The majority of this paper has been recently published as a portion of an article that I wrote this past year:


The new material concerns the recent case in Vermont and Virginia concerning custody of the child born during Lisa and Janet Miller-Jenkins' civil union.

A. Recognizing the Parties' Legal Relationship Universally or Recognizing the "Incident of Marriage" at Issue in the Case

When first writing about interstate recognition of the marriages of same-sex couples, I argued that same-sex couples in ongoing relationships need to have our status as married couples recognized universally, rather than being required to seek recognition for each incident of marriage as the need arose.¹ Courts regularly view the term "marriage" as "an all-purpose concept."² For same-sex couples in ongoing relationships who will be interacting with numerous governmental and private institutions, this "universal" recognition of our status as a married couple is vital. Same-sex couples should not have to live with the uncertainty and expense that would arise from having to litigate one incident of marriage at a time, rather than having our marriages honored on a universal basis.³

But there are occasions, well-illustrated by the seven cases considering interstate recognition of Vermont civil unions when the same-sex couple's marriage, civil union, or domestic partnership could, and should, be recognized at least with regard to the particular incident of marriage involved, even if a court were to refused to honor it universally within the forum state.⁴ "Incidents of marriage" refer to each of the specific benefits, rights, or

¹See Cox, If We Marry, supra note 18, at 1063 n. 168.
³Additional problems with an issue-by-issue determination of rights and responsibilities include uncertainty and arbitrariness. See, Inching Down the Aisle, supra note 6, at 2024-25 (discussing how a "functional" approach to recognizing or rejecting same-sex unions "perpetuates the second-class status of same-sex couples, leaving them uncertain as to their rights and responsibilities and denying them the symbolic 'recognition of shared humanity' that accompanies legalization of marriage.")
⁴Let me clarify again that I believe that a same-sex couple's marriage, validly entered into under the law of the place of celebration, should usually be universally honored as valid everywhere. That is the general rule found in the Restatement (Second) of Conflicts of Laws § 283(2) (1971) which states: "A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage." The meaning of the exception for violations of strong
responsibilities flowing to a married couple based on their marital status. Professor Willis Reese, Reporter for the Restatement (Second), Conflict of Laws, and others in the late 1960s through 1980, argued that courts should develop choice-of-law rules for marriage, not as a universal status, but rather by considering the issue facing the court in each particular case, the policies behind the incident of marriage at issue, and whether the couple should be viewed as married for that purpose. As Reese explained:

In the great majority of situations, the validity of the marriage will be a question that is incidental to the determination of another issue. This is so, for example, when a person claiming to be a surviving spouse, asserts rights to testate or intestate succession, to pension, social security or work[er]'s compensation benefits, or to recover under the life insurance policy or for the wrongful death of the other spouse. . . . The problem is whether in these situations the validity of the marriage should first be established independently of the other issue involved or whether determination of the validity of the marriage should be made with reference to that issue.

When discussing how courts decide marriage recognition cases, Professor J. David Fine concluded: "It appears that the most important factor in a court's assessment of the law to be used in passing upon the validity of marriage is the issue giving rise to the litigation." Professor Fine considers numerous issues arising during a marriage, including capacity to marry, benefits for widows, and succession by children.

Additionally, Professors Eugene F. Scoles, Peter Hay, Patrick J. Borchers, and Symeon C. Symeonides, in their treatise on conflict of laws, noted that scholars repeatedly have pointed out that "the courts could and should treat all questions simply as claims to incidents but such has not been the course of the decisions. . . .[I]n recent choice-of-law cases, the courts have
begun to recognize that the enjoyment of different incidents of marriage involves different policies. Consequently, a uniform reference to a single state to resolve all choice-of-law questions involving marriage cannot be expected."10 They conclude that, "[l]ike other issues, the dominant policies and significant relationships relevant to the particular issue including the purpose for which the determination of status is pertinent will guide the court in seeking a just result."11

Even when faced with a marriage prohibited in the forum by a state statute, a court does not have to reject the marriage for all purposes. These authors explain that, although the statute prohibiting the marriage does show a policy against the marriage,

the policy thus expressed runs afoul, in these cases, of other policies which are well settled, whether expressed in positive terms or not. One is the general policy upholding a marriage whenever possible. Others relate to the particular issue involved. . . . The controlling issue becomes whether the policy of prohibition, as expressed by the legislative body, is strong enough in regard to the particular issue before the court to prevail over the policies furthered by upholding the marriage.12

They conclude that usually the court will have to decide which of these competing policies should be given the greatest weight.13

Professor David Engdahl, another proponent of an "incidents of marriage" approach, has argued that granting or denying validity to a marriage on a universal basis, as opposed to considering its validity on an issue-by-issue basis, frequently defeats the state's strong public policies that are expressed by providing particular rights and benefits to married couples.

Those [conflicts] rules, for their part, are grounded not on policies concerning, for example, succession to property or welfare expenditures, but on policies concerning the conditions under which persons should be permitted to cohabit. The consequence is that entitlement to rights is determined with reference to policies extraneous to those on which the law conferring those rights is based, and often in derogation of some strong policy sought to be achieved by that law.14

Engdahl pointed out that when a marriage prohibited by the forum state's law escapes discovery

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10Eugene F. Scoles, Peter Hay, Patrick J. Borchers, and Symeon C. Symeonides, Conflict of Laws § 13.2, at 545-46 (3d ed. 2000); see also, Constitutional Constraints, supra note 32, at 2049-2050 (noting modern scholars have suggested use of an "incidents of marriage" approach, rather than considering a marriage's universal validity before considering the issue raised in the case.)

11Scoles, supra note 68, at § 13.3, at 547.

12Id. at § 13.9, at 560-61.

13Id. at 561.

