

Unification and Harmonization of Family Law Principles: The United States Experience

PERSPECTIVES FOR THE UNIFICATION AND HARMONISATION OF FAMILY LAW IN EUROPE,
4 CEFL [Commission on European Family Law] 249 (Katharina Boele-Woelki ed., 2003)

Nancy G. Maxwell
Professor of Law
Washburn University School of Law
Topeka, Kansas, USA

1. OVERVIEW OF THE STATE/FEDERAL RELATIONSHIP IN THE CONTEXT OF FAMILY LAW

Family law issues in the United States, particularly the issues currently under study by the Commission on European Family Law - grounds for divorce and spousal support - are matters generally reserved to the individual states.¹ This situation has resulted in numerous conflicts among the states, particularly within the last 100 years, as the U.S. population became increasingly mobile. A good example of the complexities of the U.S. situation is the current inconsistency among the states concerning the legal status of same-sex couples, a topic that has received a great deal of discussion in the papers presented at this conference. On one extreme is the state of Vermont, where the 2000 state legislature created civil unions, a legal equivalent to heterosexual marriages.² On the other extreme are the states that continue to criminalize same-sex sexual activity as sodomy.³ Therefore, if a same-sex couple living in Kansas were to travel to Vermont and enter into a civil union, when the couple returns to Kansas and engages in certain types of sexual activity, the couple would be committing criminal acts. To complicate this situation, the U.S. Congress has passed legislation, known as the Defense of Marriage Act,⁴ which refuses federal recognition to same-sex marriages, should any state authorize these marriages.⁵ *250 As one can see, this situation can result in serious conflicts that could have devastating consequences on individuals' personal lives and intimate relationships.

In examining efforts to unify and harmonize the grounds for divorce and spousal support, a historical overview of the situation in the United States over the last 100 years provides an important context to understanding the current status of these legal issues in the U.S. states.

¹ "We disclaim altogether any jurisdiction in the [federal] courts of the United States upon the subject of divorce, or the allowance of alimony" *Barber v. Barber* 62 U.S. (21 How.) 582, 584 (1859).

² VT. STAT. ANN. tit. 15, §§ 1201-1207 (2000).

³ See the sodomy/sexual misconduct statutes from the following jurisdictions: Kansas, KAN. STAT. ANN. § 21-3505 (2001), Missouri, MO. ANN. STAT. § 566.090 (West 2002), Oklahoma, OKLA. STAT. ANN. tit. 21, § 886 (West 2002), Rhode Island, R.I. GEN. LAWS § 11-10-1 (2002), Texas, TEX. PENAL CODE ANN. § 21.01(1), 21.06 (Vernon 2001).

⁴ Defense of Marriage Act, 28 U.S.C. § 1738C (2001).

⁵ No state in the United States has opened marriage to same-sex couples. Vermont has created a parallel institution to marriage through its civil union legislation. Thirty-six states have passed legislation limiting marriage to one man and one woman. National Gay and Lesbian Task Force, *Specific Anti-Same-Sex Marriage Laws in the U.S.*, at <http://www.nglftf.org/downloads/marriagemap0601.pdf>.

1.1 State statutes and case law control within the jurisdiction of each state

Initially, it is important to understand that when a party, who is seeking a divorce or an order of spousal maintenance, meets the jurisdictional requirements of the state where the action is filed, then that state court applies its own substantive law, even though the other party to the marriage may be a resident of another state. This fact has resulted in forum shopping and a long history of migratory divorce in the United States. Therefore an important issue in the history of divorce in the United States has been determining whether a state, which has granted a divorce, had the proper jurisdiction to do so. It is only those divorce decrees, issued by a state court with proper jurisdiction, that will be granted recognition and enforcement in the sister states, according to the full faith and credit clause of the United States Constitution.⁶ Consequently there has been a great deal of litigation over the issue of whether a sister state must recognize and enforce another state's divorce decree, particularly if there is great disparity between the two states' substantive law.

1.2 Divorce jurisdiction

1.2.1 Full faith and credit and migratory divorce

The United States Supreme Court became involved in establishing the jurisdictional basis for divorce through the interpretation of the "full faith and credit" clause of the United States Constitution. This clause states "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."⁷ The Court interpreted this clause as it applies to divorce jurisdiction in the 1906 case of *Haddock v. Haddock*.⁸ In that case a couple was married in New York, but shortly thereafter the husband moved to Connecticut, where he obtained a divorce. According to the Supreme Court decision, the Connecticut divorce decree was not deserving of full faith and credit because New York was the marital domicile state and the wife remained a New York resident. As a result, the state of New York did not have to recognize or enforce the Connecticut divorce decree. This rule was highly criticized, particularly as the U.S. population became more mobile and the phenomenon of migratory divorces became more prevalent.

Migratory divorce was the result of great discrepancies between the states concerning the grounds for divorce and inconsistencies in the length of time one must be domiciled within a state before filing for a divorce. Citizens who resided in states that had very strict grounds for divorce, and who had adequate financial resources to do so, would travel to states where the grounds for divorce were lenient and the time periods were short. These individuals would live within the second state long enough to meet the minimum time necessary to establish domicile. Then they would file for and obtain a divorce,⁹ only to return to their home states as a divorced person. This was what occurred in the well-known Williams line of cases in which the state of North Carolina prosecuted a man and a woman for bigamous cohabitation.

