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Katharine J. Westfall

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VOIDED VOWS: ANNULMENT AS A FULL FAITH AND CREDIT SOLUTION TO THE SAME-SEX DIVORCE CONUNDRUM

Katharine J. Westfall*

Divorces are made in heaven.¹

INTRODUCTION

For same-sex couples in the United States, marriage was an absolute fantasy until 2003, when Massachusetts became the first state to legalize these unions.² In the intervening decade, eighteen additional states and the District of Columbia have validated marriages between two individuals of the same gender.³ However, as the long-held hope for marriage becomes a reality, for many gay spouses, divorce is the new pipe dream.⁴ Legal theorists have put forth several possible solutions to this marriage trap, but nearly all of these proposed fixes would require significant time and the willingness of individual states to substantially revise their domestic relations statutes.⁵ This Note explores an overlooked, but exceedingly feasible, alternative to traditional divorce for “wedlocked”⁶ same-sex couples: annulment.

* J.D. Candidate, 2015, William and Mary School of Law; B.A., Princeton University, 2009. I would like to thank the Volume 23 editorial staff for selecting and preparing this Note for publication, and my family and friends for their constant encouragement.

¹ OSCAR WILDE, *The Importance of Being Earnest*, in *THE IMPORTANCE OF BEING EARNEST AND OTHER PLAYS* 247, 255 (Oxford Univ. Press 2008) (1898).

² On November 18, 2003, following the ruling in *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), Massachusetts became the first United States jurisdiction to recognize the legal right of gay couples to marry. The new law took effect 180 days later. See Kathleen Burge, *SJC: Gay Marriage Legal in Mass.*, BOSTON GLOBE (Nov. 18, 2003), http://www.boston.com/news/local/massachusetts/articles/2003/11/18/sjc_gay_marriage_legal_in_mass/.

³ As of February 2014, seventeen states and the District of Columbia have legalized same-sex marriage. See *Defining Marriage: State Defense of Marriage Laws and Same-Sex Marriage*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 7, 2014), <http://www.ncsl.org/research/human-services/same-sex-marriage-overview.aspx#1>.

⁴ See Nick Tarasen, Comment, *Untangling the Knot: Finding a Forum for Same-Sex Divorces in the State of Celebration*, 78 U. CHI. L. REV. 1585, 1585–86 (2011).

⁵ See Mary Patricia Byrn & Morgan L. Holcomb, *Wedlocked*, 67 U. MIAMI L. REV. 1, 6 (2012).

⁶ *Id.* at 2–3 (“Same-sex couples residing in numerous DOMA states have been told by courts that because their state DoMA renders their marriages void, they cannot terminate their legal marriages. In a word, these couples are wedlocked.”).

Consider this common scenario: A couple meets in Massachusetts and marries. Two years later, a job transfer relocates them to Tennessee, where they buy a home and start a family. After several anniversaries, the relationship deteriorates, they separate, file for a no-fault divorce in Tennessee court, and dissolve their marriage. This is the generic divorce story where the parties are a husband and wife. When the parties are a wife and wife, or a husband and husband, however, such a straightforward process is virtually impossible. For spouses of the same gender living in a state that does not recognize the legality of their union, such an attempt at divorce meets significant obstacles, frequently barring the dissolution and forcing the couple to remain in an unwanted marriage.

The gradual legalization of same-sex marriage across this country has begun to expand the rights available to a previously marginalized group of people. Yet the erratic growth of these new laws has spurred unanticipated difficulties when confronted with inconsistency across state lines and the federalism that validates such inconsistency. The result is a conversation that dampens the success of marriage law amendments, while raising serious issues of how to balance states' rights with individual privileges in an evolving America. The dominant question is how a married couple may dissolve their marriage when the laws of their home state refuse to acknowledge the legal formation of the underlying union.

Current data suggests that between 40% and 50% of first marriages in the United States end in divorce.⁷ There is no reason to think that homosexual marriages, despite their long, hard fight for existence, will meet a different statistical fate. A 2011 report by the University of California–Los Angeles's Williams Institute estimated that 1.1% of same-sex marriages ended annually, compared with 2% of heterosexual marriages.⁸ As a result, many state courts will find themselves at the forefront of a less attractive and more depressing legal battle: the fight for same-sex divorce.⁹ Two related theories suggest the advent of a gay "divorce boom"¹⁰: (1) More same-sex couples than ever are married, and thus there are simply more marriages

⁷ See NAT'L MARRIAGE PROJECT, *THE STATE OF OUR UNIONS: MARRIAGE IN AMERICA* 2012 1 (2012). A parallel statistic for same-sex divorce is not available. Most data on divorce is derived from the U.S. Census, which only began recording same-sex marriages in its latest survey (2010). However for an estimated *annual* rate of divorce among same-sex couples, see M.V. LEE BADGETT & JODY L. HERMAN, *THE WILLIAMS INSTITUTE PATTERNS OF RELATIONSHIP RECOGNITION BY SAME-SEX COUPLES IN THE UNITED STATES* 1, 18 (2011).

⁸ BADGETT, *supra* note 7, at 19. When this dissolution rate was calculated, same-sex couples could marry in only six states and the District of Columbia, compared with nineteen in 2014. *See id.* at 2.

⁹ As Jesse Green wrote in a feature piece for *New York Magazine*, "How do you process the undoing of a bond that until a moment ago in history you were not allowed to form?" Jesse Green, *From "I Do" to "I'm Done"; With Newfound Rights, Newfound Fears. The Peculiar Mechanics—and Heartbreak—of Gay Divorce*, N.Y. MAG. (Feb. 24, 2013), <http://nymag.com/news/features/gay-divorce-2013-3/>.

¹⁰ *Id.*

to dissolve;¹¹ and (2) once the “backlog of long-term and presumably more stable gay couples have married, [they will leave] the field to the young and impulsive.”¹²

The problem is actually achieving the divorce. States that do not recognize same-sex marriages are also reluctant to dissolve them out of a fear the fact-finding involved in a suit for divorce will require the court to acknowledge the existence of a valid marriage.¹³ Moreover these states express concern that suits for divorce will provide same-sex marriage advocates with a roundabout means of cornering a state into rewriting its marriage laws.¹⁴

A few solutions have been suggested to help same-sex couples navigate the rough waters of divorce. The most basic solution would be for a couple, or at least one spouse, to relocate to a state that recognizes same-sex marriage for purposes of meeting the divorce residency prerequisite,¹⁵ and then to file for divorce in that state. However, such mobility is not always feasible; moving could take a person away from a job and family, or cause an unaffordable financial drain.

A more practicable version of the latter solution is for states that perform same-sex marriages to also provide an accessible forum in their courts for non-resident gay couples married in that jurisdiction to also divorce there.¹⁶ California,¹⁷ Vermont,¹⁸ Delaware,¹⁹ Minnesota,²⁰ and the District of Columbia²¹ have revised their relevant

¹¹ *Id.* (noting that the rate of marriage among same-sex couples in states that permit it is quickly rising to the rate of marriage among heterosexual couples in those states).

¹² *Id.* According to an annual report by the National Marriage Project, the likelihood of filing for divorce decreases by 24% in couples who marry after the age of twenty-five. *See* NAT'L MARRIAGE PROJECT, *supra* note 7, at 74.

¹³ Discussed *infra* Part II.B.

¹⁴ *See* Dahlia Lithwick & Sonja West, *Texas Hold 'Em*, SLATE (Sept. 11, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/09/texas_and_gay_marriage_will_texas_refusal_to_grant_divorces_to_same_sex.html (“Texas, meanwhile, takes the position that being forced to recognize same-sex divorce is no different from being forced to accept gay marriage.”).

¹⁵ Forty-six states and the District of Columbia have laws requiring that a petitioner for divorce have resided in the state where he petitions. The residency requirements range anywhere from six weeks to two years depending on jurisdiction. *See* 45(4)FAM. L. Q. 500, 500–05 (2012), *available at* http://www.americanbar.org/content/dam/aba/publications/family_law_quarterly/vol45/4win12_chart4_divorce.authcheckdam.pdf.

¹⁶ *See* Tarasen, *supra* note 4, at 1587.

¹⁷ Under normal circumstances, when a couple seeks a divorce in California, at least one party to the marriage must have lived in the state for at least six months prior to filing. *See* CAL. FAM. CODE § 2320(a) (West 2012). An updated provision allows same-sex couples living outside the state to petition for divorce provided that their marriage was solemnized in California and that neither party lives in a jurisdiction that could otherwise dissolve the marriage. *See* CAL. FAM. CODE § 2320(b)(1)–(2) (West 2012).

¹⁸ VT. STAT. ANN. tit. 15, § 592(b) (2011).

¹⁹ DEL. CODE ANN. tit. 13, § 1504 (2013).