Actually, many of these restrictions are stronger than the ones leveled against same-sex couples because many involved criminal penalties for their violation, and attached felony status until after any opportunity to challenge it has passed, such as when one spouse has died or when the relationship has ended, denying the rights that normally attach to the marriage is not effective to affirm the policy behind the marriage restriction.15

At best, it is a sterile vindication of the policy of the marriage laws, often at great human expense to a party who, through good faith, or ignorance, or carelessness, or naivete, or because he or she belonged to a subculture whose marital habits did not conform nicely to the law, is found to have offended the norm.16

For example, he questioned whether the purpose behind Social Security benefits or worker's compensation benefits is to punish a person for failing to follow the forum's marriage laws or rather to provide benefits to survivors who were dependent on the decedent for support.17 Applying this analysis to several situations, he points out that (a) a surviving spouse's rights to worker's compensation benefits should be based on the policies behind that law to support survivors, not on the policies designed to prevent "undesirable forms of cohabitation;" (b) a divorcing spouse's rights to alimony should be based on whether the policies underlying the right to alimony would be served, not on the policies about whether the husband's ex parte divorce was valid; (c) a polygamist's rights to cohabit with two wives should be based on the state's policies concerning cohabitation, not on policies of whether his marriage in another country was valid or void; and (d) multiple wives' rights to inherit property from their bigamist husband should be based on the state's policies concerning intestate succession, not on policies in that state on cohabitation.18

While recognition of a same-sex couple's ongoing relationship may sometimes require a court to determine their marital status on a universal basis, other courts should instead consider whether recognizing the couple's marriage, civil union, or domestic partnership would promote the policies behind the particular incident at issue in the case before them. Although some couples will request universal recognition of their ongoing relationship, other couples may only seek recognition of some more limited aspect of their relationship. By considering only the incident of marriage before the court and the policies behind providing that incident of marriage to married couples, some courts may recognize the marriage, civil union, or domestic partnership for that particular purpose, even while refusing to honor the relationship for other purposes.

This approach has been followed by the courts in numerous cases. Three well-known cases discussed below are examples of courts faced with marriages as vigorously prohibited by the forum's marriage statutes as some of the statutes prohibiting marriages by same-sex couples: a polygamous marriage, an interracial marriage, and a re-marriage after a divorce based on adultery.19 In each case, the court granted the incident of marriage to the spouse(s) while noting

15 Id. at 105-106.
16 Id. at 106.
17 Id. at 106.
18 Id. at 109.
19 Actually, many of these restrictions are stronger than the ones leveled against same-sex couples because many involved criminal penalties for their violation, and attached felony status
that it would have refused recognition of the marriage on a universal basis. Each case provides insights for courts considering whether to recognize a same-sex couple’s marriage, civil union, or domestic partnership.

In the case of *In re Dalip Singh Bir’s Estate*, the California Court of Appeal was faced with a petition by Harnam Kaur and Jiwi, the wives of decedent Dalip Singh Bir, for equal shares in the estate of their husband. The trial court found that both marriages entered into in India were valid under its laws, that only the first wife would be recognized in California as the widow of the decedent, and that the case needed to be continued pending proof of which marriage was first.

On appeal, the Court of Appeal reviewed the prior cases involving recognition of polygamous marriages and found that several U.S. cases did recognize those marriages for certain purposes, including succession to property. The Court acknowledged the trial court’s concern with "public policy," but believed that policy concerns "would apply only if decedent had attempted to cohabit with his two wives in California." Finding that public policy was not affected by a case involving only succession to property and noting no cases opposed to that conclusion, the Court held that the two wives should share equally in decedent’s estate.

Similarly, the Mississippi Supreme Court recognized an interracial couple’s out-of-state marriage for purposes of intestate succession even though the Mississippi Constitution and its state statutes prohibited interracial marriage within that State. The couple, an African-American woman and a white man, were indicted in Mississippi in 1923 for unlawful cohabitation, but the case was dropped when the woman agreed to leave the state. In 1939, they were legally married in Illinois and they lived together until the wife’s death.

20188 P.2d 499 (Cal Ct. App. 1948).
21The wives were still residents of India, and the husband had been a resident of India when he entered into both marriages. *Id.* at 499
22*Id.* at 499-500.
23*Id.* at 500-501.
24*Id.* at 502.
25*Id.* But see, *People v. Ezeonu*, 588 N.Y.S.2d 116, 117-18 (Sup. Ct. 1992)(court held that polygamous marriage was "absolutely void" in New York, although valid under Nigerian law where it was celebrated, and thus did not provide a defense to a charge of rape of the defendant’s 13 year, "junior" wife); see also, *Constitutional Constraints*, supra note 32, at 2041(citing *In re Look Wong*, 4 Repts. Of Causes Determined in U.S. Dist. Ct. Haw. 568 (1915) and *Ng Suey Hi v. Weedin*, 21 F.2d 801, 802 (9th Cir. 1927), where each court refused to recognize the children of U.S. nationals as legitimate for immigration purposes because they were from their parents' second marriages validly entered into in China). It is important to note that all three of these cases involved a question of recognizing foreign polygamous marriages as a way to gain ongoing benefits in the U.S.
26*Miller v. Lucks*, 36 So. 2d 140, 142 (Miss. 1948).
The Supreme Court of Mississippi noted that both the State Constitution and its state statutes voided any marriage between a white person and a person with "one-eighth or more of negro blood." Concluding that neither statute should be given extra-territorial effect, it held that the valid Illinois marriage "must be recognized and given effect as such unless so to do violates this statute or the state's public policy declared therein." The Court emphasized that the parties were married in Illinois and that neither party returned to Mississippi after they left. Finding that the "manifest and recognized purpose of this statute was to prevent persons of Negro and white blood from living together in this state in the relationship of husband and wife," permitting one spouse to inherit property in the state "does no violence" to the purposes of the constitutional and statutory prohibitions. Finding that cases from other states "faced with this Negro problem" reached the same conclusion, the Court recognized the marriage "to the extent only of permitting one of the parties to inherit from the other property in Mississippi."

The Pennsylvania Supreme Court faced the issue of whether to recognize a second marriage validly entered into by its domiciliaries in West Virginia. Each of the spouses, while living in Pennsylvania, had been married previously and each was divorced from their prior spouse based on their adultery with the other. They wanted to marry but Pennsylvania statute section 169 prevented those guilty of the crime of adultery from marrying "the person with whom the said crime was committed during the life of the former wife or husband." Thus, they traveled to West Virginia to marry, returned to Pennsylvania to live, and lived there together until the husband's death.

Then the wife sought a marital exemption from the property transfer tax that was permitted under state inheritance law. After deciding that the remarriage prohibition contained section 169 did apply those divorced due to adultery, not just those convicted in a criminal proceeding, and thus Pennsylvania law did prevent the couple from marrying, the Court had to determine whether West Virginia law or Pennsylvania law should be applied in the case.