⁶ U.S. CONST. art. IV, § 1.

⁷ *Id.*

⁸ 201 U.S. 562 (1906).

⁹ Generally, in this scenario the party filing for divorce would give notice to his or her spouse of the divorce action by publishing a written notice in a local newspaper, which had the practical effect of no actual notice at all because the other spouse remained in the marital domicile state. If, however, the couple agreed to the divorce, then the filing spouse would file a document signed by the other spouse submitting to the jurisdiction of the divorce court.

The couple, who were married to other individuals and resided in North Carolina, traveled to Nevada, where they obtained divorces and then married one another, returning to live together in North Carolina. The state prosecutor's argument in the criminal trial for bigamous cohabitation was that the couple's divorces in Nevada were not worthy of recognition in North Carolina under the Supreme Court's interpretation of the full faith and credit clause in the Haddock case, because North Carolina was the marital domicile and the defendants' spouses remained in North Carolina.

In the first case of *Williams I*,¹⁰ however, the U.S. Supreme Court reversed the Haddock case, holding that if a party was actually domiciled in the state that granted the divorce, then the divorce decree was worthy of full faith and credit. Because the state of North Carolina had failed to provide evidence on the issue of whether the parties were, in fact, domiciled in the *252 state of Nevada at the time of the divorce, the Nevada divorce decree carried the presumption that it was a valid decree deserving full faith and credit. After a retrial, the case was again appealed to the Supreme Court and, in the *Williams II* decision,¹¹ the Court modified its earlier holding. In *Williams II* the Court held that a court in a second state could decide for itself whether the party obtaining a divorce decree was, in fact, domiciled in the first state. However, if the first state had made a determination in the divorce decree that the party was domiciled there, that determination was entitled to "respect and more" in the second state. Thus the party attacking the decree in a second state carried the burden of proving the absence of domicile. The proof of domicile is based on two factors: one's physical presence within a state, coupled with that person's intent to remain within the state. The practical impact of *Williams II* was that the person attacking the court's finding of domicile had the difficult burden of disproving another person's state of mind. This decision resulted in two states having valid jurisdiction to issue divorces - the state in which the plaintiff spouse had established a new domicile, as well as the marital domicile state, assuming the other party to the marriage remained domiciled there.¹²

1.2.2 Due process challenges and migratory divorces

In 1975 a woman seeking a divorce in Iowa challenged the constitutionality of an Iowa statute that required a person to be domiciled within the state for one year prior to filing for a divorce.¹³ The litigant alleged that this waiting period denied her due process of the laws under the U.S. Constitution. The Supreme Court disagreed, finding that Iowa had a legitimate interest in making certain its decrees were not subject to attack under the full faith and credit clause under the *Williams* cases. The court cited the *Williams* case, stating that "until such a time as Iowa is convinced that appellant intends to remain in the State, it lacks the 'nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost importance.'"¹⁴ Therefore each state was allowed to determine how long a person must remain within the state in order to establish domicile before filing for a divorce.
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¹⁰ *Williams v. North Carolina*, 317 U.S. 287 (1942).

¹¹ *Williams v. North Carolina*, 325 U.S. 226 (1945).

¹² For a detailed discussion of migratory divorce, see HOMER CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, § 12.2 (2d ed. 1988).

¹³ *Sosna v. Iowa*, 419 U.S. 393 (1975).

¹⁴ *Id.* at 407, citing *Williams v. North Carolina*, 325 U.S. 226, 229 (1945).

1.2.3 Personal jurisdiction and orders of spousal support

The cases discussed up to this point involved *ex parte* divorces - in other words, the other spouse was domiciled in another state and was not present before the divorce court. The issue in these cases was limited to whether a state court had proper jurisdiction to alter the party's status from a married person to a divorced person. The U.S. Supreme Court determined that these cases involved limited *in rem* jurisdiction, the *res* being the status of the party. In order for a divorce court to require a party to pay spousal maintenance, however, the court must have personal jurisdiction over the party. General rules of civil procedure require a person to have some "nexus" or connection to a state before that state's courts can assert personal jurisdiction over the person. One exception to this rule is when the defendant, who is not a resident of the state in which the law suit is brought, submits to that state's jurisdiction over him or her.

This was the situation in a 1948 United States Supreme Court case involving the issue of the recognition and enforcement of a divorce decree where the non-domiciled spouse actually participated in a divorce action in a state other than the marital domicile. In *Sherrer v. Sherrer*¹⁵ the wife left the marital domicile state of Massachusetts and moved to Florida. After living in Florida for the requisite period of time to establish domicile under the Florida divorce statutes, the wife filed for divorce. The husband entered his appearance in the Florida divorce action, opposing the divorce and claiming the wife was not a bona fide domiciliary of Florida. At the time of trial, however, the husband did not present evidence concerning the issue of whether his wife was domiciled in Florida. Ultimately the Florida court granted the wife a divorce. The husband then brought a suit in Massachusetts attacking the validity of the Florida divorce. On appeal, the United States Supreme Court held that the husband was prevented by the principle of *res judicata*¹⁶ from attacking the Florida divorce action. By submitting to the jurisdiction of the Florida court, the Florida divorce court had obtained personal jurisdiction over the husband. The United State Supreme Court held that a divorce decree was a valid decree when 1) the defendant had participated in the divorce proceedings, 2) he had been *254 accorded full opportunity to contest the jurisdictional issues and 3) the decree was not susceptible to collateral attack in the courts of the state that rendered the decree.

