSTON GLOBE, Jan. 3, 2007, at A1. This attempt was ultimately defeated, however, when the ban failed to receive enough votes in its second legislative hearing, thereby preventing its placement on the 2008 ballot. Frank Phillips & Andrea Estes, *Right of Gays to Marry Set for Years to Come*, BOSTON GLOBE, June 15, 2007, at A1.

43. Dafna Linzer, *Same-Sex Divorce Tests U.S. Legal System: Gay Couples Face Complications that Heterosexuals Don’t Encounter*, ST. PAUL PIONEER PRESS, Jan. 6, 2008, at A10.

44. MASS. GEN. LAWS ANN. ch. 208, § 4 (West 2007). As one observer notes regarding achieving domicile in Massachusetts:

The law governing domicile is well established and fact-intensive. This means that to get a divorce [in Massachusetts] a same-sex spouse who is domiciled elsewhere will have to . . . make Massachusetts his or her permanent place of abode, i.e.[.] there will have to be sufficient indicia of domicile in the event it is challenged in the divorce or (more significantly) the issue of the validity of domicile and the divorce is challenged at some future date.

KINDREGAN & INKER, *supra* note 32, § 26:19.

45. MASS. GEN. LAWS ANN. ch. 208, § 5 (West 2007); *see also* KINDREGAN & INKER, *supra* note 32, § 27:4.

Provided the spouse seeking dissolution of the same-sex marriage complies with these statutory requirements, his or her petition for divorce will proceed similarly to that of heterosexual spouses.⁴⁶ That is not to say, however, that same-sex couples encounter substantially the same difficulties as heterosexual couples. Because DOMA defines marriage as only between a man and a woman,⁴⁷ any federal rights that are typically granted to heterosexual couples upon divorce are denied to homosexual divorcees, as their marriage never existed under federal law.⁴⁸ Rights to pensions, tax deductions for alimony payments, and medical coverage are only some of the federal rights that are thus denied to divorcing homosexual couples.⁴⁹ As a result, despite the increase in rights given to same-sex couples under Massachusetts laws, there is little doubt that these rights still fall short of those given to heterosexual couples.

Because of Massachusetts's recognition of same-sex marriage, homosexual couples flocked to that state to obtain marriage licenses, and subsequently returned to their home states with apparent validation in tow.⁵⁰ As some of these relationships broke down, however, the couples were forced to seek legal dissolution of the marriage. As discussed earlier, a return to Massachusetts for such a proceeding entailed difficult domicile and durational residency requirements, prices that many couples were not willing to pay.⁵¹ Thus, to achieve dissolution, couples began seeking legal divorces in the courts of their current domiciliary state. Three examples of such couples are examined below.

46. For a more in-depth examination of same-sex divorce law in Massachusetts, see KINDREGAN & INKER, *supra* note 32.

47. For further discussion of DOMA, see *supra* Part II.A.

48. See KINDREGAN, & INKER, *supra* note 32, § 26:19; Infanti, *supra* note 28; Linzer, *supra* note 43.

49. See KINDREGAN & INKER, *supra* note 32, § 26:19; Linzer, *supra* note 43.

50. See Belluck, *supra* note 42. *But see* MASS. GEN. LAWS ANN. ch. 207, § 11 (West 2007) (stating that “[n]o marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction”). Currently, under chapter 207, section 11, only couples from New Mexico, New York, and Rhode Island are allowed to obtain valid marriage licenses, as these are the only states where same-sex marriage is not clearly prohibited by law. See *Cote-Whiteacre v. Dep’t of Pub. Health*, No. 04-2656, 2006 WL 3208758, at *4 (Mass. Sup. Ct. Sept. 29, 2006) (finding that Rhode Island law does not prohibit same-sex marriage); David Abel, *Same-Sex Couples From N.M. Allowed to Marry in Mass.*, BOSTON GLOBE, July 27, 2007, at B3 (discussing the Massachusetts Department of Public Health’s ruling that New Mexico does not explicitly ban gay marriage); C.M. v. C.C., 867 N.Y.S.2d 884, 887–88 (N.Y. Sup. Ct. 2008) (holding that same-sex marriages performed in Massachusetts are valid in New York, absent contrary legislative action).

51. For a brief summary of these domicile and durational residency requirements, see KINDREGAN & INKER, *supra* note 32, §§ 26:19, 27:4; see also MASS. GEN. LAWS ANN. ch. 208, §§ 4–5 (West 2007).

2. Rhode Island

In May 2004, shortly after Massachusetts officially recognized same-sex marriages, Margaret R. Chambers and Cassandra B. Ormiston legally married in Fall River, Massachusetts.⁵² In October 2006, the couple sought to dissolve their marriage, and Ms. Chambers accordingly filed a petition for divorce in Rhode Island Family Court.⁵³ On December 11, 2006, the family court certified to the Rhode Island Supreme Court “a question as to whether or not the family court [had] subject matter jurisdiction to grant a petition for divorce with respect to a same-sex couple.”⁵⁴

In a 3-2 decision, the Rhode Island Supreme Court ruled that the family court lacked jurisdiction to grant such a petition.⁵⁵ The court based its decision in part on a dictionary definition of marriage from 1961, the year the act creating the Rhode Island Family Court became law.⁵⁶ Based on this definition, the court concluded “there [was] absolutely no reason to believe that, when the act creating the family court became law in 1961, the legislators understood the word marriage to refer to any state other than ‘the state of being united to a person of the opposite sex.’”⁵⁷ According to the Rhode Island Supreme Court, whether to grant jurisdiction to the family court to divorce same-sex couples was a question of policy to be left to the legislature.⁵⁸ Thus, Ms. Chambers and Ms. Ormiston’s divorce petition was dismissed, and “[l]awyers have said Ormiston and Chambers could get divorced if one [of them] moved to Massachusetts and lived there for a year.”⁵⁹

Understandably, both partners were unwilling to do so because, in Ms. Ormiston’s words, “[t]o move to Massachusetts when I own a home here [in Rhode Island] is an unfair and unreasonable burden that no other citizen has to bear.”⁶⁰ This case, therefore, highlights the unique difficulties that same-sex couples often encounter when trying to dissolve their marriage. As mentioned earlier, states impose these difficulties when they close the courthouse doors to same-sex divorcees, forcing the couples to return to the

52. Edward Fitzpatrick, *R.I. High Court Rules Against Divorce in Same-Sex Marriages*, PROVIDENCE J., Dec. 8, 2007, at A1, available at http://www.projo.com/news/courts/content/same_sex_divorce_12-08-07_6D869Q6_v18.2709228.html.

53. *Chambers v. Ormiston*, 935 A.2d 956, 958–59 (R.I. 2007).

54. *Id.*

55. *Chambers*, 935 A.2d at 958, 967; Fitzpatrick, *supra* note 52.

56. *Chambers*, 935 A.2d at 961–63.

57. *Id.* at 962 (quoting WEBSTER’S THIRD INT’L DICTIONARY 1384 (Philip Gove ed., 1961)).

58. *Id.* at 966–67.