The Court followed the Restatement (Second) of Conflicts and referred to the principles in section 6 and section 283 to guide its analysis. Noting the strong policy favoring uniformity

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27Id. at 141, citing Miss. Const. sec. 263 and Miss. Code. § 459 (1942) which held such marriages to be "unlawful and void."
28Id.
29Id. at 142.
30Id., citing Whittington v. McCaskill, 61 So. 236 (Fla. 1913) and Cabellero v. Executor, 24 La. Ann. 573 (1872)(both of which recognized out-of-state interracial marriages for succession to property purposes, while noting that the marriages would have been invalid for purposes of ongoing cohabitation). See also, Andrew Koppelman, Same-Sex Marriage and Public Policy: The Miscegenation Precedents, 16 Quinnipiac L. Rev. 105, 119-126 (1996) [hereinafter The Miscegenation Precedents] and cases cited therein.
33Id.
34Restatement (Second) of Conflict of Laws §§ 6 and 283. The principles in Section 6 are
of result in marriage cases, the Court noted in a time of "widespread travel and ease of mobility, it would create inordinate confusion and defy the reasonable expectations of citizens whose marriage is valid in one state to hold that marriage invalid elsewhere."\(^{35}\) Concluding that Pennsylvania had the "most significant relationship" to the spouses and the marriage,\(^{36}\) it focused on whether the policy behind section 169 was so strong that it must control the case, "thereby destroying the uniformity of result which is so desirable in a case concerning the recognition of a marriage that is valid in the state where it was contracted."\(^{37}\) The Court was clear that the strength of the policy supporting section 169 depended "to a significant degree" on the incident of marriage at issue in the case. Thus it balanced the policy behind section 169 "as it relates to the marital exemption to the inheritance tax against the need for uniformity and predictability of result. . . ."\(^{38}\)

The Court concluded that the policy behind Section 169 was not to punish the adulterous spouses so much as to protect "the sensibilities of the injured and innocent husband or wife. . . to be wounded, or the public decency to be affronted, by being forced to witness the continued cohabitation of the adulterous pair. . . ."\(^{39}\) While concluding that this policy might be significant "with respect to cohabitation, and many other incidents of marriage," it would not be furthered by denying the surviving spouse the tax exemption because any such affront caused by the second marriage ended with the husband's death.\(^{40}\) The Court determined that the policy behind the tax exemption for transfers of property between spouses on one spouse's death recognized that jointly held property was "in reality the product of their joint efforts and should pass to the survivor without the imposition of a tax."\(^{41}\) Noting that this policy would be "frustrated" by applying Section 169 to this marriage and that the policy behind section 169 was "significantly outweighed by countervailing policies," the Court refused to invalidate the marriage.\(^{42}\)

Writing about *Lenherr*, Professor Reese noted that the Pennsylvania Supreme Court intended to guide courts when deciding between conflicting laws in marriage recognition cases. Those principles are "(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied." For the language of Section 283, see, *supra* note 62.

\(^{35}\) 314 A.2d at 258. The Court also noted its concern that couples might try to circumvent legitimate state policies by the "sham of traveling to a nearby less stringent jurisdiction." *Id.*

\(^{36}\) This refers to the standard contained in *Restatement (Second) of Conflict of Law* § 283.

\(^{37}\) 314 A.2d at 258.

\(^{38}\) *Id.* (emphasis in original).

\(^{39}\) *Id.* at 259, citing *Stull's Estate*, 183 Pa. 625, 632 (1898), although that case refused to recognize the out-of-state marriage entered into in Maryland.

\(^{40}\) *Id.* at 259.

\(^{41}\) *Id.*

\(^{42}\) *Id.*
did not follow the usual practice of first determining, without regard to the principal issue involved, whether the marriage was valid or invalid. Instead, it addressed itself immediately to the principal issue. . . . It made entirely clear that it would have held the marriage invalid for other purposes as, for example, whether the parties could lawfully cohabit with one another. In other words, the court did not treat marriage as an all-purpose concept. This is in line with the approach suggested here.43

When same-sex couples are litigating their marital status in an ongoing relationship, they need judicial decisions that embrace the universality principle and recognize their marriages as valid for all purposes. But some courts will be unwilling to recognize the marriage for all purposes, although they may be willing to recognize the marriage for some more limited purposes. Additionally, other courts will not be confronted with whether the relationship should be recognized as an ongoing marriage with all the rights and responsibilities that other married couples enjoy because the parties may be seeking dissolution of the marriage or other incidents of marriage that arise only upon the death of one of the spouses. In such situations, courts should consider the particular incident of marriage at issue and the public policy reasons for providing that incident to married couples, and they may find it appropriate to validate the marriage at least for those limited purposes.

In the six cases discussed below, four involved petitions for dissolution of the couples' civil union status and separation of the couple's property and debts. Another case involved whether a couple's civil union satisfied an earlier custody decree permitting each parent to have visits of their minor children so long as only that parent's spouse shared the parent's household. The final case involved a lawsuit for wrongful death by a surviving spouse acknowledged by the decedent's blood family as that person's spouse.

In each case, the courts should have recognized the civil union between the couple and provided them with the assistance that they sought. In no case (except perhaps Burns44) was the court confronted with the question of acknowledging an ongoing same-sex relationship within the forum. Three cases provided their citizens with the help they sought (two of which are on appeal),45 and three refused their citizens that assistance. By reviewing the cases and the policies at issue, we can see how focusing on the particular issue at hand may lead courts to recognize the legal relationships of same-sex couples for some purposes, even when they may be unwilling to

43Reese, supra note 60, at 970.
44In Burns, the court considered whether a civil union entered into in Vermont by one parent with her same-sex partner was sufficiently similar to a marriage so as to permit visitation of the woman's three minor children while her same-sex partner was present in the house. Thus, even this case is not about the civil union itself but about its sufficiency within that context.
recognize their status for all purposes.
B. Specific Cases involving Recognition of Vermont Civil Unions Using an "Incidents of Marriage" Analysis

1. New York

Contrary to the cases from Connecticut, Texas, and Georgia (which I have deleted from this excerpt of the Widener Law Journal article) where the courts seemed to go out of their way to refuse to honor a Vermont civil union, Justice Dunne of the New York Supreme Court of Nassau County held that John Langan should be treated as Neal Spicehandler's spouse for purposes of Langan's wrongful death lawsuit against St. Vincent's Hospital, based on the couple's Vermont civil union. 46 The court stated that the couple had lived together since 1986 and were joined in a civil union, attended by friends and family, in 2000.