Another general rule of civil procedure for obtaining personal jurisdiction over a defendant is through personal service of process. This occurs when a plaintiff, who is domiciled in another state, is able to serve the defendant with a law suit when the defendant happens to be physically present within the borders of plaintiff's domicile state. There had been some debate over the issue of whether personal service would be sufficient, under the due process clause, to establish personal jurisdiction over a defendant in a divorce action if the defendant had no connection with the state. According to this debate, it was questioned whether a state could impose its substantive laws concerning spousal maintenance, child support and property division on a defendant who had no "nexus" with the plaintiff's domicile state other than coincidentally being within that state's borders. That issue was resolved in 1990 in the case of *Burnham v. Superior Court of California*¹⁷ in which the U.S. Supreme Court applied the general rule,

15 334 U.S. 343 (1948).

16 A result similar to the application of the principle of *res judicata* occurs under the doctrine of estoppel. Under this equitable doctrine, a person who has participated in obtaining a judgment is estopped from attacking that judgment in a later proceeding. The policy behind *res judicata* is that there must be finality in litigation once a party has had the opportunity to present his or her case. The policy behind estoppel, however, is one of a personal disability, preventing someone from challenging the validity of a judgment that he or she actively procured. See Clark, *supra* note 12, at § 12.3.

17 495 U.S. 604 (1990).

finding that personal service was sufficient to establish personal jurisdiction. Consequently, if the plaintiff is able to lure the defendant within the borders of his or her new state of domicile and personally serve the defendant, then the defendant will be bound by the substantive law of that state, including the laws concerning the award of spousal maintenance.

To summarize, a state court's divorce decree must be given full faith and credit in all other states if the divorce is issued by the marital domicile court, assuming at least one party to the marriage remains within the state. In addition, a decree that merely alters the status of the parties, i.e. a simple decree of divorce, also is entitled to full faith and credit if it is issued in a state in which the plaintiff is a bona fide domiciliary. Finally, a court has jurisdiction to grant spousal maintenance when that court has personal jurisdiction over the debtor. Personal jurisdiction can be established if the debtor is personally served within the borders of state where the action for support is filed, or if the debtor has submitted to the jurisdiction of the court. Given this situation, it is conceivable that there may be concurrent jurisdiction in two different states to grant the divorce if the parties to the marriage have different domicile states. In addition, it is possible that a state granting the divorce may not have jurisdiction to issue an order for spousal support if the debtor is not subject to personal jurisdiction within that state. For example, if a couple's marital domicile is the state of Kansas *255 and the wife leaves Kansas and becomes a domiciliary of Texas, both Texas and Kansas would have jurisdiction to grant her a divorce, but Texas would not have jurisdiction to order the husband to pay her spousal support if the husband does not come within the borders of Texas and he refuses to submit voluntarily to the jurisdiction of the Texas divorce court. In order to get an order of spousal support, the wife would be required to bring the support action in the courts of Kansas, where she could obtain personal service over her husband. In that situation, the Texas court would apply Texas divorce law¹⁸ in granting the divorce, but the Kansas court would apply Kansas law in determining spousal support. Both decrees, under the full faith and credit clause, must be recognized and enforced in all the states.

1.2.4 Failure to enforce orders of spousal support

Although a court may have jurisdiction to issue a spousal support order, historically this did not necessarily result in a sister state enforcing the order against a debtor resident. Only those decrees that are "final orders" are covered under the full faith and credit clause of the U.S. Constitution. Many spousal support orders are subject to modification, based on changed circumstances of the parties. Therefore, it was not uncommon for a state to refuse to enforce a sister state's original support order because the order was not "final" or a state allowed the debtor to seek a modification of the first state's original order. This resulted in decrees being issued in different states with different amounts being ordered, leaving courts in a quandary as to which order should be recognized and enforced. For example, assume that the couple was divorced in the marital state of New York and the New York court ordered the man to pay \$500 a month in spousal support. The man then moves to Kansas and stops making the spousal support payments. The woman brings the New York order to a Kansas court, seeking enforcement of the New York order. The Kansas court may determine that the New York judgment is not a final judgment in the state of New York, because the New York court has the power to modify the decree upon a showing of a material change in circumstances, and the Kansas court refuses to enforce the order. Or another possibility is that the Kansas court may allow the man to file a motion to modify the New York order, reducing the amount to \$300 a month, based on a material change in circumstances. Even if the man pays the \$300 a month in Kansas, he remains in arrears in New York for the additional \$200 each month, in continuous violation *256 of the New York order. The woman could then seek enforcement of the New

¹⁸ Texas divorce procedure is highly unusual because it provides for a jury trial. TEX. FAM. CODE ANN. § 6.703 (Vernon 1998).