59. Fitzpatrick, *supra* note 52; *see also supra* note 42 and accompanying text.

60. Fitzpatrick, *supra* note 52.

state of marriage or civil union to achieve appropriate legal dissolution of the relationship under the laws of that state.⁶¹ As the case of Ms. Chambers and Ms. Ormiston demonstrates, however, this often involves a significant burden on the couple, such as establishing domicile within the state of marriage and meeting any durational residency requirements.⁶² It is clear from this case that these difficulties are real and that they hold real consequences for same-sex couples, such as not being able to divorce at all. Later, this Comment will examine in detail the implications of a state's adoption of such a no-divorce policy for same-sex couples.⁶³

3. New York

While the Rhode Island case serves as an example of banning same-sex couples outright from access to the courts for divorce, the contrasting New York case of *Gonzalez v. Green*⁶⁴ shows a court's approval of a homosexual couple's dissolution based on contract law. David Gonzalez and Steven Green were married in Massachusetts in February 2005.⁶⁵ The relationship did not last, however, and in September 2005, Mr. Green's attorney drafted a "separation agreement" for the parties, which was designed to "confirm their separation and make arrangements in connection therewith, including the settlement of their property rights, and other rights and obligations growing out of the marriage relation."⁶⁶ In other words, this document was a typical separation agreement, similar in content to those often executed by divorcing heterosexual couples.⁶⁷ Mr. Green and Mr. Gonzalez fully executed the agreement on September 21 and 22, 2005, and on January 20, 2006, Mr. Gonzalez filed an "Action [f]or [a] Divorce" in the New York County Supreme Court.⁶⁸

Several months following Mr. Gonzalez's filing, New York's highest court, the court of appeals, ruled in *Hernandez v. Robles*⁶⁹ that "the New York Constitution does not compel recognition of marriages between members of the same sex," indicating that refusing to grant marriage licenses to same-sex

61. See *supra* Part I.

62. For a brief summary of these domicile and durational residency requirements, see KINDREGAN & INKER, *supra* note 32, §§ 26:19, 27:4; see also MASS. GEN. LAWS ANN. ch. 208, §§ 4–5 (West 2007).

63. See *infra* Part III.A.

64. 831 N.Y.S.2d 856 (N.Y. Sup. Ct. 2006).

65. *Id.* at 857.

66. *Id.*

67. For a rough example of such an agreement, often termed a "marital settlement agreement," see LEONARD L. LOEB ET AL., SYSTEM BOOK FOR FAMILY LAW 8-20–8-34 (6th ed. 2007).

68. *Gonzalez*, 831 N.Y.S.2d at 857–58.

69. 855 N.E.2d 1 (N.Y. 2006).

couples passed New York constitutional muster.⁷⁰ Following this ruling, Mr. Green filed a motion for summary judgment seeking dismissal of Mr. Gonzalez's petition for divorce, as well as rescission of the separation agreement.⁷¹ Mr. Green put forward several grounds for rescission, including failure of consideration, violation of public policy, and mutual mistake, all of which were based on the argument that the parties never had a valid marriage under either Massachusetts or New York law.⁷²

The court in *Gonzalez* agreed that the parties never had a valid marriage, and therefore dismissed the plaintiff's "Action for a Divorce."⁷³ As to the separation agreement, however, the court employed basic contract principles in upholding its validity. According to the court, "while cohabitation without marriage does not give rise to the property and financial rights which normally attend the marital relation, neither does cohabitation disable the parties from making an agreement within the normal rules of contract law."⁷⁴ Thus, the court was unwilling to nullify the agreement on public policy grounds because it did not want to infringe upon the parties' freedom of contract. The court similarly dismissed the defendant's failure of consideration and mutual mistake arguments and ultimately ruled that the agreement was "valid and in full force and effect."⁷⁵ This case provides an excellent example of a court's reliance on contract principles to facilitate same-sex divorce, and it will serve as a helpful tool when this Comment in Part III examines using such a method in Wisconsin.

Gonzalez was not, however, the last word on same-sex divorce in the New York courts. In the most recent development, the New York courts have faced a challenge to the holding in *Gonzalez* that the parties never had a valid marriage. This challenge occurred in the case of *C.M. v. C.C.*,⁷⁶ in which a same-sex couple who had been married in Massachusetts sought a divorce in the New York court system.⁷⁷ This was the same situation as that presented by the parties in *Gonzalez*, yet the court in *C.M.* refused to nullify the parties'

70. *Id.* at 5, 12.

71. *Gonzalez*, 831 N.Y.S.2d at 858.

72. *Id.* In *Gonzalez*, the court found the parties' marriage to be null and void in Massachusetts because of a statute that nullified marriages contracted in Massachusetts by same-sex couples planning to reside in a state where such a marriage would be void. *Id.* at 858–59 (citing MASS. GEN. LAWS ANN. ch. 207, § 11 (West 2007)). The court also found the marriage to be null and void under New York law because the state statutes governing marriage impliedly limited its availability to opposite-sex couples, and the court of appeals' decision in *Robles* upheld the constitutionality of this limitation. *Gonzalez*, 831 N.Y.S.2d at 857–58 (citing *Robles*, 855 N.E.2d at 6, 12).

73. *Gonzalez*, 831 N.Y.S.2d at 859.

74. *Id.* (quoting *Morone v. Morone*, 413 N.E.2d 1154, 1156 (N.Y. 1980)).

75. *Gonzalez*, 831 N.Y.S.2d at 860–61.

76. 867 N.Y.S.2d 884 (N.Y. Sup. Ct. 2008).

77. *Id.* at 885.

Massachusetts marriage as the court in *Gonzalez* had done. Instead, the court in *C.M.* held that

[t]here is nothing in the holding of *Hernandez [v. Robles]*⁷⁸ to suggest that the Court of Appeals intended to place same sex marriages, validly authorized by other states or countries, into the narrow category of abhorrent conduct for which comity or full faith and credit should not apply in a divorce proceeding.⁷⁹

Thus, because it found that neither New York law, Massachusetts law, nor public policy prevented recognition of the Massachusetts marriage, the court in *C.M.* officially recognized the marriage and, therefore, held that it had jurisdiction over the divorce action.⁸⁰

The court in *C.M.* based this holding in part on the New York Supreme Court, Appellate Division's decision in *Martinez v. County of Monroe*,⁸¹ in which the court held that neither the New York Court of Appeals' decision in *Robles* nor the public policy of the state of New York prohibited recognition of the plaintiff's same-sex marriage, which was performed in Canada.⁸² Because the court recognized this marriage, it granted the plaintiff the protection of the New York sexual orientation discrimination laws.⁸³ The court in *C.M.*, after discussing the *Martinez* court's recognition of the Canadian marriage and noting that the court's decision in *Gonzalez* could not be reconciled with the *Martinez* decision, refused to adopt the portion of the

78. 855 N.E.2d 1, 12 (N.Y. 2006).

79. *C.M.*, 867 N.Y.S.2d at 887. Essentially, then, the courts in *Gonzalez* and *C.M.* simply differed in their interpretations of *Robles*, with the former believing it affirmatively prohibited same-sex marriages in New York, and the latter reasoning that it merely required the legislature to speak directly to the availability of same-sex marriage, refusing itself to either prohibit or require it. *Id.*; *Gonzalez*, 831 N.Y.S.2d 856.