²⁰ MINN. STAT. § 518.07(2) (2013).

²¹ D.C. CODE § 16-902(b) (2013).

statutes to create such limited jurisdiction, but there are no exemptions yet in the remaining thirteen states. These laws would permit parties to a same-sex divorce to travel to the state where they were wed only for the purpose of obtaining the divorce judgment.²² While such a theory is novel and exciting, it continues to present some unresolved issues as to personal jurisdiction.²³

A third proposal abolishes the domicile rule for divorce in favor of a more traditional minimum contacts personal jurisdiction approach.²⁴ Under this theory, a state may obtain jurisdiction over an individual if he takes part in sufficient activities in the state that he could reasonably expect to be called into court there.²⁵ Still the potential remains that some same-sex couples will not even have the necessary minimum contacts in any state willing to adjudge their divorce. For example, their only experience in a same-sex marriage state may have been when they traveled to that state in order to wed under its laws.

This Note takes another stance, attempting to find a compromise between the individual rights of the same-sex couples and the federalist values so important to state identity. Looking to the relevant statutes of states that do not recognize homosexual marriages, and the reasoning of recent cases denying divorce to same-sex couples, this Note suggests that current mini-DOMA laws provide a vehicle for a state to dissolve a same-sex union without acknowledging the marriage's validity, and while still providing access to the rights that arise in a traditional divorce. That vehicle is a traditional annulment, a judgment through which a marriage is voided from the beginning as part of a judicial declaration given interstate recognition under the Constitution's Full Faith and Credit Clause (FF&CC).²⁶

The Note advances in three parts. Part I addresses the interpretation of the FF&CC that inhibits accessibility to same-sex divorce. It explains an exception to the constitutional provision that permits a state to deny recognition to foreign rulings that violate that state's public policy. It then breaks down the obstacles that confront a same-sex couple seeking a divorce in a mini-DOMA²⁷ state, and discusses the legal and private

²² See Tarasen, *supra* note 4, at 1587 (noting that, as of 2011, four states had passed laws of this kind giving their courts limited subject matter jurisdiction to hear such cases).

²³ See *id.* at 1558 (attempting to resolve the personal jurisdiction question and arguing that the domiciliary requirement should not apply to certain same-sex divorces).

²⁴ See, e.g., Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669, 1670 (2011).

²⁵ See *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

²⁶ U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.")

²⁷ The Defense of Marriage Act, discussed *infra* Part I, permits any state to deny legal confirmation to a same-sex marriage solemnized in another state, or to any right or claim derived from the marriage. The term "mini-DOMA" refers to individual state statutes reflecting this federal provision. Margaret Talbot, *Now for the Mini-DOMAS*, NEW YORKER

consequences of failing to dissolve an unwanted, although unrecognized, marriage. Part II explores the procedural similarities and statutory distinctions between divorce and annulment. It addresses possible resistance to annulments among same-sex couples, and then evaluates the pro-annulment message of state court case law on same-sex divorce. Part III discusses non-traditional legal vehicles by which annulled same-sex couples can obtain judicially-enforced rights to custody, support, and property. This final section establishes that, through annulment, same-sex couples can effectively reach the same clean and fair outcome as they would with a divorce proceeding.

I. THE PROBLEM OF FULL FAITH AND CREDIT

The public policy exception to the FF&CC,²⁸ while “not unique to marriage law,”²⁹ has become most controversial in recent years because of its prevalent use in the opposition to same-sex marriage legalization. Under this exception, the separate states are not obligated to recognize marriages solemnized in another state if the union is found to violate public policy.³⁰ The most explicit manifestation of this constitutional concession is the Defense of Marriage Act (DOMA).³¹ While denial of recognition has not presented a problem to heterosexual couples, it has become a topic of controversy for same-sex marriage advocates who question the constitutionality of failing to require full faith and credit for homosexual unions.³²

The other side argues that the distinction is due to the fact that marriage is “not a judgment, but (truly) a ‘ministerial’ act.”³³ Marriage is essentially an agreement between two private parties; while the state must sanction the union to give it legal viability, this certification involves no presentation of evidence, disputed interests, or other characteristics standard to the judicial process.³⁴ The legal status of marriage

(July 2, 2013), <http://www.newyorker.com/online/blogs/comment/2013/07/now-for-the-mini-domas.html>.

²⁸ See, e.g., Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 935 (1998) (“In a situation in which a state would ordinarily apply another forum’s law . . . the public policy doctrine permits the state nonetheless to prefer its own law.”).

²⁹ *Id.* at 934.

³⁰ *Id.* at 922 (“Ordinarily, marriages that are valid where they are celebrated are valid everywhere, for all purposes. There is a longstanding exception to this rule, however, in cases where a marriage violates the strong public policy of the forum in which the question arises.”).

³¹ 1 U.S.C. § 7 (1996), *declared unconstitutional by* United States v. Windsor, 133 S.Ct. 2675 (2013); 28 U.S.C. § 1738C (1996). For a description of this Act, see *infra* notes 38–40 and accompanying text.

³² See, e.g., Koppelman, *supra* note 28, at 974 (“[I]t is doubtful that Congress has the power thus to nullify the self-executing force of the Full Faith and Credit Clause.”).

³³ Jeffrey L. Rensberger, *Same Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 CREIGHTON L. REV. 409, 421 (1998).

³⁴ *Id.* at 421–22.

in this context has been compared to the Supreme Court's finding that the proceedings of administrative agencies are entitled to full faith and credit only if they are "sufficiently judicial in nature."³⁵ Absent "adversariness [or] a neutral decision-maker," the outcome of a legal interaction is not considered a judgment, and is therefore not subject to obligatory inter-state recognition.³⁶ Simply put, the language of the FF&CC mandates full faith and credit only for judicial proceedings, and the law has not defined marriage within that category.³⁷

Since 1942, the United States courts have held that the FF&CC requires a state to enforce a divorce judgment entered by another state, even though that divorce may contradict the enforcing state's public policies.³⁸ The same is not true of marriages. With the enactment of DOMA in 1996, Congress created a marriage exception to the FF&CC, permitting any state to deny recognition to a same-sex marriage, "or a right or claim arising from such relationship," despite the union's validity under the laws of another state.³⁹ The state statutes that replicate this federal law—often called "mini-DOMA" laws—characterize this exception as based in a state's right to promote its own public policy.⁴⁰

With the exception of the unique experience of same-sex couples, marriage traditionally has been obtainable in virtually any state with few to no prerequisites.⁴¹ Divorce laws, on the other hand, tend to contain more stringent conditions. Prior to the institution of no-fault divorce, the petitioning party had the burden of establishing why he or she deserved to have the marriage dissolved.⁴² Furthermore, to this

³⁵ *Id.* at 422 (citing *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966)).

³⁶ *Id.* at 421.

³⁷ *Id.*

³⁸ *See Williams v. North Carolina*, 317 U.S. 287, 303 (1942) (noting that Congress had never expressed a public policy exception to the FF&CC that covered divorce). Prior to 1942, the main precedent on this issue was the 1906 case *Haddock v. Haddock*, 201 U.S. 562 (1906), in which the Supreme Court held that, although a decree of divorce may have been enforceable in the state where it was entered, that did not mandate interstate enforcement under the FF&CC.

³⁹ 28 U.S.C. § 1738C (1996).

⁴⁰ *See, e.g.,* OHIO REV. CODE ANN. § 3101.01 (LexisNexis 2013); *see also infra* notes 67–68 and accompanying text.

⁴¹ *See generally* Judith M. Stinson, *The Right to (Same-Sex) Divorce*, 62 CASE W. RES. L. REV. 447, 449 (2011) ("[M]ost states impose no residency requirement for marriage, but every state requires residency for divorce."); *see also id.* at 449 n.4 (discussing MASS. GEN. LAWS ch. 207, § 19 (2007), which "requir[es] a three-day waiting period to obtain a marriage license but impos[es] no requirement that the parties be Massachusetts residents").

⁴² California passed the first no-fault divorce legislation in 1969 and within the next ten years every other state followed suit. *See generally* Peter Nash Swisher, *Marriage and Some Troubling Issues With No-Fault Divorce*, 17 REGENT U. L. REV. 243, 245–46 (2005). However a majority of states introduced no-fault divorce as a mere alternative to fault-based divorce, meaning that "only a *minority* of states—about fifteen—are 'true' no-fault divorce jurisdictions." *Id.* at 249.

day, divorce statutes contain significant residency requirements.⁴³ These domiciliary obligations create the most significant barrier to divorce for same-sex couples who live outside of the state that solemnized their marriage.⁴⁴ When seemingly the only available option is to relocate long-term to a state that will recognize the marriage for purposes of divorce, for many couples this is really no option at all. As Part II of this Note explains, an annulment allows for marital dissolution without the upheaval of a divorce suit.