The court noted that New York "adheres to the general rule that 'marriage contracts, valid where made, are valid everywhere, unless contrary to natural laws or statutes.'"47 Based on that rule, the court held that "if plaintiff has a validly contracted marriage in the State of Vermont, and if the Vermont civil union does not offend public policy as would an incestuous or polygamous union, it will be recognized in the State of New York for purposes of the wrongful death statute."48

Explicitly following the incident of marriage analysis urged in this article, Justice Dunne explained that "the court will not determine whether plaintiff has a valid marriage in the State of New York for all purposes, but only whether he may be considered a spouse for purposes of the wrongful death statute, much as the Court of Appeals has held that a same sex domestic partner is a 'family' member for the limited purposes of the New York City's rent control laws."49

The court reviewed the numerous ways in which same-sex couples are given legal recognition and protection under New York law, including recognition by New York City and by the State for employment benefits, recognition as "family members" under rent control laws, permission to adopt one another's children using second parent adoptions, and recognition for benefits following the September 11, 2001 attacks on New York City. 50 The court noted that "while other jurisdictions were enacting [anti-marriage laws], New York State amended [its laws] to prohibit discrimination on the basis of sexual orientation. . . ."51 The Court concluded that "New York's public policy does not preclude recognition of a same-sex union entered into in a sister state, . . ."52

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47 Id. at 414.
48 Id.
49 Id. at 415.
50 Id. at 415-16.
51 Id. at 416.
52 Id. This could well be true, because the state's public policy, even if opposed to marriages by same-sex couples, may not be violated by a claim by the surviving spouse after the death of his or her spouse. Henson, supra note 66, at 581. Henson also emphasized that this
New York precedent would also have led the court to honor a marriage that was valid in the state where contracted. For example, in *Van Voorhis v. Brimnall*, the Court of Appeals considered whether a child from the second marriage of her father could inherit as his legitimate heir when he had been divorced in New York from his first wife on grounds of adultery and prohibited from remarrying within his first wife's lifetime. Finding that the Legislature could have prevented New York citizens from remarrying outside New York, the Court concluded, instead, that "[t]he statute does not in terms prohibit a second marriage in another state and it should not be extended by construction." Thus, even though New York statutes declared marriages after divorce for adultery to be "absolutely void" if entered into before the death of the first spouse, the Court concluded there was no "intent so to impress the citizen with the prohibition as to make an act, which is innocent and valid where performed, an offense when he returns to this State, and himself a criminal for performing it." Thus, the Court concluded the child was legitimate and entitled to inherit from her father.

Following this precedent, in *Holland v. Holland*, the court considered whether a marriage in Oregon by New York residents who were underage to marry in New York could be annulled in New York. The court stated the general rule as being one that honors marriages if valid where celebrated, "unless contrary to the prohibition of natural law or the express prohibition of a statute of the state of which the parties were citizens at the time of their marriage and in which the marriage is questioned." Additionally, the New York Court of Appeals, in the case of *In re May's Estate*, stated that "in the absence of a statute expressly regulating within the domiciliary State marriages solemnized abroad," and except for polygamous or incestuous marriages, a marriage valid where celebrated will be honored in New York. Even after stating the exception for incestuous marriages, the Court recognized a marriage in Rhode Island between an uncle and a niece, both of whom were New York residents. Although the New York statutes declared incestuous marriages to be void and imposed criminal penalties on violators, the Court held that "the statute does not by express terms regulate a marriage solemnized in another State whereas in our present case, the marriage was concededly legal."

Since no New York statute prevented it from recognizing the civil union before it, the incident of marriage is not provided by the state (except by recognizing that the surviving spouse has standing to bring the suit), but instead is provided by a private enterprise in terms of damages awarded for the wrongful death. *Id.* at 581-82.

53 Id. at 35.
54 Id. at 38.
56 Id. at 807.
57 114 N.E.2d 4, 6 (N.Y. 1953).
58 Id. at 6.
Langan court next considered the purposes behind Vermont’s civil unions statute and determined that "the civil union is indistinguishable from marriage, notwithstanding that the Vermont legislature withheld the title of marriage from application to the union." Thus, John Langan should be recognized as Neal Spicehandler’s spouse and would be entitled to recover in a wrongful death action in Vermont. The only remaining question facing the court was whether to recognize Langan as Spicehandler’s spouse in New York, and the court used the same analysis that it would use in deciding whether to recognize a spouse in a sister state’s common law marriage.

The Court turned to the legislative purpose of New York's wrongful death statute and found that the statute was intended to "compensate the pecuniary losses first and foremost of the decedent's immediate family, that is, his or her spouse and children, those most likely to have expected support and to have suffered pecuniary injury." Finding Langan as "[t]he person most likely to have expected support and to have suffered pecuniary injury," the court held that he was a spouse for purposes of the New York statute. Even though the Legislature when writing New York’s wrongful death statute would not have intended to include the same-sex spouses from civil unions within that definition, the court noted that concepts of marriage evolve over time. Finding that spouse is a gender neutral term, the court looked at the intended meaning of that term in determining that Langan should be viewed as a spouse within the meaning of the wrongful death statute. Even more importantly, the court recognized that excluding Langan from the remedy offered by the wrongful death statute would be based on little more than unconstitutional discrimination.

Spouse is a gender neutral word, it applies to a man or a woman, and is applied to plaintiff under the Vermont civil union. As the [wrongful death statute] is construed to apply to a common law couple who have not been joined by a civil ceremony and may separate at will, it is impossible to justify, under equal protection principles, withholding the same recognition from a union which meets all the requirements of a marriage in New York but for the sexual orientation of its partners. To withhold recognition from one joined under the Vermont statute on the grounds that it is not a marriage, when it requires all the same formalities as New York, and at the same time to extend recognition to a common law 'marriage' of a sister state, does not withhold benefits equally from homosexuals and heterosexuals.

2. West Virginia

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62 Id. at 418.
63 Id. at 419.
64 Id. The Court went on to note that among those spouses who were disqualified from being recognized as a surviving spouse included those whose "marriage was void as incestuous . . . bigamous . . . or a prohibited remarriage," not a marriage by a same-sex couple. Id. citing New York stat. § 5-1.2.
65 Id. at 420.
66 Id. at 420-22.
M.G. and S.G. entered into a civil union on July 3, 2000 in Bennington, Vermont. M.G. sought a dissolution based on irreconcilable differences on July 29, 2002 in the Family Court of Marion County, West Virginia. The parties had resolved all issues concerning division of property and had no children. Thus, the only issue before the court was "whether or not petitioner and respondent should be granted a divorce or a dissolution of the civil union. . ." The Court referred to title 15, § 1201(3) of the Vermont Statutes, which it interpreted as meaning that "two eligible persons have established a relationship pursuant to this chapter and may receive the benefits and protections and be subject to the responsibilities of spouses." The court also noted that, under Vermont law, parties to a civil union must be members of the same sex while parties to a marriage must be one woman and one man.