80. *C.M.*, 867 N.Y.S.2d at 887–89. The court in *C.M.* also analyzed whether the marriage was invalid in Massachusetts on account of the Massachusetts Superior Court's decision in *Cote-Whiteacre v. Department of Public Health*, No. 04-2656, 2006 WL 3208758 (Mass. Sup. Ct. Sept. 29, 2006). *C.M.*, 867 N.Y.S.2d at 889. In *Cote-Whiteacre*, the court found that "same-sex marriage is prohibited in New York," based solely on the New York Court of Appeals' decision in *Robles*. *Cote-Whiteacre*, 2006 WL 3208758, at *2. The court in *C.M.* noted, however, that according to the Massachusetts courts, same-sex marriage became prohibited in New York only as of the date of the *Robles* decision. *C.M.*, 867 N.Y.S.2d at 889. Because the *C.M.* plaintiff's marriage predated the *Robles* decision, it was not prohibited by New York law at the time, and thus was valid under Massachusetts law, allowing the court to recognize its validity in New York. *Id.*

81. 850 N.Y.S.2d 740 (N.Y. App. Div. 2008).

82. *Id.* at 743; see also *Beth R. v. Donna M.*, 853 N.Y.S.2d 501, 504–06 (N.Y. Sup. Ct. 2008) (holding that principles of comity dictated recognizing the validity of parties' Canadian same-sex marriage).

83. *Martinez*, 850 N.Y.S.2d at 743.

Gonzalez decision prohibiting recognition of a same-sex marriage performed in Massachusetts.⁸⁴ Thus, based on the *C.M.* and *Martinez* decisions, it appears that New York will recognize the validity of same-sex marriages from at least Massachusetts and Canada and apply New York laws to the members of such unions.

These decisions, combined with that of *Gonzalez v. Green*,⁸⁵ provide excellent examples of the multiple ways states can choose to handle same-sex divorce. The contractual-relationship method employed by the court in *Gonzalez* and the application of state law to same-sex unions favored by the courts in *C.M.* and *Martinez* show that there are viable options outside complete bans on court access for same-sex divorces. With this in mind, this Comment now turns to an examination of same-sex marriage in Wisconsin, followed by a discussion of how Wisconsin courts might implement these and other options.

C. Same-Sex Marriage in Wisconsin

Before examining how Wisconsin should handle the possibility of same-sex divorce, it is helpful to first discuss Wisconsin's background and history relating to same-sex marriage. By statute, the Wisconsin Legislature has defined marriage as "a legal relationship between 2 equal persons, a husband and wife, who owe to each other mutual responsibility and support."⁸⁶ Therefore, under this and other Wisconsin laws, same-sex couples are clearly and specifically banned from obtaining legal marriage within the state of Wisconsin or from having a marriage obtained in another state recognized by the Wisconsin government.⁸⁷

Wisconsin took this ban one step further in 2006 when its citizens voted to amend the state constitution to ban recognition of out-of-state civil unions and same-sex marriages.⁸⁸ The Wisconsin amendment states, "Only a marriage

84. *C.M.*, 867 N.Y.S.2d at 887.

85. 831 N.Y.S.2d 856 (N.Y. Sup. Ct. 2006).

86. WIS. STAT. § 765.001(2) (2007–2008).

87. See WIS. STAT. § 765.04(1) (2007–2008). This section reads, in relevant part:

If any person residing and intending to continue to reside in this state who is . . . prohibited from contracting marriage under the laws of this state goes into another state or country and there contracts a marriage prohibited or declared void under the laws of this state, such marriage shall be void for all purposes in this state with the same effect as though it had been entered into in this state.

Id.

88. Bill Glauber, *Election 2006: Marriage*, MILWAUKEE J. SENTINEL, Nov. 8, 2006, at 9A; see also WIS. CONST. art. XIII, § 13. The legality of this constitutional amendment was recently challenged in the Dane County Circuit Court, when a University of Wisconsin-Oshkosh professor alleged that the amendment was improperly presented to voters. Stacy Forster, *Judge Upholds*

between one man and one woman shall be valid or recognized as a marriage in [Wisconsin],” and a “legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in [Wisconsin].”⁸⁹ Because same-sex marriage already was barred by statute, this amendment’s primary effect was to ban the recognition of civil unions formed in other states and to thereby deny same-sex couples any rights or privileges they may have enjoyed as a result of such a union.⁹⁰ Ultimately, the statutes and this constitutional amendment make it clear that Wisconsin’s public policy is strongly against recognition of same-sex unions, which certainly will affect Wisconsin courts’ willingness to dissolve such relationships.

III. SAME-SEX DIVORCE IN WISCONSIN: OPTIONS AND IMPLICATIONS

Although there have been no cases, as there were in Rhode Island and New York, where a local same-sex couple has turned to the Wisconsin courts for dissolution of either a civil union or marriage obtained in another state, the situation undoubtedly will arise based on the expanding recognition of such unions across the United States.⁹¹ When that situation occurs, the Wisconsin courts will have at least three options for handling the same-sex divorce: 1) bar the couple from access to the courts for such proceedings; 2) allow the parties into court and apply Wisconsin law to adjudicate the divorce; or 3) allow the parties into court and apply the law of the state where the relationship was founded. The rest of this Comment will examine these options in detail, discussing their relative advantages, disadvantages, and justifications.

State’s Ban on Gay Marriage, MILWAUKEE J. SENTINEL, May 31, 2008, at B3. The UW-Oshkosh professor claimed that “two separate subjects were presented to voters” and argued that the propriety of same-sex marriage is an issue distinct from that of “other similar legal relationships, such as civil unions.” *Id.* Under the Wisconsin Constitution, “if more than one amendment be submitted [to the voters], they shall be submitted in such manner that the people may vote for or against such amendments separately.” WIS. CONST. art. XII, § 1. The court ultimately dismissed the professor’s complaint, however, holding that the constitutional amendment “fully complied with the requirements of Wis. Const. art. XII, § 1, in that it properly included two propositions that both related to the same subject matter, and were designed to accomplish the same general purpose.” *McConkey v. Van Hollen*, No. 07-CV-2657, 2008 WL 5503993, at *1 (Wis. Cir. Ct. June 9, 2008).

89. WIS. CONST. art. XIII, § 13.

90. Glauber, *supra* note 88.

91. See sources cited *supra* note 2 and accompanying text.

A. Option 1: Outright Ban

1. Implications and Consequences

Wisconsin's first, and perhaps simplest, option for dealing with same-sex divorce is to impose an outright ban on access to the courts for this proceeding. In doing so, the courts would align themselves with the state's apparent policy against same-sex marriage, embodied by the recent constitutional amendment.⁹² Similar to Wisconsin's amendment banning same-sex marriage, a common-law ban on the use of Wisconsin courts for same-sex divorce would be consistent with the people of Wisconsin's apparently negative view toward granting homosexual couples the rights, benefits, and incidents of heterosexual marriage.⁹³

The counterargument, however, is that courts should not be allowed to make this type of sweeping policy judgment. More specifically, policy decisions such as this are better left to the legislature, as exemplified by Wisconsin's prohibitory statutes and constitutional amendment.⁹⁴ However, it is actually because of this constitutional amendment that the "judicial activism" argument fails. When told that it should not make policy decisions better left to the legislature, a court could simply reply that it is interpreting the law in accordance with the stated policy of the legislature and the people of Wisconsin, as embodied by the statutes and the constitution.