York arrearage in Kansas, putting the Kansas court in a position of having to choose between the contradictory orders.

1.3 Federal limitations on state power – access to divorce courts and sexual equality issues

As shown in the prior discussion, the U.S. Supreme Court’s rulings on the full faith and credit clause have had little effect on harmonizing the grounds for divorce or the law of spousal support. Neither have the rulings resulted in uniformity in the recognition or enforcement of sister state decrees. There are two decisions, however, that have had a national impact on state laws.¹⁹ The first case, *Boddie v. Connecticut*²⁰ involved a constitutional challenge against a Connecticut statute that required a mandatory payment of filing fees before one could file an action for divorce. A group of indigent women sued the state, alleging that the requirement of the filing fee prevented them from obtaining a divorce. The petitioners alleged that they were being denied due process of the law because the filing fee requirement prevented them from having access to the only remedy available to them to end their marriages, divorce. The Supreme Court agreed, striking down the statute as a violation of the due process clause; “a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so.”²¹ Therefore, state statutes cannot prevent access to the divorce court by requiring a filing fee, if a person is unable to pay the fee.²²

The second case, *Orr v. Orr*,²³ involved a constitutional challenge of Alabama’s spousal maintenance statute, which authorized the court to award support to a wife but was silent about an award to a husband. The Alabama Supreme Court interpreted the statute as authorizing support only in favor of the wife. The U.S. Supreme Court struck down the statute because it violated the equal protection clause of the U.S. Constitution,²⁴ based on impermissible sex discrimination. As a result, all state statutes and courts must use sex neutral considerations in awarding spousal support.

2. ATTEMPTS TO UNIFY AND HARMONIZE SUBSTANTIVE FAMILY LAW

2.1 Early attempts - *The Uniform Marriage and Divorce Act*

¹⁹ There have been a number of U.S. Supreme Court cases that have impacted substantive family law principles. See generally Victoria Mikesell Mather, *Commentary: Evolution and Revolution in Family Law*, 25 ST. MARY’S L. J. 405, 417-27 (1993). However, because the initial investigation of the CEFL concerns the grounds for divorce and spousal support, these other cases are not discussed here because they are outside the scope of this article.

²⁰ 401 U.S. 371 (1971).

²¹ *Id.* at 383.

²² To comply with this constitutional mandate a state statute may provide that an affidavit of poverty may be filed with the divorce action, showing an inability to pay the fee. See KAN. STAT. ANN. § 60-2001 (Supp. 2002). However, some courts assess the filing fee at the end of the proceedings, after granting the divorce, thereby creating a debt to the court. See *Davis v. Davis*, 623 P.2d 1369 (Kan. App. 1981).

²³ 440 U.S. 268 (1979).

²⁴ U.S. CONST. amend. XIV, § 1.

An obvious way to deal with problems of forum shopping is for the states to have similar substantive laws. The National Conference of Commissioners on Uniform State Laws (NCCUSL) was formed for this purpose, to draft uniform or model acts, which would be presented to the individual state legislatures for consideration and, hopefully, enacted without amendments. In the 1960s, NCCUSL began work on the Uniform Marriage and Divorce Act (UMDA). Perhaps the best description of the 1970 Uniform Act, when it was presented to the American Bar Association, was that its provisions were a hybrid between the “common core” and the “better law” approach.²⁵ The most significant evidence of the better law approach was the proposal to eliminate fault as a factor in granting the divorce as well as in awarding spousal maintenance, child support and dividing the couple’s property. The Commissioners were influenced by the no-fault movement in Europe and in California²⁶ and the movement’s rationale that divorce should not place blame, but rather focus on effective ways to resolve the issues that result from the breakdown of a marriage.

Unfortunately, the 1970 version of the UMDA met with strong opposition in the House of Delegates of the American Bar Association (ABA) and actually resulted in the ABA proposing another uniform act in opposition to the NCCUSL’s proposal. The NCCUSL amended the UMDA in 1971 and again in 1973, during which time there were acrimonious debates until, finally, in early 1974, the American Bar Association approved the 1973 version of the UMDA.²⁷ The main focus of the disagreement was that *258 the 1970’s version of the Act did not define a specific ground for divorce; rather the Act used a series of procedural steps that the court applied in determining whether the marriage had broken down. This issue was resolved in the 1973 version in which a compromise provision required a finding that the marriage was irretrievably broken, either through evidence that “(i) the parties have lived separate and apart for a period of more than 180 days next preceding the commencement of the proceeding, or (ii) there is serious marital discord adversely affecting the attitude of one or both parties toward the marriage.”²⁸ Another provision of the Act stated that a finding of irretrievable breakdown “is a determination that there is no reasonable prospect of reconciliation.”²⁹ According to the Commissioners’ Comment the “legal assignment of blame is here replaced by a search for the reality of the marital situation: whether the marriage has ended in fact.”³⁰ In addition, if the parties established that the marriage was irretrievably broken, “the court is not authorized to make a contrary finding because of the impact of the dissolution of the marriage on the minor children.”³¹

There were two other significant changes in the UMDA, one involving property division and the other

25 See Masha Antokolskaia, *The “better” law approach and the harmonisation of family law*, in this book, 157.

26 Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. CIN. L. REV. 1, 45 (1987).