Interestingly, the Court determined that West Virginia's statute that purports to refuse recognition of marriages between persons of the same sex did not apply to the case. West Virginia Code § 48-2-603 states:

A 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 the other state, territory, possession, or tribe, or a right or claim arising from such a relationship, shall not be given effect by this state. Despite finding that a civil union gave the parties the "benefits and protections" and "responsibilities of spouses," the court held that "Vermont law does not define a Civil Union as a marriage" and thus, section 48-2-603 did not apply to this action. The court reached this conclusion despite language in the statute which makes it applicable to "a relationship between persons of the same sex that is treated as a marriage...or a right or claim arising from such a relationship. . ." Given the language of § 48-2-603, the Court might have determined that a civil union fell within that section because Vermont law treats civil unions as the same as marriages. It could have then followed the lead of the Connecticut and Texas courts and denied M.G. and S.G. the legal assistance they were seeking to dissolve their relationship legally.

Instead, the court was clear that it should not deny the parties the relief they were seeking.

67 In re Marriage of M.G. and S.G., No. 02-D-292 (Fam. Ct. W.V. 2003)(unpublished decision on file with author)(Because this decision is unpublished and has not received the media attention of the Texas and Iowa lower court decisions, for privacy reasons, I am using the women's initials only, even though the court opinion includes their full names.)

68 Id. at 2.

69 Id.


71 None of the so-called "Defense of Marriage Acts" have been challenged in court as unconstitutional. Until their constitutionality is upheld, I will refer to them in this manner.


73 In re Marriage of M.G. and S.G. at 2.

74 Id.
seeking. It found that "[t]he parties are citizens of West Virginia in need of a judicial remedy to dissolve a legal relationship created by the laws of another state."\textsuperscript{75} Because West Virginia citizens needed the assistance of their state court, the Court declined to use \textsection{} 48-2-603 as a way to deny them that assistance. Unlike the courts of Connecticut and Texas that refused to provide assistance to their own citizens who were seeking legal dissolution of their civil unions, this West Virginia Family court chose to provide the parties with a judgment ending their civil union. The court ordered that the civil union be dissolved for irreconcilable differences, and that the parties have "no further legal responsibility or relationship with each other."\textsuperscript{76}

The actions of this family court judge were similar to those of several other West Virginia courts. In \textit{State v. Austin}, the West Virginia Supreme Court upheld the under-age marriage of a woman in Maryland against a charge that the husband had contributed to the delinquency of a minor.\textsuperscript{77} The Court specifically noted that neither party to the marriage was seeking to annul the marriage, that they were both happily married, and that the wife had not instigated the charge against her husband.\textsuperscript{78} Despite violating West Virginia's evasion statute, the Court upheld the Maryland marriage, noting that marriages valid in another state will generally be recognized as valid in West Virginia.\textsuperscript{79} Although the marriage was subject to annulment, it was valid and entitled to be fostered and encouraged like all other marriages until, and unless, it was annulled.\textsuperscript{80}

In \textit{Spradlin v. State Compensation Commissioner}, the Supreme Court also recognized a marriage, celebrated in Kentucky, that was claimed to be bigamous because the husband supposedly had been previously married and not divorced.\textsuperscript{81} Finding that the evidence failed to establish any prior marriage of the husband, the Court noted that the presumption that a "lawfully solemnized or consummated" marriage exists is "one of the strongest presumptions of the law, regardless of whether it was common-law or ceremonial, regularly or irregularly celebrated, or proven directly or circumstantially."\textsuperscript{82} Thus, the wife was entitled to receive worker's compensation benefits upon her husband's death.\textsuperscript{83}

The West Virginia Supreme Court also upheld the validity of a common law marriage created in the District of Columbia, even though West Virginia law did not recognize common

\textsuperscript{75} \textit{In re marriage of Gorman and Gump, supra} note X, at 2.
\textsuperscript{76} \textit{Id.} at 2.
\textsuperscript{77} 234 S.E.2d 657 (W.Va. 1977).
\textsuperscript{78} \textit{Id.} at 662.
\textsuperscript{79} \textit{Id.} at 662-63.
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} 113 S.E.2d 832 (W. Va. 1960).
\textsuperscript{82} \textit{Id.} at 835.
\textsuperscript{83} \textit{Id.} at 835-36. It is important to note that the Court considered, but did not decide, whether it should apply Kentucky law, which would declare a subsequent bigamous marriage to be void, or West Virginia case law, which would find such a marriage only voidable until judicially declared a nullity. \textit{Id.} at 834-35, citing \textit{Sledd v. State Compensation Commissioner}, 163 S.E. 12 , 13 (W.V.1932).
law marriage. Applying D.C. law, the Court found that the parties had validly entered into a common law marriage during the six years they lived in the District, despite living for twenty-four years in Virginia which also did not recognize common law marriages.

These cases show that West Virginia courts have been willing to honor the relationships that their citizens have entered, and provide the assistance those citizens needed from their courts. Similarly, the West Virginia court dissolved the civil union of these two women because they were "in need of a judicial remedy."

3. Iowa

In another case that has drawn significant media attention, the Iowa District Court for Woodbury County, Iowa, granted a dissolution to KJB and JSP on November 14, 2003. According to the petition for dissolution, the two women had "married" in Bolton, Vermont, on March 25, 2002; the marital relationship had broken down "to the extent that the legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved"; and they were seeking dissolution of their relationship with property and debts to be equally divided between the two.

With little fanfare, District Court Judge Jeffrey A. Neary granted the dissolution of marriage, finding that their "Stipulation in Dissolution of Marriage" was duly signed by the parties and proper, and making its provisions part of the Decree dissolving the women's "marriage." Nowhere did the Court indicate that it was dissolving a Vermont civil union (as opposed to a Vermont marriage) and nowhere did the Court indicate any concern about subject matter jurisdiction or contrary Iowa statutes. In fact, in media stories after his decision, Judge Neary was quoted as saying that he signed the divorce agreement "without realizing the couple who wished to break up were both women." After noticing the two women's names on the petition and discussing the matter with the lawyer for one of the women, the Judge decided to allow the divorce to stand. "We can't ignore it from a legal perspective," he said. "We have to figure out how to deal with it. If people have disputes, and they otherwise live here, then they should have access to the judicial system."