If Wisconsin courts did choose to close their doors to potential same-sex divorcees, what options would these couples have? Most likely, the couple would be forced to return to the courts of the state where their relationship was legally validated and sever the relationship there.⁹⁵ The couple could also, however, make a private agreement to divide the property gained during the relationship, as well as to establish each individual's rights and responsibilities following separation.⁹⁶ This, however, would hardly constitute sufficient certainty as to the parties' rights and remedies in the event of a subsequent breach of the agreement, as there would be no guarantee

92. See WIS. CONST. art. XIII, § 13.

93. See, e.g., Stacy Forster, *Distant Gay Nuptials Defy Obscure Law: California Weddings Could Draw Prosecution in Wisconsin*, MILWAUKEE J. SENTINEL, July 3, 2008, at B1 (referencing WIS. STAT. §§ 765.04 and 765.30(1)(a) (2007–2008), which, collectively, would subject same-sex couples who married in another state to criminal prosecution, with a possible fine of \$10,000 and up to nine months in prison); Bill Glauber, *Marriage Measure Backer Savors Win: She Prepares for Future After Amendment*, MILWAUKEE J. SENTINEL, Nov. 9, 2006, at A9 (describing the intense lobbying efforts of one citizen's group in support of the Wisconsin constitutional amendment banning gay marriage).

94. WIS. STAT. §§ 765.001(2), 765.04(1) (2007–2008); Glauber, *supra* note 93, at A9.

95. See, e.g., *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007).

96. See, e.g., *Gonzalez v. Green*, 831 N.Y.S.2d 856 (N.Y. Sup. Ct. 2006).

that they would be allowed into court to litigate such a separation dispute.⁹⁷ If they were denied access, perhaps because of the courts' complete ban on anything resembling same-sex divorce, the agreement likely would be useless and the parties would end up seeking a divorce in court in the original state anyway. Therefore, it is unlikely that any such solution would be either long-lasting or satisfactory for the parties, particularly given the discord that frequently accompanies a divorce.

The likelihood of forced travel, along with its attendant difficulties, seems to make an outright ban on same-sex divorce unfair to the affected individuals. More specifically, is it fair to the parties involved to force them to travel cross-country to dissolve their legal relationship, especially considering the relatively low burden of adjudicating these disputes in the Wisconsin court system? Given the Wisconsin divorce rate,⁹⁸ the court system obviously deals frequently with marriage dissolution. Balanced against the courts' familiarity with divorce matters, of course, is the often protracted and litigious nature of actions for divorce.⁹⁹ On the other hand, the 2000 U.S. Census indicated that at that time, only 0.7% of Wisconsin households were headed by same-sex partners.¹⁰⁰ Though that number has risen since 2000,¹⁰¹ it is still not large enough to infer that state courts would be inundated with same-sex divorce requests.

Such an inundation seems particularly unlikely given that the only couples who would actually seek legal dissolution are those who have had their relationship legally recognized in another state¹⁰² and have subsequently taken

97. If the Wisconsin courts were willing to view such a separation agreement as merely a private contract by which the parties agreed to order their affairs, there is little doubt that the parties could litigate their dispute in the Wisconsin courts. *See Watts v. Watts*, 405 N.W.2d 303, 306 (1987) ("Courts traditionally have settled contract and property disputes between unmarried persons, some of whom have cohabited."). If, however, the courts chose to view the agreement as an instrument of divorce under the "outright ban" method (i.e., a complete refusal to entertain any action even resembling same-sex divorce), the court may prevent itself from hearing the dispute.

98. In 2006, the number of divorces in Wisconsin equaled 50% of the number of marriages in the same year, or 16,730 divorces. WIS. DEP'T OF HEALTH & FAMILY SERVS., *supra* note 4, at 12.

99. *See, e.g., Gonzalez*, 831 N.Y.S.2d 856; *see also Fitzpatrick*, *supra* note 52.

100. Tavia Simmons & Martin O'Connell, *Married-Couple and Unmarried-Partner Households: 2000*, in CENSUS 2000 SPECIAL REPORTS (U.S. Dep't of Commerce, Census Bureau ed., 2003), available at <http://www.census.gov/prod/2003pubs/censr-5.pdf>.

101. One study indicates that from 2000 to 2005, the number of same-sex couples in Wisconsin rose from 8,232 to 14,894, an increase of 81%. GARY J. GATES, SAME-SEX COUPLES AND THE GAY, LESBIAN, BISEXUAL POPULATION: NEW ESTIMATES FROM THE AMERICAN COMMUNITY SURVEY, app. 1 (UCLA Law Sch. Williams Inst. on Sexual Orientation ed., 2006), available at <http://www.law.ucla.edu/williamsinstitute/publications/SameSexCouplesandGLBpopACS.pdf>.

102. Obviously, such legal recognition would have to occur outside of Wisconsin, given Wisconsin's current statutory and constitutional blocks to same-sex marriage. *See* WIS. CONST. art. XIII, § 13; WIS. STAT. §§ 765.001(2), 765.04(1) (2007–2008) (prohibiting, collectively, both same-sex marriage and same-sex civil unions).

up Wisconsin residence. Because this number is likely small, and the number of such couples actually seeking legal dissolution is even smaller, an outright ban probably cannot be justified on the grounds of judicial economy or efficiency. Indeed, a willingness to adjudicate same-sex divorces actually is supported by concerns for national judicial economy, as courts in states recognizing same-sex marriage would not be forced to deal with the administrative issues and inefficiencies that typically accompany adjudication of disputes involving out-of-state litigants. Therefore, there does not seem to be any reason, outside of Wisconsin's apparent public policy against same-sex marriage, for denying same-sex couples access to the Wisconsin courts for legal dissolution.

2. Counterarguments to an Outright Ban

Despite Wisconsin's apparently clear policy against same-sex marriage, that policy, by itself, should not preclude discussion of the arguments against opening the Wisconsin courts to same-sex divorcees. Arguments against an outright ban on same-sex divorce, which this section will explore, include the following: 1) because Wisconsin law apparently recognizes same-sex partners' rights against one another in contexts other than marriage, it should consider giving them rights to divorce; and 2) same-sex marriage and same-sex divorce are fundamentally different procedures, and the public policy against same-sex marriage, therefore, should not automatically preclude same-sex divorce.

Although it is rarely, if ever, stated explicitly within the Wisconsin statutes, there are areas of Wisconsin law that appear to protect, or can be interpreted to protect, the rights of same-sex partners against one another. One such area is domestic abuse, which is governed by section 968.075 of the Wisconsin Statutes.¹⁰³ This statute defines "domestic abuse" as the commission, by an adult person, of any of the statutorily defined actions "against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common."¹⁰⁴ Because this definition does not explicitly apply only to heterosexual couples (as the statutes governing marriage do¹⁰⁵), it is certainly reasonable to conclude that the legislature intended this section to protect homosexual victims of domestic violence as well.