A. Effect of the Full Faith and Credit Clause on Same-Sex Divorce

The Supreme Court's 2013 holding in *United States v. Windsor*⁴⁵ found unconstitutional Section 3 of DOMA, which restricted the federal definition of marriage to a relationship between a man and a woman.⁴⁶ However, the Court made no decision as to Section 2, the aforementioned exception clause.⁴⁷ Thus, while the federal government must now recognize same-sex marriages, recognition among the separate states remains varied. This inter-state discrepancy raises substantial issues for same-sex couples who seek to dissolve their unions in states that are unwilling to acknowledge the validity of the marriage.

As of July 2013, twenty-nine states had constitutional amendments restricting marriage to heterosexual unions, and six states had general laws to the same effect.⁴⁸ Nearly all of these statutes go so far as to deny recognition to same-sex marriages legally certified in other jurisdictions.⁴⁹ Same-sex couples living in states that recognize their marriage find divorce relatively simple. For instance, when gay marriage became legal in Rhode Island on August 1, 2013, the state instantly saw its first filings for same-sex divorce.⁵⁰ In contrast, the confusion of couples living in non-recognizing states is cleverly depicted by this train ride story:

⁴³ For example, Virginia law requires that, to maintain a divorce action, at least one of the parties must have been "an actual bona fide resident and domiciliary of [the] Commonwealth for at least six months" prior to the filing of the suit. VA. CODE ANN. § 20-97 (2013); *see also* discussion *supra* note 15.

⁴⁴ *See* Joslin, *supra* note 24, at 1711–12.

⁴⁵ 133 S.Ct. 2675 (2013).

⁴⁶ 1 U.S.C. § 7 (1996).

⁴⁷ 28 U.S.C. § 1738C (1996).

⁴⁸ *See Statewide Marriage Prohibitions*, HUMAN RIGHTS CAMPAIGN (July 2, 2013), http://www.hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/marriage-prohibitions_6-10-2014.pdf.

⁴⁹ *See, e.g.*, ALA. CODE § 30-1-19 (LexisNexis 2013); *see also infra* note 70 and accompanying text.

⁵⁰ *See RI Couples Use New Marriage Law to Get Divorced*, U-T SAN DIEGO (Aug. 2, 2013), <http://www.utsandiego.com/news/2013/aug/02/ri-couples-use-new-marriage-law-to-get-divorced/>.

‘Imagine you’re a same-sex couple married in Washington, D.C., and taking the Amtrak from there to Boston’ . . . ‘You’re married in D.C.; everything’s fine. . . . Then you get to Pennsylvania, which has not been recognizing these out-of-state marriages as anything at all, and not allowing divorces, so while there you are potentially a legal stranger to your spouse. That’s not a good part of your trip. New Jersey recognizes your marriage only as a civil union. Then, phew, you’re in New York and you’re married again; same in Connecticut. . . . Finally, you reach Massachusetts, and you can breathe a sigh of relief: You’re married. And you can divorce. But it’s a very complicated legal ride.’⁵¹

Consider one further consequence of the inter-state deviation: A spouse in a contested divorce opposed to the dissolution may use a state’s public policy against the recognition of same-sex marriage to prevent the petitioning spouse from succeeding in court.⁵² In October 2013, a woman who had been legally married to her same-sex partner under California law, and now resided in Mississippi with her spouse, used this tactic when she asked a Mississippi court to dismiss her wife’s petition for a divorce.⁵³ The petition was fault-based, alleging adultery and cruelty by the contesting spouse.⁵⁴ If the court dismissed the petition on public policy grounds that the marriage never legally existed in Mississippi, the justice system might trap the petitioning spouse in an abusive relationship. This scenario prompts a necessary societal concern about the risk that the inconsistent availability of same-sex divorce may confine individuals to unwanted, sometimes unsafe, domestic situations.

B. The Need for Judicial Dissolution Despite a Domiciliary State’s Refusal to Recognize Same-Sex Marriage

At first glance, officially terminating a same-sex marriage may seem unnecessary when the spouses reside in a jurisdiction that already considers them unmarried. However, the fact that an unrecognized same-sex marriage theoretically does not exist in one state does not preclude its ongoing existence in a more sympathetic jurisdiction.⁵⁵ Weighty concerns therefore arise from leaving a marriage legally intact despite the spouses’ preference to be free of it.

⁵¹ See Green, *supra* note 9 (quoting Susan Sommer, Director of Constitutional Litigation for Lambda Legal).

⁵² See, e.g., *Woman Asks Mississippi Court to Dismiss Same-Sex Divorce Case from California Wedding*, GULF LIVE (Oct. 2, 2013), http://blog.gulflive.com/mississippi-press-news/print.html?entry=/2013/10/woman_asks_mississippi_court_t.html.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See Byrn & Holcomb, *supra* note 5, at 3–4.

Outside the parties' non-recognizing residential state, several issues will surface. Imagine a homosexual couple in New Mexico—where same-sex marriage is not recognized—who have agreed between themselves that their marriage is over, but have not been able to obtain a legal declaration of that decision. Sometime thereafter, one spouse travels to San Francisco for work. The law of California still considers the couple legally married. The traveling spouse is involved in a tragic car accident that leaves him comatose in a California hospital. Despite the privately agreed dissolution and the union's virtual non-existence in the domiciliary state of New Mexico, California's ongoing recognition of the marriage confers certain crucial and controversial rights on the other spouse, such as the decision whether to remove life support.⁵⁶

Perhaps more likely to impact the lives of a former couple is the fact that, if they do not legally dissolve their marriage, neither party will be able to remarry.⁵⁷ In fact if one spouse were to leave the state of domicile and attempt remarriage in a state that allows same-sex unions, that state would almost definitely render any second marriage (and not the first one) void *ab initio* under a statutory ban on polygamy.⁵⁸

Furthermore, the Supreme Court's 2013 holding in *Windsor*⁵⁹ creates difficulties for these couples on a federal scale. Section 3 of DOMA now encompasses same-sex spouses, allowing married gay couples access to the same federal benefits that individuals in heterosexual marriages have always received.⁶⁰ As long as a couple's marriage was performed legally and has not been dissolved by a court, spouses can receive certain federal benefits that they would not receive as single individuals.⁶¹ Without a legal end to the marriage, the spouses will unfairly maintain ongoing privileges based in the marriage, such as federal benefits from shared rights in intellectual property.⁶² Additionally, from a taxpayer standpoint, the idea that the federal government may provide what are primarily financial benefits to a couple that no longer intends to hold itself out as married seems unjust and even wasteful. Same-sex spouses hoping to exit their marital commitment therefore have every reason to seek the most efficient and effective judicial declaration that their legal relationship has terminated.

⁵⁶ See Tarasen, *supra* note 4, at 1586.

⁵⁷ See Byrn & Holcomb, *supra* note 5, at 4.

⁵⁸ See *id.* at 4–5 n.10 (citing *Elia-Warnken v. Elia*, 972 N.E.2d 17 (Mass. 2012)).

⁵⁹ See *United States v. Windsor*, 133 S. Ct. 2675 (2013).

⁶⁰ See generally Adam Liptak, *Supreme Court Bolsters Gay Marriage With Two Major Rulings*, N.Y. TIMES, June 27, 2013, at A1, available at <http://www.nytimes.com/2013/06/27/us/politics/supreme-court-gay-marriage.html>.

⁶¹ *Id.*

⁶² See *Why Civil Unions Are Not Enough*, NATIONAL GAY AND LESBIAN TASK FORCE, http://www.thetaskforce.org/downloads/reports/fact_sheets/WhyCivilUnionsAreNotEnough.pdf.

II. ANNULMENT AS A FULL FAITH AND CREDIT ALTERNATIVE TO SAME-SEX DIVORCE

As discussed above, the law of this country has not perceived marriage as a traditionally judicial act that must be enforced inter-state under the FF&CC.⁶³ Conversely, divorce generally involves “adversariness [or] a neutral decisionmaker with the power to grant or deny relief,” which are “the hallmarks of a judicial proceeding.”⁶⁴ As a result, a judgment of divorce is enforceable across state lines.⁶⁵ Same-sex parties—as well as heterosexual parties—require an official judicial declaration for the purpose of terminating their marriage not only in the state where they reside, but nationwide.⁶⁶

Courts in mini-DOMA states entertaining requests to divorce same-sex couples who were wed in other jurisdictions express the concern that in the course of the proceedings the court will necessarily be required to make a factual finding that the marriage existed, even if solely for the purpose of dissolving it.⁶⁷ These courts likely fear that such a decision will violate the public policy of the state, or inadvertently create new law with regard to that public policy.⁶⁸

The trick to maneuvering this awkward situation is striking a balance between the legal rights of individuals to be freed from an unwanted marriage, and the constitutional rights of the states to maintain their own laws independent of their sister states. Given the current law, the most accessible and efficient solution should focus on statutory provisions for annulment.