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84 *In re Foster*, 376 S.E.2d 144 (W.V. 1988).
85 *Id.* at 147.
87 *In re the Marriage of KJB and JSP*, Equity No. CDCD 119660 (Woodbury County District Court, 11/14/02)(unpublished opinion on file with author)(I have used initials to protect the parties' privacy.)
88 Petition for Dissolution, pgs 1-2, filed with the court on August 1, 2003 (unpublished court papers on file with the author). The parties referred to themselves as being "married" and to their "marital" relationship having been irretrievably broken down, even though they did not legally marry but rather entered into a Vermont civil union.
90 *Id.*
But others were not as understanding and tolerant as Judge Neary. After Neary's decision was reported by the media, four State Representatives, two State Senators, one Congressman, one private citizen, and one church challenged his ruling in the Iowa Supreme Court.91 The basis for their petition was that Iowa statute section 595.2(1) states that "[o]nly a marriage between a male and a female is valid."92 Thus, Judge Neary lacked the legal authority to acknowledge a Vermont civil union as a marriage and to dissolve this civil union under chapter 598 of the Iowa Statutes which controls divorce.93 They conclude that the Judge "usurped lawmaking powers designated to the legislature by redefining 'marriage.'"

Among the grievances that flow from this act, the Petition states that, (1) as taxpayers, they have been injured by the court opening up a new class of litigants outside those who are provided for under state law requiring an expenditure of judicial resources; (2) as married people, they are interested in promoting marriage as a legal union that confers on the legally married certain rights and privileges not granted others; and (3) as members of the legislature, they were active in restricting marriage to opposite-sex couples only.94 They ask the Court to annul the District Court's ruling "in order to avoid injustice which will result unless such relief is granted."95

In the amazingly public struggle over these women's private relationship, Judge Neary then issued a revised opinion following the petition for certiorari. In a two-page ruling, he said "that he had no jurisdiction to dissolve a marriage defined by state law, but that he could terminate the civil union that joined the women."96 He determined that the parties' civil union no longer existed, the parties "are free of any obligations incident thereto," and that both were declared to be "single individuals with all the rights of an unmarried individual, including but not limited to, the right to marry."97 When he originally granted a divorce to the women, Judge

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92 Id. at 2, citing Iowa Code § 595.2(1); but see, Andrea L. Clausen, Note: Marriage of Same-Sex Couples in Iowa: Iowa Statute 595.2 is Not Constitutional under the Iowa Constitution Article I, §§ 1, 6, and 9, 6 J. Gender Race & Just. 451 (2002).
93 Id. The petitioners also allege that the two women were not married as indicated in their petition for dissolution, because Vt. Stat. Ann. tit. 15, § 1201(4) defines marriage as "the legally recognized union of one man and one woman," and Vt. Stat. Ann. tit. 15, § 1202(2) requires that the parties of a civil union "be of the same sex and therefore excluded from the marriage laws of this state." Id.
94 Id. at 3.
95 Id. at 6.
96 Frank Santiago, Judge revises his ruling on lesbians’ divorce, Des Moines Register, December 31, 2003, at 3B.
97 Id. Unfortunately, Judge Neary seemed to ignore that the uproar created by his earlier ruling was based, specifically, on the fact that these two women are legally prevented from marrying in Iowa. Unlike other unmarried individuals, those who wish to enter into a same-sex marriage are denied the right to marry.
Neary noted "[w]e can't turn people away from our court system and say we can't resolve your disputes. . . . I clearly look at this as a dispute between parties that in some way I'm going to have to solve."98

Unlike the petitioners seeking to intervene in the case, it is clear that Judge Neary recognized the importance of helping Iowa citizens who were seeking dissolution of a legal relationship that no longer worked for the parties. While he did not cite Iowa precedent, it seems that he was providing the same type of assistance to this couple as the Iowa Supreme Court has applied when honoring out-of-state marriages in the past.

In *Boehm v. Rohlf*, the Court considered whether the marriage of two Wisconsin residents (one aged 19, one aged 14) in Minnesota was valid in Iowa.99 The question before the Court was whether Harry Rohlf, the husband, had attained his majority (then 21) by marrying Ruth Dutter in Minnesota, and thus would have inherited from his decedent uncle. The Court noted that Wisconsin law, which is where the couple was domiciled at the time of the marriage, prevented marriage by females under 15 and also prevented Wisconsin residents from leaving the state to contract a marriage that would have been prohibited under Wisconsin law by also making those out-of-state marriages null and void in Wisconsin.100

Finding that the marriage was voidable, but not void, the Court concluded that it was valid under Minnesota law, where it was celebrated, and "a marriage valid where made is valid everywhere."101 Noting that had the husband not died and the parties remained marriage for one year, the marriage would no long be voidable.102 The Court focused on the policy reasons behind permitting underage spouses to have their marriages honored, noting that "it is not the policy of the law to impose upon them and especially their innocent offspring, the distressing penalties that would result if the marriage was held to be absolutely void, . . . ."103

4. Vermont/Virginia

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98 *Id*. As Daniel Bray, chair of the Iowa State Bar Association's Family Law section, stated: "[A]ll the two women 'wanted was a legal remedy.' . . . And Judge Neary is clearly within what the law would allow." *Id.*

99 276 N.W.2d 105 (Iowa 1936).

100 *Id.* at 107-108. The Court cited Wis. Stat. § 245.02 (underage marriage) and Wis. Stat. § 245.04, which states: "If any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting marriage under the laws of this state shall go into another state or country and there contract a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state with the same effect as though such prohibited marriages had been entered into in this state." Wisconsin was one of only a handful of states to adopt the Uniform Marriage Evasion Act. See *Cox, If We Marry*, supra note 18, at 1074.

101 276 N.W.2d at 108, noting that "some exceptions" exist to this general rule.

102 *Id.*

103 *Id.*
Many of us who are interested in interstate recognition of same-sex couples' marriages, civil unions, or domestic partnerships have been focused on the recent custody and visitation case in Vermont and Virginia. In that case, Lisa, the biological mother of a daughter, filed an action for dissolution of her Vermont civil union on November 24, 2003. Lisa and her partner, Janet, had entered into a civil union in Vermont on December 19, 2000 while they were living in Virginia. They later decided to have a child and Lisa was impregnated using the sperm of an anonymous sperm donor. Their daughter was born on April 16, 2002, in Virginia. The couple afterwards decided to move to Vermont because they believed Virginia was an inhospitable place to raise their child, and they moved to Vermont in August 2002.