27 See generally, Harvey L. Zuckman, *Commentary: The ABA Family Law Section v. The NCCUSL: Alienation, Separation and Forced Reconciliation Over the Uniform Marriage and Divorce Act*, 24 CATH. U. L. REV. 61 (1974).

28 UNIF. MARRIAGE & DIVORCE ACT § 302 (amended 1973) 9A U.L.A. 200 (1998).

29 UNIF. MARRIAGE & DIVORCE ACT § 305(c), 9A U.L.A. 242 (1998).

30 *Id.* § 305(c), cmt.

31 *Id.*

dealing with spousal support. The 1970 version of the Act proposed a modified community property concept, a concept that existed in a minority of states, generally those states located in the southwestern part of the country, as well as Louisiana, states that were influenced by the civil law of Spain or France. The 1973 version, however, adopted the “equitable division” concept, which was followed in the majority of the states. This concept gives a great deal of discretion to the court in determining the division of the property.

In the area of spousal support, which the drafters referred to as “maintenance,” the new provisions narrowly limited the award only to those situations in which the court found that the spouse receiving maintenance lacked sufficient property to provide for his or her needs and was unable to support himself or herself through appropriate employment or was the custodian of a child whose condition or circumstances made it appropriate that the custodian not be required to seek employment outside the home.³² In determining maintenance, the UMDA set out six factors the court *259 should consider in making the award. Specifically, the section stated the following:

The maintenance order shall be in amounts and for periods of time the court deems just, without regard to marital misconduct, and after considering all relevant factors including: (1) the financial resources of the party seeking maintenance, including marital property apportioned to him, his ability to meet his needs independently, and the extent to which a provision for support of a child living with the party includes a sum for that party as custodian; (2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment; (3) the standard of living established during the marriage; (4) the duration of the marriage; (5) the age and the physical and emotional condition of the spouse seeking maintenance; and (6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.³³

The Commissioners’ Comment stated that it was their intention to encourage the court to provide for the financial needs of the spouses through the division of the property rather than by an award of spousal support,³⁴ a clear departure from the current status of the law. Although the number of cases in which spousal support is awarded has remained at approximately 15%, the introduction of no-fault divorce resulted in spousal payments having shorter time limits, as opposed to the previous open-ended awards that generally continued until death of either party or remarriage of the spouse receiving support.³⁵ The impact of this change has had significant negative consequences on the economic status of former wives and children in their custody and has been referred to as the “feminization of poverty.”³⁶

At the same time the ABA was balking at adopting the UMDA, many state legislatures began to embrace

³² UNIF. MARRIAGE & DIVORCE ACT § 308(a), (amended 1971, 1973) 9A U.L.A. 446 (1998).

³³ *Id.* § 308(b).

³⁴ *Id.* § 308, cmt.

³⁵ Marsha Garrison, *The Economic Consequences of Divorce: Would the Adoption of the ALI Principles Improve Current Outcomes?*, 8 DUKE J. GENDER L. & POL’Y 119 (2001).

³⁶ *See generally*, LENORE WEITZMAN, *THE DIVORCE REVOLUTION* 337-43 (New York, Free Press; London, Collier Macmillan 1985).

the idea of no-fault divorce. Some states adopted portions of the 1970, 1971 and 1973 versions of the Act or adopted provisions of the California Family Law Act, which influenced the drafters of the UMDA.³⁷ Some states adopted major portions of the various acts, while others merely added a no-fault ground to the statutory list of ground for divorce. Only 8 states ultimately adopted either the 1970, 1971 or 1973 *260 versions of the UMDA,³⁸ but the no-fault divorce revolution had impacted every state in the Union. By 1985, all state legislatures had enacted some form of a no-fault ground for divorce, most having done so before the end of the 1970s. Eliminating fault as a factor in spousal support was not as successful; currently 29 states permit the court to consider some form of marital fault in determining spousal support, with 7 of these states allowing a total ban on support if a potential recipient committed adultery.³⁹

2.2 *Recent developments*

2.2.1 **Unifying the Uniform Acts - The Joint Editorial Board for the Family Law Acts**

The UMDA has not been met with broad acceptance among the states, although many of the concepts contained in the Act can be found in numerous state statutes or judicial decisions. Other NCCUSL uniform acts dealing with family law, however, have been widely adopted in the states.⁴⁰ Even with these acts, however, the state legislatures have amended key provisions, resulting in reduced uniformity than had been anticipated. Recently NCCUSL established a Joint Editorial Board for the Family Law Acts (JEB), with the purpose of reviewing the effectiveness of current acts and to recommend amendments that would remove the lack of uniformity among the states. The JEB also is charged with determining and recommending the areas of family law in which new uniform acts may be drafted in the future.

2.2.2 **Transforming spousal support to compensatory payments - The American Law Institute's Principles of the Law of Family Dissolution**

The American Law Institute (ALI) is well-known for its work on the Restatements of the Law, which synthesize legal principles into the majority and minority positions among the states. The ALI also has been involved in drafting model acts, as well, presenting the model act as the "better law" in a particular subject area.⁴¹ It is this second function that prompted the *261 ALI Project on Family Dissolution to study and ultimately propose the Principles of the Law of Family Dissolution. As is noted in the Forward of the 1997 draft, the "current disarray in family law" prompted the Institute to draft principles that would "give greater weight to emerging legal concepts" than a Restatement.⁴² In the Principles, the

³⁷ Kay, *supra* note 26, at 50-56.