Although there is no case law in Wisconsin where this statute has been used to protect a homosexual partner, there is plenty of evidence that same-sex domestic violence is a real threat and that this statute should, therefore, be

103. WIS. STAT. § 968.075 (2007–2008).

104. *Id.* § 968.075(1)(a).

105. *See, e.g., id.* § 765.001(2).

construed to protect same-sex partners. According to one report, domestic violence in same-sex relationships occurs at about the same rate as heterosexual relationships, or as high as between 25% and 33%.¹⁰⁶ Given the high incidence of same-sex domestic violence, it is not unreasonable to believe that the Wisconsin Legislature actually intended Wisconsin domestic violence law to protect same-sex partners.¹⁰⁷

Admittedly, statutory protection against domestic violence is far from recognizing same-sex divorce. However, this statutory protection does show that Wisconsin law is not entirely devoid of recognition of rights for members of same-sex couples. Just as members of heterosexual couples can be reassured that the law protects them against violence by their partners, members of homosexual couples know that the law extends to them as well. From this extension, it is reasonable to conclude that the Wisconsin Legislature is not completely averse to granting those in same-sex relationships access to the court system, particularly for matters involving their partners. Certainly, access for domestic violence would not lead, by itself, to a conclusion that individuals in same-sex relationships should have court access for divorce purposes. Access would provide evidence, however, that the courtroom doors have opened before to allow those in same-sex relationships to assert their rights against their partners, as well as provide a reasonable basis for same-sex couples to believe the doors can, and should, be opened further.

Another area of law where same-sex couples appear to have an opening for increased rights is Wisconsin's common law regarding cohabitation. Given the marked increase in cohabitation across the United States in recent decades,¹⁰⁸ it is not surprising that many states have recognized certain rights arising from a cohabiting relationship.¹⁰⁹ While there certainly is a broad spectrum as to the amount and breadth of these rights, there is no doubt that states are adapting to the societal shift toward cohabitation.

106. Connie Burk, *Think, Re-think: Domestic Violence in Lesbian, Bisexual and Trans Relationships*, WIS. COALITION AGAINST DOMESTIC VIOLENCE, Summer 1999, at 2.

107. This belief is bolstered by the legislative history of section 968.075, which states that Wisconsin's domestic violence law was created so that criminal laws would be "enforced without regard to the relationship of the persons involved." Act of April 21, 1988, 1987 Wis. Sess. Laws 1229, 1229.

108. See, e.g., Eric Nagourney, *Study Finds Families Bypassing Marriage*, N.Y. TIMES, Feb. 15, 2000, at F8.

109. See, e.g., *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976); *Glasgo v. Glasgo*, 410 N.E.2d 1325, 1327 (Ind. Ct. App. 1980); *Connell v. Diehl*, 938 A.2d 143, 145 (N.J. Super. Ct. App. Div. 2008). But see *Costa v. Oliven*, 849 N.E.2d 122, 123-24 (Ill. App. Ct. 2006) (explaining that public policy precluded a holding that the plaintiff was entitled to an equitable interest in his cohabitant's property).

Wisconsin joined these states in 1987, with the case of *Watts v. Watts*.¹¹⁰ In *Watts*, the plaintiff and the defendant had cohabited for twelve years, and the relationship produced two children.¹¹¹ Once the relationship ended, the plaintiff filed suit seeking an accounting of the defendant's personal and business assets accumulated during the cohabitation and a determination of her share of such assets.¹¹² The Wisconsin Supreme Court ultimately held that, although the plaintiff's claim to the property acquired during the relationship could not rest on the property division statute in place at the time (i.e., the divorce statute), it could rest on "contract, unjust enrichment or partition."¹¹³ The court specifically stated:

Courts traditionally have settled contract and property disputes between unmarried persons, some of whom have cohabited. Nonmarital cohabitation does not render every agreement between the cohabiting parties illegal and does not automatically preclude one of the parties from seeking judicial relief, such as statutory or common law partition, damages for breach of express or implied contract, constructive trust and quantum meruit where the party alleges, and later proves, facts supporting the legal theory.¹¹⁴

Based on the *Watts* case, then, it is clear that Wisconsin law recognizes rights of cohabiting partners, and that these rights are grounded in contract theory.

As with the domestic violence statute discussed above,¹¹⁵ there is no case law regarding the *Watts* case's applicability to same-sex couples. Based on the court's statements quoted above, however, the dissolution of a cohabiting relationship has been characterized by Wisconsin courts as a contract or property dispute. Additionally, the Wisconsin Supreme Court failed to explicitly limit the rights of cohabiting parties, following dissolution of the relationship, to heterosexual couples. By failing to do so, the court apparently left the door open for cohabiting, homosexual couples to seek resolution of their separation disputes in the court system, guided by established principles of contract law.¹¹⁶

110. 137 Wis. 2d 506, 405 N.W.2d 303 (1987).

111. *Id.* at 510, 405 N.W.2d at 305.

112. *Id.*

113. *Id.* at 538, 405 N.W.2d at 316.

114. *Id.* at 511–12, 405 N.W.2d at 306.

115. WIS. STAT. § 968.075 (2007–2008).

116. Given the age of the *Watts* case (decided more than twenty years ago), it is certainly possible, and perhaps even likely, that the Wisconsin Supreme Court did not consider its decision's ramifications for same-sex couples. However, as the decision does not bar same-sex couples from

Obviously, contract disputes occur between all types of people, male and female, gay and straight. It is unlikely (and probably a violation of the federal Equal Protection Clause) that a court could, or would, refuse to handle a property dispute because of the parties' gender or sexual orientation.¹¹⁷ Therefore, because two homosexual people would have access to the court to resolve any basic, or "normal," contractual or property disputes, it does not seem unreasonable to extend this access to implied or express contracts based on the parties' cohabitation.¹¹⁸ And, one could argue, if homosexual couples who are merely cohabiting are granted access to the courts for the enforcement of rights, then homosexual couples who have achieved a valid marriage or civil union in another state should certainly have court access for the dissolution of the contractual relationship created by such out-of-state unions.¹¹⁹

The second major argument against an outright ban on same-sex divorce is that the public policy behind banning same-sex marriage is not directly applicable to same-sex divorce. More specifically, the fact that same-sex divorce is a process different and separate from same-sex marriage means that recognition of such divorce presents no significant public policy issues. To understand this argument, it is necessary to first examine the distinction it makes between same-sex marriage and same-sex divorce.

This distinction is that same-sex divorce is the legal termination of an essentially contractual relationship, while marriage is the creation of such a relationship. The primary policy problem always has revolved around the creation, and not the dissolution, of marriage. In fact, many critics would likely seek to dissolve as many of these relationships as possible. Supporters of same-sex divorce would, therefore, argue that a court's recognition of this

seeking contractual remedies following the dissolution of a cohabiting relationship, there is no reason to doubt that such couples could use the court system to obtain these remedies.

117. U.S. CONST. amend. XIV, § 1, cl. 2; *see, e.g.*, *Romer v. Evans*, 517 U.S. 620, 624, 635–36 (1996) (striking down, on equal protection grounds, a Colorado constitutional amendment that "prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect . . . homosexual persons").