Lisa filed for dissolution after living in Vermont for more than 16 months. She filed the initial papers in the Rutland County, Vermont Family Court, asking for a dissolution of the civil union she had entered into with Janets, and noting that their daughter was "the biological or adoptive children of said civil union."104 She then asked "that the Court award the plaintiff legal rights and responsibilities for the minor children" and "physical rights and responsibilities of the minor children" and asking "that the Court award the defendant suitable parent/child contact (supervised)."105

The Rutland County Court issued a Temporary Custody Order on June 17, 2004, allocating parental rights and responsibilities between Lisa and Janet. Lisa was "awarded temporary legal and physical responsibility for the minor child of the parties."106 Janet was awarded "parent-child contact" with their child of 2 weekends in June, 2004 in Virginia; 1 week in July, 2004 in Virginia; and the third full week of every month starting in August, 2004 in Vermont.107 Each party was also awarded telephone contact with their daughter once per day while she was in the other party's custody.108

Lisa decided that she disliked the decision of the Vermont court, and filed an action in Frederick County, Virginia, Circuit Court to determine the parentage of their daughter. The Frederick County court asserted jurisdiction over the case because the child had been living in Virginia for more than six months prior to the date of filing. The Court found that Lisa was the biological parent of their daughter, that she had sole "legal rights, privileges, and obligations as parent" for their daughter, and that Janet had no claim of parentage or visitation over their

104"Summons, Complaint for Civil Union Dissolution, Notice of Appearance and Affidavit of Child Custody," filed by Plaintiff, Lisa Miller-Jenkins, naming Janet Miller-Jenkins as defendant, on November 24, 2003 in the Family Court of Rutland County, Vermont, at pg 1. The Complaint noted that Lisa lived in Winchester, Virginia, and that Janet lived in Fair Haven, Vermont, and had lived in Vermont continuously since August 5, 2002. Id. Copy on file with author.
105Id. at pg 2.
107Id. at pgs 1-2.
108Id. at pg 3.
109Final Order of Parentage, October 15, 2004, Judge John R. Prosser, Circuit Court,
On August 13, 2004, Judge Prosser had sent a letter to Judge Cohen, indicating that Lisa had filed a petition for parentage, and ordering that the child not be removed from Virginia and that the visitation, ordered by Judge Cohen, would be continued until after Judge Prosser ruled on the matter.110

After Judge Prosser's order was entered, Janet brought a contempt action against Lisa for her failure to abide by the Vermont Court's temporary order dated June 17, 2004. Judge Cohen found that "Lisa has wilfully refused to comply with this court's order regarding visitation since mid-June, solely because she does not like it."111 The Court also indicated that Lisa disagreed "with this court's decisions that she waived her right to challenge Janet's status as a parent, and that she has no viable legal challenge to Janet's status as a parent under Vermont law anyway."112

Since that time, an interlocutory appeal was taken from Judge Prosser's order and that appeal has not been decided by the Virginia courts.113 In the interlocutory appeal certification, Judge Prosser ruled that Virginia's "Marriage Affirmation Act," Va. Code § 20-45.3, controlled the case.114 That statute, which took effect on July 1, 2004, the same day Lisa filed her suit in Frederick County Court, states:

A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.115

Judge Prosser then concluded that Janet's claim of parentage under Vermont law was based on her civil union with Lisa, that the civil union was null and void under Virginia law, and therefore
the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) in Virginia, VA Code § 20-146.1, did not recognize her as a "person acting as a parent" who "claims a right to legal custody under the laws of this Commonwealth."116 Thus, neither the UCCJEA nor the Parental Kidnapping Prevent Act (PKPA), 28 USC § 1738A, applied to the case.117

The question that interests us today is whether Virginia had jurisdiction over Lisa’s petition for parentage. Lisa is the person who filed the dissolution petition in Vermont. Lisa is the person who indicated in that petition that the court should award "parent-child contact" to Janet. Lisa is the person who involved Janet in the life of their child during their civil union. But then, when, as the Vermont court noted, "she received a temporary order she did not like, she not only refused to comply with it, but she actually initiated a separate action in a Virginia court, asking that court to disregard the fact that she had already initiated an action involving the same issues... in Vermont."118

This case is a perfect example of why an "incidents of marriage" analysis is appropriate in recognition of civil union cases. Here, the findings and purposes of the PKPA, as explicitly declared by Congress, are to recognize that "the laws and practices [under the laws, and in the courts of the different States]... are often inconsistent and conflicting," that parties involved in conflicts over child custody and visitation often disregard court orders and "obtain...conflicting orders by the courts of various jurisdictions."119 It also recognizes "the failure of the courts of such jurisdictions to give full faith and credit to the judicial proceedings of the other jurisdictions, and [cause] harm to the welfare of children and their parents and other custodians."120 Thus, Congress established "national standards under which the courts of such jurisdictions will determine their jurisdiction" and "the effect to be given by each such jurisdiction to such decisions by the courts of other such jurisdictions."121 Congress stated that the purpose of the PKPA was to "promote cooperation between State Courts" and to "discourage continuing interstate controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child..."122

Under the PKPA, a contestant, such as Janet, is any person, "including a parent, who claims a right to custody or visitation of a child."123 Clearly, Janet qualifies, since under the Vermont law controlling her civil union with Lisa and under the law of dissolution for that civil union, Janet was presumed to be a parent of the child born of the civil union. Additionally, Vermont qualified as their daughter's "home state" under the Act because that was "the State in which, immediately preceding the time involved, the child lived with [her] parents... for at least six consecutive months..."124 In deciding whether Vermont or Virginia rightly had jurisdiction

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116 Order and Certification for Interlocutory Appeal, at 2.
117 Id. at 2.
118 Order of Contempt, dated September 2, 2004, at 4-5.
119 42 USC 1305, sec. 7(a)(2) and (3) (1980).
120 Id. at sec. 7(a)(4).
121 Id. at sec. 7(b).
122 Id. at sec. 7(c)(1) and (4).
123 PKPA, 28 USC 1738A(b)(2).
to issue the custody order in this case, the PKPA indicates that the court must have jurisdiction under the law of the state (which it did in both cases) and the state "is the home state of the child on the date of the commencement of the proceeding...and a contestant continues to live in such State. . .".

Additionally, "the jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long" as the requirements of subsection c(1) are met (true in this case because the child was a resident of Vermont at the time Lisa filed her petition for dissolution in November 2003) and a contestant continues to live in that state (true in this case because Janet continues to live in Vermont). Additionally, a court may modify that determination only if "the court of the other State no longer has jurisdiction" (not true for Virginia in this case because Vermont still has jurisdiction) and "A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court in another State" so long as that other state properly had jurisdiction (thus, Virginia could not exercise jurisdiction because Vermont already asserted jurisdiction in the matter, at Lisa's request, and Vermont meets the jurisdiction requirements of the statute.)