³⁸ UNIF. MARRIAGE & DIVORCE ACT (amended 1971, 1973), 9A U.L.A. 169 (1998).

³⁹ For current charts on the factors for awarding spousal support in the U.S., see Chart 1 at <http://www.abanet.org/family/familylaw/tables.html>.

⁴⁰ For example, see the UNIF. CHILD CUSTODY JURISDICTION ENFORCEMENT ACT, 9 U.L.A. 649 (1998); UNIF. INTERSTATE FAMILY SUPPORT ACT, 9 U.L.A. 235 (1998); UNIF. PREMARITAL AGREEMENT ACT, 9 U.L.A. 35 (2001).

⁴¹ J. Thomas Oldham, *The American Law Institute's Principles of the Law of Family Dissolution: Its Impact on Family Law*, 7 TEX. J. WOMEN & L. 161 (1998).

⁴² GEOFFREY C. HAZARD, ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND

drafters do not

address the growing debate about the efficacy of no-fault divorce,⁴³ but rather focus on such areas as property division, spousal support, child support and child custody, within the context of both marital and non-marital relationships. Recognizing that the majority of family dissolutions reach the courts with a negotiated settlement, the goal of the drafters was to create presumptions and formulas that would make the negotiation process, as well as a decision by a court, predictable, consistent and reliable.⁴⁴ After approximately 10 years of study, the ALI adopted the final draft of the Principles in May of 2000, which were officially published in 2002.

Chapter 5 deals with spousal payments; the innovative nature of the Chapter is immediately identifiable by its title, "Compensatory Spousal Payments." The goal of the drafters was to shift the focus of spousal payments from a needs-based analysis to one of compensatory entitlements. According to § 5.03, compensatory awards should equitably allocate the financial losses that one or both of the spouses may suffer when, at dissolution, the family is divided into separate economic units. This section sets out the circumstances in which there should be a compensatory payment.

- (2) The following compensable losses are recognized in Topic 2 of this Chapter:
 - (a) In a marriage of significant duration, the loss in standard of living experienced at dissolution by the spouse who has less wealth or earning capacity (§ 5.04).
 - (b) An earning capacity loss incurred during marriage but continuing after dissolution and arising from one spouse's disproportionate share, during marriage, of the care of the marital children or of the children of either spouse (§ 5.05). *262
 - (c) An earning capacity loss incurred during marriage but continuing after dissolution, and arising from the care provided by one spouse to a sick, elderly, or disabled third party, in fulfillment of a moral obligation of the other spouse or of both spouses jointly (§ 5.12).
- (3) The following compensable losses are recognized in Topic 3 of this Chapter:
 - (a) The loss either spouse incurs when the marriage is dissolved before that spouse realizes a fair return from his or her investment in the other spouse's earning capacity (§ 5.15).
 - (b) An unfairly disproportionate disparity between the spouses in their respective abilities to recover their pre-marital living standard after the dissolution of a short marriage (§ 5.13).⁴⁵

Although these factors for triggering a payment may be found in either current statutory law or in judicial decisions, the Principles require a state to create a percentage-based presumption, both as to the duration of the payment and the value of the payment. A major criticism of the Principles, however, is

RECOMMENDATIONS, Forward (Proposed Final Draft Part I, 1997).

43 Oldham, *supra* note 41, at 162.

44 "A core recommendation of Chapter 5 [Compensatory Spousal Payments], however, is the establishment of presumptions and guidelines to provide predictability and consistency . . ." Ira Mark Ellman, *Chief Reporter's Forward* to PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, xix (AM. LAW INST. 2000). *See also*, Garrison, *supra* note 35, at 123.

45 A.L.I. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION §§ 5.03(2), (3) (2002).

that they merely provide a formula without offering any appropriate percentages. For example, under § 5.04, a compensable loss occurs when a person, married to someone with significantly greater wealth or earning capacity, suffers a loss in the standard of living that person would otherwise experience, and the marriage is of sufficient duration that equity requires that some portion of the loss be treated as the spouses' joint responsibility. The provision continues by stating that there should be a statewide rule "under which a presumption of entitlement arises in marriages of specified duration and spousal income disparity."⁴⁶

The weakness of the Principles, however, is their failure to provide specificity. Instead § 5.04 states that the value of the award "should be determined by a rule of statewide application that sets a presumptive award of periodic payments calculated by applying a specific percentage to the difference between the incomes the spouses are expected to have after dissolution."⁴⁷ This percentage is called the durational factor, which "should increase with the duration of the marriage until it reaches a maximum value set by the rule."⁴⁸ Under § 5.06 an award under this previous section can be for a specific time or can be indefinite, but a presumption arises that the term should be indefinite "when the age of the obligee, and the length *263 of the marriage, are both greater than a minimum value specified in the rule."⁴⁹ If this presumption does not apply, however, then "the term is fixed at a duration equal . . . to the length of the marriage multiplied by a factor specified in the rule . . ."⁵⁰ It becomes readily apparent that the amounts of the awards from state to state will vary greatly, depending on the numerical value of the factors and the percentages each state adopts.