An annulment is defined as:

A judicial . . . declaration that a marriage is void. An annulment establishes that the marital status never existed. So annulment and dissolution of marriage (or divorce) are fundamentally different: an annulment renders a marriage void from the beginning, while dissolution of marriage terminates the marriage as of the date of the judgment of dissolution.⁶⁹

The term’s implicit meaning is that a petition to annul a same-sex marriage would not compel a court to recognize the marriage for any purpose whatsoever. Rather, an annulment inherently denies recognition to a marital relationship.

⁶³ See *supra* notes 28–37 and accompanying text; Rensberger, *supra* note 33, at 421.

⁶⁴ See Rensberger, *supra* note 33, at 421.

⁶⁵ See *Williams v. North Carolina*, 317 U.S. 287, 303 (1942).

⁶⁶ See *id.*

⁶⁷ See, e.g., *In re J.B.*, 326 S.W.3d 654, 664 (Tex. App. 2010).

⁶⁸ See, e.g., Lithwick & West, *supra* note 14.

⁶⁹ BLACK’S LAW DICTIONARY 106 (9th ed. 2009).

The statutes of many states provide a natural channel for such practice; the term “void,” which appears in the above definition, is also written front and center (either literally or synonymously) into marriage statutes in the majority of states that explicitly oppose recognition of same-sex unions. For example, Alabama “[will] not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued.”⁷⁰

Not only does an annulment not require a finding on the marriage’s initial legitimacy, but as a judicial declaration it also meets the requirements for interstate recognition under the FF&CC.⁷¹ This is a crucial aspect of its relevance to same-sex couples seeking a universally recognized dissolution. Could interstate enforcement of an annulment implicate public policy concerns? Perhaps, but such a hypothetical seems very unlikely. A state that has legalized same-sex marriage could theoretically choose not to recognize an annulment granted by a state with opposing views. However, such an approach would defy logic. Although states that grant same-sex marriages promote a public policy of support for same-sex unions, it is hard to conceive of an argument that their policy extends to controlling the decisions made within individual same-sex relationships. After all, a couple that has received an annulment in this scenario will have petitioned for it, an indicator that the couple has chosen personally to dissolve their marriage in such a manner. For these reasons, an annulment is not only easily sought, it is also a nearly certain guarantee that the marital dissolution will receive nationwide recognition.

A. Dispelling Potential Resistance to the Annulment Alternative

As with any new legal proposition, there are potential impediments to encouraging annulment as an effective tool for dissolving same-sex marriages outside of a

⁷⁰ ALA. CODE § 30-1-19 (LexisNexis 2013). For similar language in other state statutes, see, e.g., GA. CODE ANN. § 19-3-3.1 (2013) (“Any marriage entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in [Georgia.]”); KY. REV. STAT. ANN. § 402.045 (LexisNexis 2013) (“A marriage between members of the same sex which occurs in another jurisdiction shall be void in Kentucky”); OHIO REV. CODE ANN. § 3101.01 (LexisNexis 2013) (“Any marriage between persons of the same sex is against the strong public policy of this state. Any marriage between persons of the same sex shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void ab initio and shall not be recognized by this state.”). For interpretive purposes, note that the Merriam-Webster Thesaurus lists “invalid” as a synonym to “void.” MERRIAM WEBSTER’S THESAURUS, <http://www.merriam-webster.com/thesaurus/void>.

⁷¹ Leon Gabinet, *Refusal to Grant Same-Sex Divorce: Uncertainty in Tax, Property, and Marital Status Issues*, 29 J. TAX’N INVESTMENT. 67,87 n.65 (2011) (citing *Sutton v. Lieb*, 342 U.S. 402, 406 (1952)).

ceremonial state. An initial problem is simply that parties may not be aware of annulment as an option. For one thing, a significant proportion of individuals involved in marriage dissolution suits do not retain a lawyer. Statistics on self-representation are scattered, but when states have conducted studies into this issue, the results consistently indicate a common trend of *pro se* litigants in family court.⁷² In 2006 the National Center for State Courts compiled statistics collected from a range of state court systems.⁷³ For example, according to that report, 49% of petitioners and 81% of respondents in Utah divorce cases were *pro se*,⁷⁴ and Utah was not the only state with statistics following such a pattern.⁷⁵ Because divorce is the most traditional means of dissolving a marriage, without the assistance of counsel familiar with a state's procedural doctrine, many separating parties are unlikely to recognize annulment as a feasible answer to their problem.

Another potential issue is the cultural association of annulments with religious, rather than legal, decisionmaking.⁷⁶ The Catholic Church, whose doctrine prohibits divorce for church members, grants annulments when it finds that "something contrary to the nature of marriage or to a full, free human decision prevents [the marriage] contract from being sound or binding."⁷⁷ However, a church annulment is not legally binding; while it enables a person to remain in good standing with the Church and to freely remarry within the faith, the annulment has no bearing on the laws of the states.⁷⁸ For that reason, a judicial ruling on the marriage is still necessary for the completion of a secular dissolution. Many parties, in particular those

⁷² See, e.g., *Pro Se Statistics*, TEX. ACCESS TO JUSTICE COMM'N, <http://www.texasatj.org/files/file/3ProSeStatisticsSummary.pdf> (estimating that from 2010 to 2011, self-represented litigants were responsible for 21.6% of filings in Texas family courts, and the percentage was much higher when separated by county).

⁷³ See Madelynn Herman, *Self-Representation: Pro Se Statistics Memorandum*, NAT'L. CTR. FOR STATE CTS. (Sept. 25, 2006), <http://web.archive.org/web/20120504035215/http://www.ncsconline.org/wc/publications/memos/prosestatsmemo.htm#statecourt>.

⁷⁴ *Id.*

⁷⁵ The National Center for State Courts report offered further data. For example, a 2000 California investigation found that in San Diego 77% of divorce filings involved one *pro se* litigant, and some counties in Wisconsin see as many as 70% of family court cases involving self-representation. See *id.* It is worth noting, though, that not all of the states discussed in the study are states with mini-DOMA laws; some, such as California, have legalized same-sex marriage.

⁷⁶ The Merriam-Webster Dictionary defines annulment as "a judicial or ecclesiastical pronouncement declaring a marriage invalid." MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/annulment>.

⁷⁷ Joseph M. Champlin, *Ten Questions About Annulment*, AM. CATHOLIC, <http://www.web.archive.org/web/20140404151248/http://www.americancatholic.org/newsletters/cu/ac1002.asp> (last visited Oct. 23, 2014).

⁷⁸ Generally, a religious annulment occurs only after civil dissolution has occurred. See *id.* ("When couples do separate and divorce, therefore, the Church examines in detail their marriage to determine if, right from the start, some essential element was missing in their relationship.")

without representation, may be unaware that annulment is an option through the judicial system, as well.

Perhaps the most significant barrier to convincing same-sex couples to pursue annulments is simply the meaning that is both personally and socially embodied in the word “divorce”—the fact that at one time the parties were *legally married*.⁷⁹ While constitutional arguments of equal protection and the fundamental right to marry drive much of the same-sex marriage movement, a significant subargument focuses on the basic social importance of being identified as a married couple, as opposed to two individuals united in a domestic partnership, civil union, or anything else by another name.⁸⁰ A 2012 opinion piece for *The New York Times* suggested that a solely legal view of the same-sex marriage argument lacked a crucial element:

[M]arriage’s social meaning makes it possible for couples to communicate information about their relationships in a particularly effective way. This is important because people do not only care about tangible benefits (such as money or health care or the like); they care about intangible benefits as well. In particular, people care deeply about how they are regarded by others—which inevitably depends on the information about them that is shared in their community.⁸¹

The same issue of social meaning logically holds true in the context of dissolving a marriage. A couple that chooses to separate is making a decision perceived as best for the two people directly involved. The couple is likely not, however, looking to undermine the fight for marriage equality. Many same-sex couples, alerted to the fact that an annulment ends a marriage with the legal fiction that the marriage somehow never existed (and never had any legitimate right to exist), may resist annulment as an effective means of dissolution on the grounds that it violates the substance of the movement that enabled their marriage, and many other marriages, in the first place. Despite these potential—and legitimate—reasons for resistance, annulment remains the most accessible, efficient, and effective means of dissolving a marriage for many same-sex couples living under the powerful hand of DOMA.

⁷⁹ Interestingly, it is really just a permutation of this concern that courts express as the root of their unwillingness to grant same-sex divorces—doing so would mean accepting the underlying marriage.