118. The biggest possible problem with this extension is whether the implied contract that grants rights to the cohabiting parties is based on living in a marriage-like relationship. If there is such a requirement, it is highly unlikely that the Wisconsin courts would recognize such an implied contract, as it would be contrary to public policy and the Wisconsin Constitution. *See* WIS. CONST. art. XIII, § 13 (forbidding recognition of "[a] legal status identical or substantially similar to that of marriage for unmarried individuals" of the same sex). However, the Wisconsin Supreme Court imposed no such requirement in *Watts*, meaning there is apparently no black-letter law in Wisconsin to that effect. An interesting topic, therefore, would be the effect of this constitutional amendment on Wisconsin law regarding cohabitation, specifically the *Watts* case. Such a topic, however, is beyond the scope of this Comment.

119. *See, e.g.*, *C.M. v. C.C.*, 867 N.Y.S.2d 884 (N.Y. Sup. Ct. 2008); *Gonzalez v. Green*, 831 N.Y.S.2d 856 (N.Y. Sup. Ct. 2006).

procedure would have no bearing on a state's policy regarding the *creation* of same-sex marriages. The two processes—one a creation, the other a dissolution—are fundamentally different (although they are of course linked), and because of this difference, the argument goes, it is entirely possible for a court to recognize same-sex divorce without recognizing same-sex marriage.

The problem with this argument, however, is two-fold. First, many people may consider recognition of same-sex divorce a de facto recognition of same-sex marriage and condemn it as a mere end-around to avoid the constitutional and statutory bans.¹²⁰ These people may be concerned that granting same-sex couples the right to seek a divorce would undercut the effectiveness of these bans by expanding the rights of, and therefore the legal recognition of, same-sex couples. Second, as a doctrinal matter, it is difficult to discern how a court could logically dissolve a relationship it does not recognize in the first place. For same-sex couples to avoid the first problem, it would likely be necessary to categorize their relationship as something other than a marriage, such as a civil union. However, while this may solve the first problem, it does not solve the logical inconsistency created by the Wisconsin Constitutional amendment discussed earlier.¹²¹ Because this amendment basically denies recognition of civil unions, the courts still would be asked to dissolve a relationship they cannot legally recognize.¹²² Because of this logical and ultimately legal obstacle, supporters of same-sex divorce likely would have a difficult time finding a sufficient lack of connection between same-sex marriage and divorce to placate those opposed to legal recognition of either or both legal processes.

Ultimately, there are several arguments on both sides regarding an outright ban on same-sex divorce in the Wisconsin courts. Imposing such a ban would have obvious consequences for same-sex couples whose relationship is legally recognized in another state, and would further cement Wisconsin's position as decidedly anti-same-sex marriage. Of the three possible options for dealing with same-sex divorce, an outright ban is the most extreme, at least in terms of the denial of rights to same-sex couples. That said, however, as the recent constitutional amendment shows, Wisconsin

120. See, e.g., Anemona Hartocollis, *Gay Marriage Gains Notice in State Court*, N.Y. TIMES, Mar. 6, 2008, at B1 (discussing the various forms of recognition of same-sex marriage in New York state, including through granting such couples a divorce, and noting the negative reaction to such recognition by opponents of same-sex marriage).

121. See WIS. CONST. art. XIII, § 13, discussed *supra*, Part II.C.

122. Indeed, this logical, legal obstacle could mean that Wisconsin's current policy (if it can be said to have one, as the need to define such a policy has not yet arisen) is in fact an outright ban. Because of the statutory and constitutional prohibitions, courts probably could not simply process same-sex divorce petitions as they would opposite-sex petitions, as this would force them to recognize the couple's legal relationship, in violation of law. Courts could avoid this problem, however, by adopting either of Options 2 or 3, discussed *infra* Part III.B–C.

is not averse to taking aggressive positions when it comes to same-sex marriage.

B. Option 2: Apply Wisconsin Law

The second possibility for solving the potential same-sex divorce problem is to apply Wisconsin law to such actions. In doing so, Wisconsin courts could choose to apply Wisconsin divorce law, or in the alternative, Wisconsin contract law. Each of these options presents various difficulties and advantages that will be discussed in detail below.

1. Divorce Law

One possibility for utilizing Wisconsin law in adjudicating same-sex divorce petitions would be to apply the divorce statutes equally to heterosexual and homosexual couples. The two groups would have substantially the same rights under the law and would have equal access to the Wisconsin courts for the dissolution of their contractual relationships. For several reasons, however, this option is highly unlikely, and most likely contrary to the Wisconsin Constitution.¹²³

A Wisconsin court's attempt to apply Wisconsin divorce statutes likely would violate both the Wisconsin Statutes and the Wisconsin Constitution. In particular, section 767.35 of the Wisconsin Statutes provides that "[a] court shall grant a judgment of divorce . . . if . . . the court finds that the *marriage* is irretrievably broken"¹²⁴ This provision, combined with section 765.001(2), which defines marriage as "a legal relationship between 2 equal persons, a husband and wife," shows that Wisconsin law currently extends divorce privileges only to married couples, and therefore only to heterosexual couples.¹²⁵ Additionally, under the constitutional amendment discussed above,¹²⁶ it is unlawful for any court to recognize a same-sex marriage, or even a same-sex marriage-like relationship. Based on Wisconsin public policy and existing laws banning same-sex marriage, the Wisconsin courts and legislature would likely include even a de facto recognition of same-sex marriage in this constitutional ban, which would be accomplished as a result of performing a judicial dissolution of a same-sex marriage using Wisconsin law.

123. See WIS. CONST. art. XIII, § 13; *supra* note 118 and accompanying text.

124. WIS. STAT. § 767.35(1)(b) (2007–2008) (emphasis added).

125. *Id.* § 765.001(2).

126. WIS. CONST. art XIII, § 13, discussed *supra* Part II.C.

2. Contract Law¹²⁷

A second option Wisconsin courts would have in applying Wisconsin law to same-sex divorce would be to apply basic principles of contract law to the relationship. More specifically, the courts could view same-sex marriages and civil unions as relationships of cohabitation and look to the doctrines of implied contract, unjust enrichment, or promissory estoppel in determining the parties' rights following the dissolution of the legal relationship entered into in a different state. Just as the Wisconsin Supreme Court agreed to apply these principles to the dissolution of heterosexual cohabitation relationships in *Watts v. Watts*,¹²⁸ Wisconsin courts could simply expand this application to same-sex divorce.

The primary benefit of treating same-sex divorces as contract disputes is that it offers a forum to same-sex couples while avoiding the statutory violations that would likely attend resolving the dispute under Wisconsin divorce laws.¹²⁹ Rather than recognizing a same-sex marriage, the courts merely would be acknowledging the existence of a contractual relationship between the parties and using established contract principles to resolve the parties' dispute.¹³⁰ Granted, this may appear to critics as nothing more than a thinly veiled attempt to achieve recognition of same-sex divorce, and therefore same-sex marriage. The defining difference, however, is the substantive law that would be applied. Theoretically, the same-sex couple's court action would never have to mention the word "divorce," but instead would rely upon the modification or cancellation of a contract.¹³¹

An additional benefit of using contract law to deal with same-sex divorces would be the added incentive for same-sex couples to draft and execute their own "separation agreements," as in the New York case of *Gonzalez v. Green*.¹³² Armed with the confidence that the courts would consistently apply basic contract principles to any such agreement, the parties would be willing to invest significant time in drafting a fair and equitable agreement to end the contractual relationship. This would decrease litigation of such cases and provide for greater certainty in the law.