The practical results of the Principles are difficult to determine because of this lack of specificity. In general, though, one might be able to predict that in long term marriages, in which there is significant income disparity, a presumption of indefinite payments is more likely. In marriages that involve minor children, the formula also suggests that payments will be ordered, even in marriages of short duration. Both of these results would change the current trend in spousal support payments in the United States.⁵¹

2.2.2 A minor retreat from no-fault divorce - Covenant marriages

Three states, Louisiana, Arizona and Arkansas, have retreated from no-fault divorce by adopting legislation referred to as "covenant marriages."⁵² Under these statutes, if the couple signs a covenant

46 *Id.* § 5.04.

47 *Id.*

48 *Id.*

49 *Id.* § 5.06

50 *Id.*

51 Garrison, *supra* note 35, at 130-31. Professor Harry D. Krause notes that the ALI Principles "would on the one hand, impose greatly increased financial responsibility on divorce (thus strengthening marriage) when, on the other hand, the same ALI recommendations would allow most marital responsibilities to be negated by voluntary marital contract [under Chapter 6, Domestic Partners and Chapter 7, Agreements], thus weakening marriage." Harry D. Krause, *Marriage for the New Millennium*, 34 FAM. L. Q. 271, 293 (2000).

52 LA. REV. STAT. ANN. § 9:307 (1991), ARIZ. REV. STAT. § 25-903 (1999), ARK. CODE ANN. § 9-11-808 (2001).

marriage agreement when they marry, they voluntarily restrict the grounds for divorce to fault-based grounds, or, in the alternative, they agree to live separate and apart for a specified period of time before being able to file for a divorce. The rationale behind covenant marriages is that no-fault divorce has made divorce too easy, resulting in a myriad of societal problems, which are blamed on easy divorce. According to this rationale, if couples agree when they marry that they will only divorce if fault grounds exist or they have been separated for the required period of time, then there will be more commitment to the marriage, fewer divorces, thereby lessen these societal ills. Although covenant marriages have been recently enacted, the initial statistics show that few couples opt for the covenant marriage alternative. Most covenant marriages have been the result of couples who are already *264 married converting their prior marriages to covenant marriages. One possible negative result of covenant marriages may be the recurrence of migratory divorces, should a person in a covenant marriage wish to terminate the marriage but he or she does not care to wait the required time period for living separate and apart and neither party has committed a fault ground for divorce. This individual can easily travel to another state, establish domicile and then obtain a divorce under that second state's no-fault grounds.

3. THE UNIFICATION AND HARMONIZATION OF LAWS RECOGNIZING AND ENFORCING SISTER STATE DECREES

Unlike the history of the UMDA, several uniform acts have been widely adopted, with little amendment or variation among the states. These uniform acts deal with establishing jurisdiction for support⁵³ and child custody cases,⁵⁴ and for the interstate enforcement of any order issued in compliance with the uniform acts. The U.S. Congress is primarily responsible for the successful enactment of these uniform acts, because Congress has required a state to adopt the acts in order to receive certain federal funds. For example, every state has adopted the Uniform Interstate Family Support Act (UIFSA), because only those states that have adopted this Act will receive federal funds to assist the state agencies in collecting child support. Although the main focus of UIFSA is the enforcement of child support orders, spousal support orders also are covered under the Act. The Act prevents numerous states from issuing inconsistent orders of spousal support, which was discussed previously in section 1.2.4. According to § 211 of UIFSA, once a court, which has appropriate personal jurisdiction, grants a spousal support award, that court continues to retain jurisdiction to modify the support order, to the exclusion of all other courts in the United States. This statute prevents courts in other states from modifying the original support order; instead the other courts are required to enforce the original order.⁵⁵ Consequently, where the uniform acts have failed in unifying and harmonizing substantive family law principles, Congress, with its control over the disbursement of federal funds to the states, has been *265 highly successful in persuading the state legislatures to adopt uniform acts setting out jurisdictional and enforcement provisions for spousal support orders.

4. CURRENT STATUS OF U.S. LAW CONCERNING THE GROUNDS FOR DIVORCE AND THE LAW OF SPOUSAL SUPPORT

53 UNIF. INTERSTATE FAMILY SUPPORT ACT, 9 U.L.A. 235 (1998).

54 UNIF. CHILD CUSTODY JURISDICTION ENFORCEMENT ACT, 9 U.L.A. 649 (1998).

55 Another uniform act that has been widely accepted deals with enforcement of other states' decrees, the UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT, 13 U.L.A. 160 (2002), which has been enacted in 48 states. On the other hand, the UNIFORM DIVORCE RECOGNITION ACT, 9 U.L.A. 23 (1999) promulgated in 1947 to deal with migratory divorce, was adopted in only one state; the NCCUSL withdrew this second Act in 1978 as obsolete.