⁸⁰ See Ralph Wedgwood, *The Meaning of Same-Sex Marriage*, N.Y. TIMES (May 24, 2012, 9:30 PM), <http://opinionator.blogs.nytimes.com/2012/05/24/marriage-meaning-and-equality/> (“[M]arriage is fundamentally a traditional way of life that possesses a certain social meaning. This social meaning consists of the web of shared understandings and expectations that have built up over centuries.”).

⁸¹ *Id.*

B. State Court Attitudes Towards Annulling Same-Sex Marriages

The majority of case law relevant to this issue focuses on petitions for same-sex divorce, which have been handled differently depending on the jurisdiction.⁸² Suggestions of annulment as a more feasible alternative arise most commonly in the dicta of these cases.⁸³ In 2013 the Supreme Court of Texas heard two prominent cases regarding the state's ability to grant divorces to same-sex couples without recognizing their marriages, which would be in violation of Texas public policy.⁸⁴ The ultimate outcome of these cases is of minimal relevance to this Note.⁸⁵ Rather, the discussion in both cases during lower state appellate review provided a clear look at the comfortable distinction a mini-DOMA state tends to find in granting annulments rather than divorces.

In the Dallas case *In re J.B.*, J.B. filed for a divorce from his husband, H.B., whom he had wed in Massachusetts in 2006.⁸⁶ The state intervened almost immediately, calling upon its right to oppose the divorce petition with the purpose of defending the constitutionality of Texas law.⁸⁷ Despite the state's argument that the trial court lacked subject-matter jurisdiction on the grounds that no legitimate marriage existed between J.B. and H.B., the trial court held that it did in fact have the authority to consider the petition, and that the state had no basis on which to intervene.⁸⁸

On review, the state appellate court addressed two main issues: (1) the distinction between suits for divorce and suits declaring a marriage void;⁸⁹ and (2) whether granting a divorce inherently involves recognition of a valid underlying marriage.⁹⁰

⁸² See, e.g., *Atwood v. Riviotta*, 1 CA-CV 12-0280, 2013 Ariz. App. Unpub. LEXIS 567 (Ariz. Ct. App. May 16, 2013); *In re J.B.*, 326 S.W.3d 654 (Tex. App. 2010).

⁸³ See, e.g., *Atwood*, 2013 Ariz. App. Unpub. LEXIS 567, at *2.

⁸⁴ See Jordan Smith, *Texas Supreme Court Considers Same-Sex Divorce*, AUSTIN CHRON. (Nov. 5, 2013, 1:13 PM), <http://www.austinchronicle.com/daily/news/2013-11-05/texas-supreme-court-considers-same-sex-divorce/>.

⁸⁵ On February 26, 2014 a federal court judge issued a ruling that the Texas ban on same-sex marriage was unconstitutional. See Manny Fernandez, *Federal Judge Strikes Down Texas' Ban on Same-Sex Marriage*, N.Y. TIMES, Feb. 27, 2014, at A14. There is currently a stay on this decision pending the state party's appeal to the Fifth Circuit. See *id.* The author wishes to note that the future of same-sex marriage in Texas has no bearing on the argument presented by this Note. The two Texas cases explored herein serve simply as strong paradigms for the legal thought processes of virtually any mini-DOMA state confronted by the issue of divorce.

⁸⁶ *In re J.B.*, 326 S.W.3d 654, 659 (Tex. App. 2010).

⁸⁷ *Id.*

⁸⁸ *Id.* at 659–60.

⁸⁹ *Id.* at 663 (“Appellee did not plead for a declaration of voidness. Rather, he sought a divorce on the ground of insupportability.”).

⁹⁰ *Id.* at 666 (“[I]n order to prevail, appellee must show that a same-sex divorce gives no effect at all to the purported same-sex marriage.”).

As to the first question, the court emphasized the law's explicit distinction between the types of marriage dissolution suits and noted that a same-sex marriage is void at its inception.⁹¹ Elaborating, the court looked to legislative intent in the language of the state's mini-DOMA statute,⁹² a prohibition on giving "legal effect even to a claim . . . predicated on a same-sex marriage."⁹³ Then, turning to the dictionary definition of the word "claim," the court found that "[a] petition for divorce is a claim—that is, 'a demand of a right or supposed right,'" and therefore fell outside of the court's jurisdiction.⁹⁴

With regard to the second question, the court determined that "[a] suit for divorce presumes a valid marriage."⁹⁵ It concluded that even to consider the divorce petition solely for the purpose of denial would give legal validity to the marriage on which the request was based.⁹⁶ As support for its conclusion, the court provided examples of the specific means by which suits for divorce presume marriage validity, such as the petitioner's burden at trial to offer evidence that he or she was legally married to the other party.⁹⁷

Having affirmed the trial court's dismissal of J.B.'s petition, the appellate court briefly evaluated another course of dissolution on which it might have reached a different outcome.⁹⁸ The court unambiguously expressed its view that a suit to declare a marriage void in no way gives effect to the marriage; rather it asserts that a marriage never existed.⁹⁹ It further observed that any orders arising out of such a proceeding, "such as restraining orders and name changes . . . merely facilitate the disentanglement of the parties' affairs."¹⁰⁰

The Austin case, *State v. Naylor*,¹⁰¹ reached a markedly different outcome and was less vocal as to divorce alternatives, yet equally suggestive. In *Naylor*, Angelique Naylor filed for a divorce from Sabina Daly, whom she had legally married in Massachusetts five years earlier.¹⁰² In response, Daly petitioned the court to instead declare their marriage void under Texas law.¹⁰³ In contradiction to the Dallas court's

⁹¹ *Id.* at 663.

⁹² *Id.* at 664–65.

⁹³ *Id.* at 665 (paraphrasing TEX. FAM. CODE § 6-204(c)(2)).

⁹⁴ *Id.* (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY UNABRIDGED 414 (1981)).

⁹⁵ *Id.* at 666 (quoting *Gray v. Gray*, 354 S.W.2d 948, 949 (Tex. Civ. App. 1962)).

⁹⁶ *Id.* at 665.

⁹⁷ *Id.* at 666 (quoting *Gray*, 354 S.W.2d at 949). The court offered other examples, including the fact that "[a]n obvious purpose and function of the divorce proceeding is to determine and resolve legal obligations . . . arising from or affected by their marriage." *Id.* at 667.

⁹⁸ *Id.* at 667.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ 330 S.W.3d 434 (Tex. App. 2011).

¹⁰² *Id.* at 436.

¹⁰³ *Id.* (citing TEX. FAM. CODE § 6.204(b) (West 2006)).

dismissal in *J.B.*, the Austin trial court entered a divorce decree per Naylor's initial request.¹⁰⁴ Following final judgment, like in *J.B.*, the state intervened and filed a notice of appeal, asserting its right to defend the constitutionality of the mini-DOMA statute.¹⁰⁵ The state claimed it had not intervened sooner because it expected that Daly would be heard on her petition for voidance and that her argument would take the form of a defense of the statute's constitutionality.¹⁰⁶

The appellate court subsequently held that the state had no right to intervene, on the grounds that neither Naylor nor Daly had made any explicit constitutional argument.¹⁰⁷ The court refused to read Naylor's request for divorce as an "implied constitutional attack," and further reasoned that Daly could not have had any reason to defend the statute if it had never been under attack.¹⁰⁸ "[A] request for relief under a statute[.]" the court held, "is not the equivalent of a defense of that statute from hypothetical constitutional attack."¹⁰⁹ While the *Naylor* court surprisingly granted the divorce petition, its discussion of Daly's move to instead void the marriage is enlightening as to a court's interpretation of a same-sex party's request for annulment. First, Daly's decision to file for voidance suggests some awareness that in a mini-DOMA state, this maneuver had a more likely chance of success. Second, the Court's notation that Daly merely sought relief, and had no intention of waging constitutional war, proposes that the court recognized Texas's mini-DOMA law as providing a logical procedural means for dissolving a same-sex union.

Consolidated, *Naylor* and *J.B.* came before the Texas Supreme Court for ultimate state consideration in November 2013.¹¹⁰ At oral argument, the deputy attorney general yet again emphasized the state's stance on same-sex divorce: "Texas law does not recognize those marriages . . . [They are] void for all purposes in Texas."¹¹¹ That

¹⁰⁴ *Id.* at 437.

¹⁰⁵ *Id.* at 435–36.

The state or an agency or political subdivision of the state may not give effect to a: (1) public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction; or (2) right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction.

TEX. FAM. CODE § 6.204(c)(1-2); *see id.* at 441.

¹⁰⁶ *Naylor*, 330 S.W.3d at 441 ("According to the State, it was virtually represented by Daly until she abandoned her 'defense of the statute.'").

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 443.

¹¹⁰ *See* Smith, *supra* note 84.