Under the PKPA, "where home-state jurisdiction is available, it has priority over any other jurisdictional basis. Additionally, "the state that entered the most recent order in accordance with the PKPA has exclusive continuing-modification jurisdiction as long as the child or one party continues to reside in that state and that state has jurisdiction under its own law." Both requirements are met in this case by Vermont. "Under the PKPA, a state may not modify a custody judgment of another state unless the state that made the initial custody determination no longer has jurisdiction or declines to exercise it." Judge Prosser from Virginia claimed that Virginia's "Marriage Affirmation Act" did not recognize Janet as a valid "contestant" under the PKPA because her status as a contestant was granted by Vermont's civil union statutes which Virginia claims to be null and void in Virginia. But Janet is not seeking recognition of her parental status in Virginia; she is seeking recognition of the custody order by the Vermont court in a proceeding begun by Lisa while both parents and their child were living in Vermont.

The Uniform Child Custody Jurisdiction and Enforcement Act "was formulated to clarify ambiguities and reconcile conflicting interpretations regarding the circumstances under which a state has jurisdiction to make or modify custody or visitation orders." The "stated objective"

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124PKPA, 28 USC 1738A(b)(4).
125PKPA, 28 USC 1738A(c)(1) and (2)(A)
126PKPA, 28 USC 1738A(d).
127PKPA, 28 USC 1738A(g).
129Id. at 24.
130Id., citing 28 USC § 1738A(d).
131Hogan, supra note , at 24-25.
of the UCCJEA is to reconcile the UCCJA with the PKPA "by providing clearer standards for which states can exercise original jurisdiction over a child custody determination."\textsuperscript{132} Like the PKPA, the UCCJEA focuses solely on which state courts should have jurisdiction in a wide range of proceedings, including divorce (such as the dissolution order Lisa filed in the Vermont court) and paternity (such as the dissolution order filed by Lisa recognizing Janet's right to "parent-child contact."\textsuperscript{133} Also like the PKPA, the UCCJEA gives the "home state" priority in making initial orders in these proceedings, and it defines the home state as "the state in which the child has lived with a parent or a person acting as a parent for at least six consecutive months immediately before commencement of a custody proceeding."\textsuperscript{134}

A keystone of the UCCJEA is that the original-decree state retains exclusive continuing-jurisdiction to modify its own custody and visitation orders unless and until one of the following events occurs: the child and both parents (or any person acting as a parent) no longer live in the state or the original-decree state decides that it no longer has significant contacts with the case. Note: only the decree state can make this determination; a new state of residence cannot. Thus, relocation of the child and one parent and the establishment of a new home state does not entitle the new state to act, nor does it end the exclusive continuing jurisdiction of the original decree state.\textsuperscript{135}

Finally, "[t]he UCCJEA establishes an affirmative duty to enforce the custody and visitation orders of other forums if those orders were entered under factual circumstances that meet the jurisdictional standards of the Act."\textsuperscript{136} The original decree state "is the sole determinant of whether jurisdiction continues" and, if a party seeking custody wants to modify the original decree, that party "must obtain an order from the original decree state stating that it no longer has jurisdiction."\textsuperscript{137}

It is clear in this case that the policy behind the PKPA, which preempts conflicting state law, and the policies behind the UCCJEA, which Virginia has adopted, is to prevent parents, such as Lisa, from doing what she has attempted to do in this case. She filed a case in Vermont recognizing her partner's right to parent-child contact with the daughter born during their civil union, and when she did not receive the result she desired, she took her daughter, moved to Virginia, and sought a new order, ignoring Vermont's initial order in the case.

\textsuperscript{132}Franki J. Hargrave, \textit{Practitioner's Guide to the Uniform Child Custody Jurisdiction and Enforcement Act}, 44 Advocate (Idaho) 8, 8 (June 2001), citing Uniform Child Custody Jurisdiction and Enforcement Act (1997), National Conference of Commissioners on Uniform State Laws, pg 6, Prefatory Note; \textit{See also}, Irene Casson Gilbert, \textit{Does the Court Have Jurisdiction Over Custody?}, 43 Orange County Lawyer 54, 55 (Sept. 2001) noting that the UCCJEA gives the home state "absolute priority" (under the UCCJA it was only a "preference") and making it compatible with the PKPA which also gives the home state "absolute priority." \textit{Id.}

\textsuperscript{133}Hogan, \textit{supra} note, at 25.

\textsuperscript{134}\textit{Id.} at 25.

\textsuperscript{135}\textit{Id.} at 26.

\textsuperscript{136}\textit{Id.} at 26.

\textsuperscript{137}Hargrave, \textit{supra} note, at 9, citing UCCJEA (1997), pg. 27, Comment to Section 201.
All that purports to permit Virginia to ignore the Vermont court's order is the "Marriage Affirmation Act" which declares civil unions to be null and void in Virginia. But no one is seeking recognition of the civil union in Virginia. All that Janet is seeking is recognition of the Vermont court's order, clearly the home state with jurisdiction under both the PKPA and the UCCJEA. That Vermont's law recognizing Janet's claim to be a parent of the daughter born into her civil union is not recognized by Virginia is of little importance.

This is particularly true when an "incidents of marriage" analysis is used because it focuses on the policy behind the incident of marriage at issue in the case, here jurisdiction between parents fighting over custody, rather than on whether Virginia would recognize the women's Vermont civil union for purposes of ongoing cohabitation or other rights in Virginia.

C. Conclusion

In the New York, West Virginia, and Iowa cases, the courts recognized the validity of the Vermont civil union for the specific incident of marriage at issue in the case. None of the cases asked the courts to recognize the civil unions on an ongoing basis because two were petitions for dissolution and one was for wrongful death following the death of one of the civil union partners. Each court correctly recognized the policy behind the incident of marriage at issue in the case, and each court correctly provided its residents with the legal assistance they were entitled to seek from their home state.

In the Vermont case, the Vermont court also appropriately exercised jurisdiction over the dissolution and child custody/visitation action brought by one member of a civil union while all three family members were living in Vermont. The error in the case occurred when the Virginia court, not having initial decree jurisdiction in the case, modified the Vermont court's order granting visitation to the non-biological parent, in violation of both the PKPA and the UCCJEA. The court mistakenly determined that the "Marriage Affirmation Act" in Virginia, by declaring rights flowing from civil unions to be void in Virginia, controlled the case. It did not and the court should have left jurisdiction with the court in Vermont.