127. For an interesting discussion of same-sex marriage as a contractual relationship, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 5.8 (7th ed. 2007).

128. 137 Wis. 2d 506, 538, 405 N.W.2d 303, 316 (1987), discussed *supra* Part III.A.1.

129. See *supra* notes 123–26 and accompanying text.

130. See, e.g., *Gonzalez v. Green*, 831 N.Y.S.2d 856 (N.Y. Sup. Ct. 2006).

131. As with the solution of applying out-of-state law to Wisconsin divorce actions, applying Wisconsin contract law to same-sex divorces is not without logistical and administrative difficulties. Problems such as which contract doctrines to apply, or how the doctrines should be modified to accommodate the unique issues in divorce cases, are only some of the possible obstacles. Again, however, an in-depth analysis of these difficulties is beyond the scope of this Comment.

132. 831 N.Y.S.2d 856, 857 (N.Y. Sup. Ct. 2006), discussed *supra* Part II.B.3.

That is not to say, however, that this method would be free of difficulties. First, the protections afforded by divorce law certainly are not identical to those typically recognized under contract principles. For example, under Wisconsin divorce law, the party receiving support or maintenance typically can return to court to seek a revision of the amount or schedule of such payments.¹³³ There is no similar provision under contract law where a party can revisit a prior cancellation agreement and seek a court order modifying the terms of that cancellation. This deficiency, among other discrepancies between divorce and contract law, may limit the rights that are available to same-sex couples who seek to dissolve their relationship. These limitations must be balanced, however, against the costs that would be incurred in dissolving that relationship in its state of origin. In this situation, limited rights may seem better than no rights at all.¹³⁴

A second difficulty regarding the application of contract principles to same-sex divorce is the determination of which contract principles would apply to these types of actions. Specifically, would courts adopt all contract doctrines, such as mutual mistake, promissory estoppel, and modification, or would they pick and choose from among the doctrines on a case-by-case basis, applying some and refusing to apply others? If Wisconsin courts adopted an inclusive policy, making any and all doctrines applicable, obviously this would not be a problem. However, given the breadth of contract law and the general aversion to granting rights to same-sex couples, the adoption of such an inclusive approach seems unlikely. It is more likely that the courts would attempt to limit the available doctrines as much as possible. To that end, the courts would have to determine just how far they are willing to extend same-sex couples' access to legal dissolution of their contractual relationship.

As an example, consider two same-sex partners who negotiated and executed a separation agreement that was upheld by the court but subsequently was breached by one of the parties. Would the court allow the nonbreaching party to come into court seeking damages, modification of the agreement, or any other legal or equitable remedies? Or would the court simply limit its own power to validation of such agreements, leaving it to the parties to work out any subsequent problems? This is admittedly a somewhat extreme example, in that the latter option would be a severely limited view of

133. WIS. STAT. § 767.59(1c)(1) (2007–2008).

134. Indeed, the couple from Rhode Island discussed in Part II.B.2 serves as an example of why same-sex couples seeking a divorce may be willing to accept something less than a full divorce proceeding. Rather than undergo the hardships associated with moving back to Massachusetts for a year, the couple instead expressed a willingness to simply remain married. Fitzpatrick, *supra* note 52. In such a situation, it seems likely that a same-sex couple would gladly accept a legal dissolution of their “contract” (i.e., their relationship), regardless of whether it was actually labeled a “divorce.”

the court's power, but it demonstrates the point that courts would have difficult decisions to make regarding the extent to which they are willing to involve themselves in the dissolution of same-sex marriages or civil unions.

A third difficulty that courts would encounter in applying contract principles to same-sex divorces would be the resolution of the ancillary issues of divorce, such as marital/community property division¹³⁵ and spousal support.¹³⁶ These issues are rarely, if ever, dealt with in any other context besides divorce, meaning the court likely would not rely solely on contract principles in resolving them. Thus, courts would be forced to consult other areas of law, particularly divorce law, in resolving these matters if the parties could not agree. Normally this would not be a problem, but given the sensitive nature of the same-sex marriage and divorce questions, if courts began applying divorce law to supposed contractual disputes, it could raise the previously discussed concerns stemming from Wisconsin's statutory and constitutional bans on same-sex marriage.¹³⁷

135. Marital/community property has been defined as “[p]roperty owned in common by husband and wife as a result of its having been acquired during the marriage by means other than an inheritance or a gift to one spouse, each spouse holding a one-half interest in the property.” BLACK’S LAW DICTIONARY 274 (7th ed. 1999). Wisconsin is one of several states to have adopted the community property system, doing so in 1984 through the passage of the Wisconsin Marital Property Act. See KEITH A. CHRISTIANSEN ET AL., MARITAL PROPERTY LAW IN WISCONSIN § 1.2 (3d ed. 2004). Although a full discussion of the rights of same-sex spouses under this community property system is beyond the scope of this Comment, it is important to note that the community property system could pose significant difficulties for Wisconsin courts attempting to apply Wisconsin divorce or contract law to same-sex couples. Although the courts likely would hold that because same-sex couples are not married under Wisconsin law, see WIS. CONST. art XIII, § 13 (banning same-sex marriage), they have no rights under the community property laws, the issue almost certainly would be litigated, see WIS. STAT. §§ 766.03(1), 766.01(5) (stating that the marital property chapter applies to spouses “upon their determination date,” and defining the “determination date” as the date of the spouses’ marriage). For further discussion of the impact of community property laws on same-sex couples in other states, see Charles W. Willey, *Effect in Montana of Community-Source Property Acquired in Another State (and Its Impact on a Montana Marriage Dissolution, Estate Planning, Property Transfers, and Probate)*, 69 MONT. L. REV. 313, 357–65 (2008).

136. These examples are only two of the myriad issues that arise in connection with normal divorce actions, with another being the rights of the parents to custody of the children. This issue can be particularly troublesome for same-sex parents, as there is no guarantee they will have any biological or adoptive relation to the children. If a couple has a civil union or other legal relationship, this may not be an issue if the couple seeks to divorce in the state where they formed that relationship, as the laws may be sufficiently developed to cover this situation. However, when the couple moves to a state that does not recognize their union, the nonbiological, nonadoptive parent could be in serious danger of losing all parental rights. This is yet another example of the difficulties surrounding same-sex divorce in non-same-sex union states, demonstrating again the care that courts and legislatures must have in deciding how to handle same-sex divorce requests. For an analysis of how the nonbiological, nonadoptive parent’s situation may proceed, see generally Deborah L. Forman, *Interstate Recognition of Same-Sex Parents in the Wake of Gay Marriage, Civil Unions, and Domestic Partnerships*, 46 B.C. L. REV. 1 (2004).

137. See discussion *supra* Part III.A.1.

Ultimately, although the application of contract law to petitions for same-sex divorce is an imperfect solution to the problem discussed in this Comment, it undoubtedly represents a compromise position that offers benefits to both sides of the argument. By offering same-sex couples access to the Wisconsin courts for these proceedings, without formally recognizing same-sex divorce (and therefore marriage), this solution would seem to appease, if not reconcile, the groups on either side of the issue.