¹¹¹ *See* Terrence Stutz, *Texas Supreme Court Considers Whether to Allow Same-Sex Divorces*, DALL. MORNING NEWS (Nov. 5, 2013, 10:50 PM), <http://www.dallasnews.com/news/politics/headlines/20131105-texas-supreme-court-considers-whether-to-allow-same-sex-divorces.ece>.

is—based on the language of the statute and lower court dicta—void for all purposes except the purpose of seeking a judicial declaration of voidness. Embedded in the very argument of marriage/divorce opponents is a legitimately feasible, but under-utilized vehicle for same-sex couples to end their marriages with a tactic that culminates in full faith and credit.

Like any issue enveloped in the same-sex marriage debate, attitudes towards dissolution have been influenced by the evolution of perspectives over time. Initially, resistance to annulling gay marriages was sometimes as strong as today's resistance to divorce judgments.¹¹² One example is the 2005 case *Lane v. Albanese*, in which a Connecticut appeals court held that a lower court had reasonably denied a same-sex couple's petition for annulment on the grounds that (1) Connecticut's public policy (at that time)¹¹³ prevented the recognition of a same-sex marriage performed under Massachusetts law,¹¹⁴ and that (2) the marriage "was not valid from its inception, but null and void, and, therefore, Connecticut ha[d] nothing to dissolve or annul."¹¹⁵

However, as support for this statement of invalidity, the court relied on the petitioners' initial argument that their marriage should be annulled because it violated a then-existing Massachusetts statute which prohibited same-sex couples from obtaining Massachusetts marriage licenses if they were residents of a state whose public policy directly opposed same-sex marriage.¹¹⁶ The reasoning of this case renders it an anomaly. The Connecticut court could have instead reflected on its own public policy of non-recognition for same-sex marriages, yet it chose to avoid such a discussion altogether.

This decision may have been less a legal conclusion and more a means of avoiding hasty judicial activism. Compared to the later actions of an Arizona court,¹¹⁷ *Lane* comes out relatively neutral with its decision not to incorporate the state's own policies as the primary motive for the outcome. This comparatively hands-off approach was likely a vague foreshadowing of 2008, when Connecticut became the third state to legalize same-sex marriage.¹¹⁸

Over the past few years, various courts—in addition to the Texas tribunals discussed above—have explored in more depth the idea that same-sex marriages are void save for the purpose of declaring voidness. In a 2011 proceeding concerning an actual request for annulment, April Atwood petitioned an Arizona superior court

¹¹² See, e.g., *Lane v. Albanese*, FA0440021285, 2005 Conn. Super. LEXIS 759 (Conn. Super. Ct. Mar. 10, 2005).

¹¹³ Connecticut subsequently legalized same-sex marriage in 2008. See *infra* note 118.

¹¹⁴ See *Lane v. Albanese*, FA044002128S, 2005 Conn. Super. LEXIS 759, at *13.

¹¹⁵ See *id.*

¹¹⁶ See *id.* at **12–13.

¹¹⁷ See *infra* notes 119–24 and accompanying text.

¹¹⁸ See generally, Rose Arce & Elise Zeiger, *Connecticut Supreme Court Legalizes Same-Sex Marriage*, CNN (Oct. 10, 2008, 5:07PM), <http://www.cnn.com/2008/US/10/10/connecticut.gay.marriage/>.

to declare void her same-sex marriage to Raina Riviotto, which they had legally solemnized under California law in 2008.¹¹⁹ The trial court dismissed the case on the grounds that it did not have the jurisdictional power to grant the annulment because of Arizona's policy against same-sex marriage.¹²⁰ Taking the issue one step further than the courts considering divorce in *J.B.*, the trial judge held that he could not even declare the marriage void without first recognizing its initial legitimacy.¹²¹

However, the appellate opinion reasoned to the contrary, in an almost verbatim iteration of the *J.B.* dicta as to declarations of voidness.¹²² Noting that the trial court decision effectively contradicted the very essence of an annulment, the appellate court held that granting an annulment would not obligate Arizona to recognize the legitimacy of the parties' union because "an action to annul a marriage is based on the premise that the marriage is void."¹²³ The appellate court remanded the case to be retried consistent with this interpretation.¹²⁴

Although there are potentially inefficient aspects of an annulment—namely the use of hotchpotch claims as the most reliable means of establishing postdissolution rights¹²⁵—the language of these cases suggests that an annulment itself may be the most efficient option for marital dissolution in mini-DOMA states, in some cases the difference between a relatively quick termination of the marriage and years of wait time characterized by attempted state intervention and one appeal after another.¹²⁶

III. RIGHTS ARISING AT DIVORCE TRANSLATE TO ANNULMENT

There is more to a marital dissolution than just a legal unbinding of the parties, and divorce provides a straightforward, standardized process for ex-spouses to divide their property, gain financial support, and establish their roles as individual parents.

¹¹⁹ See *Atwood v. Riviotto*, 1 CA-CV 12-0280, 2013 Ariz. App. Unpub. LEXIS 567 (Ariz. Ct. App. May 16, 2013).

¹²⁰ See *id.* at **1–2.

¹²¹ See *id.* at *3.

¹²² Compare *id.*, with *In re J.B.*, 326 S.W.3d 654, 667 (Tex. App. 2010).

¹²³ See *Atwood*, 2013 Ariz. App. Unpub. LEXIS 567 at *3.

¹²⁴ See *id.* at *4. A decisive outcome in the trial court is still pending; this decision is subject to further appellate review. See also *In re Surnamer*, 1 CA-CV 11-0504, 2012 Ariz. App. Unpub. LEXIS 852, at *8 (Ariz. Ct. App. July 12, 2012). In *Surnamer*, the Arizona Court of Appeals also found that the trial court had erred in denying an annulment to a same-sex couple legally wed in Canada, going so far as to hold that the court had the authority to divide the parties' property even on a finding that the marriage had never legally existed. *Id.*

¹²⁵ See *infra* Part III.

¹²⁶ In the Dallas case, *In re J.B.*, 326 S.W.3d at 659, the initial petition for divorce was filed in 2008 and the couple is still awaiting the Texas Supreme Court's final judgment. The petitioning spouse in the Austin case, *State v. Naylor*, 330 S.W.3d 434 (Tex. App. 2011), first sought a divorce in 2009.

A same-sex party may be reluctant to pursue an annulment on the assumption that she will lose the ability to have such decisions judicially governed and enforced. Indeed, historically, courts found themselves powerless to address a number of these rights after granting an annulment.¹²⁷ For instance:

By an overwhelming number, the courts of the various states have held that in the absence of any statute granting authority to the court to award alimony in connection with a decree of annulment, the court is powerless to do so irrespective of the fault or wrongdoing of either party.¹²⁸

However, the growing prevalence in our society of non-traditional domestic relationships,¹²⁹ coupled with a reluctance to deny individuals the property they in good faith believe to be theirs, has led courts to increasingly accept requests for post-dissolution rights in nondivorce proceedings on the theory of equitable distribution or other ideals of fairness.¹³⁰ While divorce offers a significantly cleaner and more efficient division of these rights, a couple that separates through annulment is not without options.

Where courts have acknowledged these rights in nonmarital relationships, they have significantly focused their decisions in contract law.¹³¹ For this reason, married same-sex couples who reside in a state where their marriage is void, would be advised to enter into either a prenuptial or postnuptial contract drafted to consider the parties' roles as contributors to the marriage, their claim to certain property, and the manner in which they anticipate parenting any children should they separate.¹³² The ability of same-sex parties to maneuver the judicial system to their advantage depends heavily on whether or not they have created a reasonably clear and reliable contract as to crucial rights underlying their relationship.

A. Property Division

In much the same way that courts can grant annulments without recognizing a valid marriage, they can provide judicial routes for property division without deeming

¹²⁷ See John S. Herbrand, Annotation, *Right to Allowance of Permanent Alimony in Connection with Decree of Annulment*, 81 A.L.R.3d 281 (1978).

¹²⁸ *Id.* (citing *Pennaman v. Pennaman*, 112 S.E. 829 (Ga. 1922)).

¹²⁹ See, e.g., Elizabeth Lopatto, *Unmarried Couples Living Together is New U.S. Norm*, BLOOMBERG (Apr. 4, 2013, 12:01 AM), <http://www.bloomberg.com/news/2013-04-04/unmarried-couples-living-together-is-new-u-s-norm.html>.

¹³⁰ George L. Blum, Annotation, *Property Rights Arising from Relationship of Couple Cohabiting Without Marriage*, 69 A.L.R.5th 219 (1997).

¹³¹ See, e.g., *Posik v. Layton*, 695 So. 2d 759 (Fla. Dist. Ct. App. 1997).