In order to track family law within the different states, the American Bar Association's family law journal, the Family Law Quarterly, publishes an annual survey, Family Law in the Fifty States, which updates the current status of the law. One of the features of the survey is a series of charts that set out the general legal principles of each state in key areas. Among these charts is a chart covering the grounds for divorce and residency (domicile) requirements (Chart 4) and a chart on spousal support factors (Chart 1). These charts also are easily accessible on-line on the ABA website.⁵⁶ According to the chart on grounds for divorce, 16 states have no-fault as the sole ground for divorce, 31 states have added a no-fault ground to the traditional fault grounds for divorce, 10 states have incompatibility as a ground for divorce, 25 states have as a ground for divorce living separate and apart for a specified period of time and 38 states also provide for a judicial decree of separation. The longest requirement for domicile before a court has jurisdiction to grant a divorce is one year, but several states have no specific time requirement; these states merely require a party to show he or she is a bona fide domiciliary.

The spousal support chart sets out that 39 states have a statutory list of factors the court considers in awarding support, 24 states do not consider marital fault as a factor as opposed to 29 states in which marital fault is a factor.⁵⁷ In addition, 41 states consider the standard of living of the couple in making an award and in 27 states the status of a spouse as a custodial parent is a relevant factor in making a spousal support order.

Although the Family Law Quarterly simplifies the difficult task of determining the laws in the various states, the lack of unification and harmonization of family law principles in the United States makes the work of a family law attorney a very localized and specialized practice. *266

5. WHAT CAN BE LEARNED FROM THE UNITED STATES EXPERIENCE?

There are several observations that can be made about the experience of the United States in attempting to unify and harmonize family law principles. First of all, formal attempts to unify substantive family law principles have been, for the most part, unsuccessful, as can be seen from the ABA hostility toward the proposed Uniform Marriage and Divorce Act. This hostility existed in spite of the fact that every state had representation on the NCCUSL, the drafters of the UMDA. One might come to the conclusion that if the U.S., with a national identity for its citizens, is incapable of producing a uniform act that is acceptable to all of the states, it is far less likely that the European Union, with its great diversity of cultures and populations among its member countries, will be successful in unifying and harmonizing family law principles. Part of this observation is true. Studies have shown that even if a legislative body enacts changes in family law principles, if the law does not reflect the public values and familial expectations, true change will not occur.⁵⁸ On the other hand, while the ABA and NCCUSL were embroiled in acrimonious debates over the elimination of marital fault in the UMDA, state legislatures began to enact statutes that adopted no-fault divorce grounds, with the majority of the states doing so in less than a 10 year period. Although the state statutes were not uniform in language, they were uniform in adopting a clear departure from former legal principles about family dissolution. A similar convergence of legal

⁵⁶ See <http://www.abanet.org/family/familylaw/tables.html>.

⁵⁷ Some states have statutes that state marital fault is not a factor in awarding spousal maintenance, although the court may consider dissipation of marital assets as a factor in awarding spousal support. These states are included in the number of states that use traditional fault factors, i.e. adultery, in determining support awards.

⁵⁸ Garrison, *supra* note 35, at 123.

principles in Europe is highly likely, because of the emergence of a more clearly recognizable European identity and citizenry, coupled with the rapid cross-pollenization that is occurring through electronic research and communication.

In addition, adoption of uniform acts that recognize and enforce sister state decrees of divorce and spousal support have been highly successful in the U.S., in part because states want to be assured that their decrees will be given full faith and credit, and in part because of the control the U.S. Congress has over federal funds paid to the states. Finally, the Supreme Court has become more actively involved in protecting due process and equal protection rights of U.S. citizens, thereby establishing a minimum standard of protecting and recognizing individual rights in the family law arena. Therefore, some advances toward harmonization of family law principles in the U.S. have occurred through the use of all three models being debated at this conference - on the level of substantive legal changes, *267 in the area of procedural recognition and the enforcement of foreign decrees and, finally, through the use of individual (human) rights.

That is not to say that there are not major differences among the states in family law principles. There is existing in the United States, at the same time, movements toward harmonization and unification, as well as distinct movements that create irreconcilable conflicts among the states and their citizens. Take, for example, the situation posed at the beginning of this article of the same-sex couple who go to Vermont and form a civil union, which is a parallel legal institution to marriage. In one such case in the U.S. the couple later sought a dissolution of the civil union in the state of Connecticut. The appellate court refused to recognize the civil union and denied any relief to the parties.⁵⁹ Without this recognition, the only way the couple can legally dissolve the relationship is for one of them to return to Vermont, establish domicile for at least 6 months, and then petition the Vermont court for a dissolution of the civil union. The irony of the Connecticut court decision is that it makes civil unions much more enduring and difficult to exit than heterosexual marriage. By applying the logic behind covenant marriages - i.e. if the institution is difficult to exit, then it should create more commitment by the couple to make the relationship work - one could argue that the Connecticut court is in fact strengthening Vermont civil unions by refusing to dissolve them! This result might be humorous, but for the fact that these are real people's lives - and the irreconcilable legal conflicts of persons who are treated as though they have a parallel institution to marriage in one state and are deemed criminal sodomites in another state, have real emotional, psychological, and financial consequences for these parties and any children they may be raising together. It is because of these very real consequences that the work of the Commission on European Family Law is important and commendable - for it is the real lives of real people that matter.

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Rosengarten v. Downes, 802 A. 2d 170 (Conn. App. 2002).