C. Option 3: Apply the Law from the State of Legal Union

The final, and perhaps most compromising, solution to the same-sex divorce problem is to allow same-sex couples access to the Wisconsin courts for divorce purposes, but use the laws of the state where the couple was legally joined to adjudicate the divorce petition. Whether it was a marriage in Massachusetts or a civil union in Vermont, the Wisconsin court could simply inform the parties that the law of their contracting state would govern the divorce proceeding, and the parties could prepare their cases accordingly.

Applying out-of-state law is not an uncommon occurrence in Wisconsin courts. Courts routinely apply out-of-state law in several different contexts, such as rights of spouses,¹³⁸ contract rights,¹³⁹ and torts.¹⁴⁰ Thus, in adjudicating same-sex divorces, Wisconsin courts could simply apply the divorce laws of the contracting state and thereby effectively resolve any disputes between the partners regarding the dissolution of the relationship, as well as issue a legally binding order of such dissolution. Because the parties' contracting state obviously would have more experience with same-sex unions (Wisconsin, of course, has none), hopefully these states would also have at least partially developed divorce codes.¹⁴¹ This would make it easier for Wisconsin courts to preside over judicial dissolutions using out-of-state law, alleviating any potential concerns over increased judicial workloads.

138. *See* *Xiong v. Xiong*, 2002 WI App. 110, ¶14, 255 Wis. 2d 693, ¶14, 648 N.W.2d 900, ¶ 14 (stating that the “law of the matrimonial domicile [sic] governs with respect to the substantial rights of husband and wife, as between themselves and their privies”) (quoting *Jaeger v. Jaeger*, 262 Wis. 14, 17, 53 N.W.2d 740, 742 (1952)).

139. *See generally* *Belland v. Allstate Ins. Co.*, 140 Wis. 2d 391, 393–95, 410 N.W.2d 611, 612–13 (Ct. App. 1987) (deciding whether Illinois, Wisconsin, or Ohio law was applicable to a family exclusion clause in an insurance contract, following a car accident occurring in Wisconsin).

140. *See generally* *Burns v. Geres*, 140 Wis. 2d 197, 199–201, 409 N.W.2d 428, 430 (Ct. App. 1987) (holding that Arizona's, rather than Wisconsin's, safe-place statute applied to plaintiff's negligence action).

141. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 208, § 4 (West 2007) (detailing divorce procedures for both heterosexual and homosexual married couples); VT. STAT. ANN. tit. 15, § 1206 (2002) (“The dissolution of civil unions shall follow the same procedure and be subject to the same substantive rights and obligations that are involved in the dissolution of marriage . . .”).

This option has several other advantages, with perhaps the most important being its compromising nature. As mentioned earlier, the “ban-it-outright” position on same-sex divorce carries with it several hardships for same-sex couples who have been joined in other states and now reside in Wisconsin.¹⁴² That position, however, is also most in line with Wisconsin’s public policy against same-sex marriage. To apply the law of the contracting state, on the other hand, would serve the interests of both Wisconsin public policy and same-sex couples seeking divorce in Wisconsin.

More specifically, applying out-of-state law would save same-sex couples from the difficulties associated with returning to the contracting state, such as complying with domicile and durational residency requirements that typically pervade divorce statutes.¹⁴³ Further, it would allow these couples to achieve the dissolution of their relationship that they would be entitled to had they remained in the contracting state.¹⁴⁴ From a public policy perspective, this solution does not undermine Wisconsin’s clearly stated policy judgment that same-sex marriage is not recognized under Wisconsin law. In applying out-of-state law, the courts would essentially serve as conduits of the out-of-state courts and, at least conceptually, would not be sanctioning same-sex marriage, either directly or indirectly. The concerns about the statutory and constitutional prohibitions of same-sex marriage would be alleviated, and Wisconsin could serve its same-sex citizens by offering same-sex couples a forum for divorce without actually recognizing it under the law, and at the same time protect its public policy against same-sex marriage.

IV. CONCLUSION

None of the solutions presented in this Comment are intended, nor are they able, to placate all those interested in the question of same-sex divorce in Wisconsin. They are intended, however, to stimulate discussion on the topic

142. See, e.g., *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007).

143. Of course, this option is not without its own logistical difficulties. For example, applying Massachusetts law to a same-sex couple’s divorce petition in Wisconsin theoretically would still require that the couple satisfy the Massachusetts domicile and durational residency requirements. For a brief summary of these domicile and durational residency requirements, see KINDREGAN & INKER, *supra* note 32, §§ 26:19, 27:4. A concession that would have to be made, likely on both Massachusetts’s and Wisconsin’s part, would be to allow the couple to meet these requirements through domicile in Wisconsin. As the example illustrates, this solution is clearly imperfect, but perfection cannot be expected. Implementing any of the solutions presented in this Comment obviously would pose certain administrative and logistical difficulties, but it is beyond the scope of this work to examine these in detail.

144. An interesting side note on this point is that such a solution would be more in line with the parties’ expectations regarding the out-of-state contract, as they likely would expect to be able to dissolve the relationship in the court system. This fact seems to provide further evidence that using out-of-state law to adjudicate what essentially amount to contract disputes would be an efficient judicial outcome.

and to provide a framework for analyzing the issue if and when it arises in the future. There almost certainly will always be staunch supporters and perhaps even stauncher opponents of increased recognition of rights for same-sex couples, making the ability to compromise between these positions paramount.

Regardless of one's individual opinion about the matters discussed in this Comment, there is no doubt that the issue of same-sex divorce is on the rise in America, and states across the country soon will be forced to establish laws and policies for handling it.¹⁴⁵ When that time comes, these states, including Wisconsin, will be forced to choose between at least three options: 1) ban same-sex couples from the courthouse, forcing them to return to their state of union; 2) apply their own state law to the proceedings, and attempt to navigate the various constitutional and statutory bans on same-sex marriage; or 3) compromise and apply the law of the state where the parties' legal union was formed, allowing the parties a judicial remedy and protecting the states' public policies against same-sex marriage, where they exist. When the time to choose does come for Wisconsin, its citizens again will be faced with the question of extending equal rights to same-sex couples. Hopefully, this time they will take a more compromising position.

LOUIS THORSON*

145. Indeed, shortly before this Comment went to print, a same-sex couple who had been married in Canada received a legal divorce from a superior court judge in New Jersey. Press Release, ACLU of N.J., ACLU-N.J. Win Case Allowing Same-Sex Couples to Divorce in N.J. (Feb. 6, 2009), available at <http://www.aclu-nj.org/news/aclunjwincaseallowingsame.htm>. Additionally, a same-sex couple filed for divorce in a Dallas state district court, which is believed to be the first such action in Texas. Roy Appleton, *Dallas Same-Sex Divorce Case a First for Texas*, DALLAS MORNING NEWS, Jan. 23, 2009, at 1A, available at <http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/012309dnmetgaydivorce.4227953.html>. Although these cases occurred too close to printing to allow an in-depth examination, they serve as further evidence that the issue of same-sex divorce is spreading quickly to courts across the nation and may make its way into the Wisconsin courts in the near future.

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