¹³² See *id.* at 760–61.

the property acquired during a marriage “marital property.”¹³³ While the case law on such divisions focuses on heterosexual couples in annulled marriages, voidness has the same meaning across marriage law, and the gender pairing of the couples should have no bearing on the precedential nature of the holdings.

In 1990 a West Virginia court found that the state’s public policy interest in encouraging legal marriages should not be permitted to undermine “a person’s equitable interests, nor a person’s rights based upon a valid agreement, expressed or implied.”¹³⁴ The court thus allowed a division of property between two unmarried cohabitants who had lived and behaved as if married.¹³⁵ As discussed above, the right of unmarried, cohabiting parties to contract is a consistent theme throughout such property division litigation.¹³⁶

To locate an implied contract, courts have also looked to the implications of the parties’ behavior while in the relationship.¹³⁷ Prior to the West Virginia ruling, a Minnesota court granted the girlfriend of a deceased man a one-half interest in the home they had shared though the title listed only his name.¹³⁸ The court based its decision in a finding that the two parties had contributed equally to the mortgage and upkeep expenses for the property.¹³⁹ In 2003, Montana further addressed the factors behind this sort of contract theory, finding that the plaintiff, the defendant’s former girlfriend, had no claim to any share of the value of the mobile home in which she had lived with the defendant.¹⁴⁰ The couple had cohabited only a short time and

¹³³ Marital property is defined as “property acquired after the date of the marriage and before a spouse files for separation or divorce.” *Property*, BLACK’S LAW DICTIONARY 1336 (9th ed. 2009).

¹³⁴ *Goode v. Goode*, 396 S.E.2d 430, 438 (W. Va. 1990).

¹³⁵ The specific language of the *Goode* court applied this holding not generally to presumptive marital partners, but to “a man and woman . . . who have considered themselves and held themselves out to be husband and wife.” *Id.* However, keeping in mind that the year of this decision was 1990, thirteen years before Massachusetts became the first state to recognize same-sex marriage, the primary factors addressed by the *Goode* court are gender neutral and equally applicable to homosexual couples: “Such order may be based upon principles of contract, either express or implied, or upon a constructive trust. Factors to be considered in ordering such a division of property may include: the purpose, duration, and stability of the relationship and the expectations of the parties.” *Id.*

¹³⁶ Many of these cases rely on *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976), a California Supreme Court decision that found an oral agreement between an unwed, cohabiting couple enforceable provided that it did not rely on an exchange of sexual services. I have chosen not to discuss this case in depth as it originated in California, which is now a state where same-sex couples might legally pursue a divorce and property division through that more traditional means. However, the case is an important backbone of the judicial system’s recognition of certain property rights independent of a legally recognized marital relationship.

¹³⁷ *Id.* at 110.

¹³⁸ *In re Estate of Eriksen*, 337 N.W.2d 671, 674 (Minn. 1983).

¹³⁹ *Id.*

¹⁴⁰ *Shein v. Aiken*, CDV-2001-752, 2003 Mont. Dist. LEXIS 3368, at **5–6 (Nov. 18, 2003).

acquired no property together.¹⁴¹ The court went on to note that even if these two perceived requirements had been fulfilled, the plaintiff would still have had the burden of providing clear and convincing evidence that she and the defendant had intended to establish a sort of “constructive trust” wherein “one party would hold the property in trust for the other who furnished the consideration for its purchase.”¹⁴²

In order to establish a right to postdissolution property division, parties must show by their actions that the relationship resembled a marital union.¹⁴³ The claim will be strengthened by evidence of a contract, or trust, intending the property to be shared.¹⁴⁴ Because a married same-sex couple has perceived itself as married despite the laws of its domiciliary state, their relationship will likely have no trouble of meeting the first element of proof. While the finding of a contract will inevitably vary case by case, evidence of interdependent contributions such as mortgage payments, home upkeep, or family insurance coverage will go far towards demonstrating the parties’ mutual understanding during their relationship.¹⁴⁵

B. Spousal Support

The issue of spousal support takes postdissolution rights a step past property division as it creates a lasting relationship between the annulled parties.¹⁴⁶ It is also perhaps more controversial, given that a primary purpose for ordering alimony has been to prevent a vulnerable ex-spouse from requiring the support of the state.¹⁴⁷ Historically, courts refused to grant alimony in an annulment proceeding because, absent a valid marriage, there existed no basis for a finding of support responsibility.¹⁴⁸

¹⁴¹ *Id.* at *6.

¹⁴² *Id.* (quoting *Omer v. Omer*, 523 P.2d 957, 960 (Wash. Ct. App. 1974)). However, finding that the plaintiff had provided defendant with some money and work towards improving the mobile home, the court awarded her restitution in that amount. *Id.* at **6–7.

¹⁴³ *See, e.g., In re Estate of Eriksen*, 337 N.W.2d at 674.

¹⁴⁴ *See, e.g., id.* at 672.

¹⁴⁵ *See, e.g., id.*

¹⁴⁶ *See Herbrand, supra* note 127.

¹⁴⁷ Here’s the reality: many [dependent divorced spouses] end up living around the poverty level. Without sufficient alimony payments, these [individuals] become dependent on welfare (at taxpayers’ expense), which is exactly why the alimony laws were created in the first place (same rationale for child support). Society did not want to be responsible to clean up people’s personal messes.

Jeff Landers, *In Many States, Alimony Reform Has Gone Too Far*, FORBES (July 12, 2011, 10:24 AM), <http://www.forbes.com/sites/jefflanders/2011/07/12/in-many-states-alimony-reform-has-gone-too-far/>.

¹⁴⁸ *See generally Herbrand, supra* note 127. *See also Williams v. Williams*, 97 P.3d 1124, 1131 (Nev. 2004) (“Absent an equitable basis of bad faith or fraud or a statutory basis, the district court had no authority to grant the spousal support award.”). However, some courts

However, with the growing acceptance of non-traditional domestic relationships, courts have increasingly recognized a support right based in contract¹⁴⁹ that might easily be invoked following a decree of annulment.

A party to a same-sex annulment seeking spousal support is best situated to apply for such payments under the doctrine that has become colloquially known as “palimony.”¹⁵⁰ In 1997, Florida enforced a lesbian couple’s promissory note evidencing the intent of one woman to provide her then-partner with lifetime support.¹⁵¹ At the commencement of their relationship, the parties hired a lawyer to draft what was essentially a prenuptial agreement, although they could not have legally married.¹⁵² Using a standard contract law analysis, the court found “no fraud or overreaching”¹⁵³ on the part of the partner who had insisted on the formalized agreement, and enforced its terms.¹⁵⁴

Same-sex couples in palimony actions have had to conquer courts’ prejudicial tendency to stereotype homosexual relationships as oversexualized.¹⁵⁵ The significant issue with placing an emphasis on the sexual nature of a contractual relationship is the legal requirement that a contract is unenforceable if based upon the expectation of sexual services.¹⁵⁶ Decades prior to the state’s legalization of same-sex marriage, a California court addressed the validity of a gay couple’s oral agreement that in cohabiting they would “combine their efforts and earnings and would share equally any and all property accumulated as a result of their efforts.”¹⁵⁷ The agreement further stated that one partner would provide financial support for the rest of the other partner’s life in exchange for his “render[ing] his services as a lover, companion, homemaker, traveling companion, housekeeper and cook.”¹⁵⁸

have allowed spousal support where the voidance of the marriage was based on fraud or other fault by only one party. *See, e.g.*, *Cortes v. Fleming*, 307 So. 2d 611, 616 (La. 1973) (holding that, where the husband did not tell his wife that he was already married to another woman, “alimony is a civil effect of the marriage in favor of a good faith wife of that putative marriage when the other party is in bad faith”). However, when a same-sex couple seeks an annulment in the marriage trap scenario discussed by this Note, fraud is unlikely to play a role. Rather, they will seek the marriage voided as in violation of state law.

¹⁴⁹ *See, e.g.*, *Posik v. Layton*, 695 So. 2d 759, 761 (Fla. Dist. Ct. App. 1997).

¹⁵⁰ Palimony is defined as “[a] court’s award of post-relationship support or compensation for services, money, and goods contributed during a long-term nonmarital relationship, esp. where a common-law marriage cannot be established.” BLACK’S LAW DICTIONARY 1219 (9th ed. 2009).

¹⁵¹ *Posik*, 695 So. 2d at 760.

¹⁵² *Id.*

¹⁵³ *Id.* at 762.

¹⁵⁴ *Id.* at 763.

¹⁵⁵ *See, e.g.*, *Jones v. Daley*, 176 Cal. Rptr. 130, 131 (Ct. App. 1981).

¹⁵⁶ *Id.* at 132–33.

¹⁵⁷ *Id.* at 131.

¹⁵⁸ *Id.*

The word choice of the agreement proved unfortunate; the court found that the use of the word “lover” indicated one partner’s “rendition of sexual services . . . an inseparable part of the consideration . . . and indeed was the predominant consideration.”¹⁵⁹ Despite a proffering of alternate definitions for “lover,”¹⁶⁰ the court invalidated the agreement and denied support.¹⁶¹ The stereotype so pervaded interpretation of the facts that the court refused to sever and enforce individual sections of the contract.¹⁶²

Other courts have taken greater care to distinguish any sexual relationship from the larger purpose of a domestic contract. For example, a lesbian in Florida seeking to invalidate an agreement she had entered with her partner urged the court to take note of the parties’ sexual relationship.¹⁶³ The court rejected this argument and held that “even though the agreement was couched in terms of a personal services contract, it was intended to be much more. It was a nuptial agreement entered into by two parties that the state prohibits from marrying.”¹⁶⁴

In dicta, the Florida court noted that such agreements should be in writing to satisfy the Statute of Frauds.¹⁶⁵ While such a requirement is not uniform across the states, it is an advisable lesson to same-sex couples living in jurisdictions that do not recognize their marriages, as is care in the drafting of such agreements to eliminate any potential interpretation of requisite sexual exchange.

C. Child Custody and Visitation

The issue of parental rights is uniquely complex in the context of same-sex families because for a vast number of these parents the parental relationship to the child does not arise biologically.¹⁶⁶ In the situation where one parent has either conceived through artificial insemination, or donated sperm for a surrogate pregnancy, the other parent will have no genetic tie to the child. Even where a couple welcomes a child through adoption, in some scenarios one of the spouses will not

¹⁵⁹ *Id.* at 133.

¹⁶⁰ *Id.* (“[A] person in love or an affectionate or benevolent friend.”).

¹⁶¹ *Id.* at 134.

¹⁶² *Id.* (“Neither the property sharing nor the support provision of the agreement rests upon plaintiff’s acting as Daly’s traveling companion, housekeeper or cook as distinguished from acting as his lover. The latter service forms an inseparable part of the consideration for the agreement and renders it unenforceable in its entirety.”).

¹⁶³ *Posik v. Layton*, 695 So. 2d 759, 761 (Fla. Dist. Ct. App. 1997).

¹⁶⁴ *Id.* at 761. In exchange for full financial support, one party agreed to give up her career to “maintain and care for the home.” *Id.* at 760.

¹⁶⁵ *Id.* at 762.

¹⁶⁶ See, e.g., Gary J. Gates, *LGBT Parenting in the United States*, WILLIAMS INST., available at <http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/lgbt-parenting-in-the-united-states/> (reporting that same-sex couples are four times more likely to adopt than heterosexual couples).

have legal parenting rights. This is due to various state laws—as inconsistent as gay marriage laws—that prohibit adoption by same-sex couples.¹⁶⁷ The result is frequent uncertainty as to one parents' legal rights to the child.¹⁶⁸ While certain federal statutory mechanisms attempt to protect the rights of parents involved in high-conflict marital dissolutions, as with property rights, same-sex parents are most secure under the law when they have entered into an explicit parenting agreement at the onset of parenthood.¹⁶⁹ It is worth noting that, in the context of parenting rights, divorce versus annulment is not particularly significant.¹⁷⁰ Beyond the scope of same-sex families, courts regularly deal with custody of children whose parents have never married; the primary issue in these circumstances is the parents' relationship with the child, rather than their relationship with one another.¹⁷¹ Despite the general irrelevance of annulment to parental rights, this Note nonetheless addresses the topic given its likely importance to many same-sex couples seeking marital dissolution.

A major concern for separated same-sex parents is, again, the interstate inconsistency of legal views on gay rights. In a marital dissolution scenario, the risk of one partner relocating without the other exacerbates this concern. Courts have responded incongruously to adoptive parents who find their parental rights denied after relocating to a state where adoption by homosexual couples is legally barred. A distinct circuit split remains as to this issue. In 2007, the Tenth Circuit held that the FF&CC required interstate recognition of an adoption decree, even if the adoption in question would have been impossible under the laws of the state now considering it.¹⁷² The court went even further, finding that the Oklahoma statute that denied recognition to out-of-state same-sex adoptions was unconstitutional as a violation of the full faith and credit requirement.¹⁷³

Yet, in 2011, the Fifth Circuit came down in the reverse, permitting Louisiana to deny enforcement of a New York adoption decree because a same-sex couple would not have been permitted to adopt under Louisiana law.¹⁷⁴ The court relied on the public policy exception to the FF&CC.¹⁷⁵ The Fifth Circuit thereby decided that

¹⁶⁷ See *50 States of Adoption*, FAM. EQUAL. COUNCIL, http://www.familyequality.org/get_informed/families_for_all/50_states_of_adoption/ (last visited Oct. 23, 2014) (noting that “[o]nly 19 states and D.C. permit same-sex couples to adopt” and that “[o]nly 6 states explicitly ban discrimination based on sexual orientation in foster care”).

¹⁶⁸ See *id.*

¹⁶⁹ The Human Rights Campaign recommends that same-sex couples with children draft co-parenting agreements and custody agreements that anticipate what the family will look like should a break-up occur. See *Second Parent Adoption*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/second-parent-adoption> (last visited Oct. 23, 2014).

¹⁷⁰ See *id.*

¹⁷¹ UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT, 9(1A) U.L.A. 657 (1999).

¹⁷² *Finstuen v. Crutcher*, 496 F.3d 1139, 1156 (10th Cir. 2007).

¹⁷³ *Id.*

¹⁷⁴ *Adar v. Smith*, 639 F.3d 146, 150 (5th Cir. 2011).

¹⁷⁵ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 (1971).

the laws of the state where the case is brought, and not the Constitution, determine the benefits parties may claim from a judgment rendered in another jurisdiction.¹⁷⁶ Subsequently, there has not been a national consensus on the interstate enforcement of adoption decrees where same-sex couples are the adoptive parents.

If the couple has received a custody order, but a state outside the ordering jurisdiction refuses to acknowledge it, the disenfranchised parent may seek interstate enforcement under two main authorities. The first is the Parental Kidnapping Prevention Act (PKPA), which mandates cross-jurisdictional recognition of child custody orders to prevent one parent from fleeing with the child to a state that would enter a new award more favorable to that parent's interests and overturn the other parent's rights.¹⁷⁷ Congress likely did not initially devise the PKPA in 1980 with same-sex parenthood in mind. However, because it is so easy to find a state that will favor a birth parent or primary adoptive parent over another same-sex parent,¹⁷⁸ these types of relationships present an epitomic risk of the scenario to which the law responds. As a result, the PKPA is a useful tool for adoptive parents who have lost access to their children across state lines.

The second authority is the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which expanded the PKPA by clarifying questions of jurisdictional priority.¹⁷⁹ Specifically, the UCCJEA reinforces the jurisdictional requirements a state must meet to assert its power over a custody dispute.¹⁸⁰ Under the UCCJEA, there are two ways for a state to have jurisdiction over custody orders: (1) if it was the home state of the child when custody proceedings began, or had been the child's home state within six months before proceedings began, and the child was removed from the state by a person claiming custody, while another parent continues to reside in the state; or (2) if the child has a significant connection to the state, and a court of another state does not have jurisdiction on the first grounds, or has declined to exercise jurisdiction.¹⁸¹

These guidelines have proven useful in resolving parental rights conflicts among separated same-sex couples. In the 2008 case *Miller-Jenkins v. Miller-Jenkins*, the Virginia Supreme Court invalidated a Virginia order granting sole custody to a biological mother, basing its ruling on the dominant authority of a previously existing Vermont order, which provided visitation to the mother's former partner.¹⁸² Lisa Miller-Jenkins and Janet Miller-Jenkins had lived together in Virginia where Lisa

¹⁷⁶ *Adar*, 639 F.3d at 161.

¹⁷⁷ 28 U.S.C. § 1738A (2014).

¹⁷⁸ *See id.*

¹⁷⁹ UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT, 9(1A) U.L.A. 657 (1997).

¹⁸⁰ *Id.* § 201.

¹⁸¹ *Id.*

¹⁸² The same-sex relationship in this case originated prior to any state's legalization of same-sex marriage; instead the parties had entered into a civil union as permitted by Vermont law in 2000. *See Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2d 822, 824–25 (Va. 2008).

gave birth to a daughter through artificial insemination.¹⁸³ When the child was two years old the family relocated to Vermont, where they resided for over one year until Lisa filed to dissolve the union and petitioned for parental rights.¹⁸⁴ The Vermont court granted Lisa temporary custody as the biological mother, with visitation rights to Janet.¹⁸⁵ Shortly thereafter, Lisa relocated with her daughter to Virginia, where she filed a new petition to establish parentage.¹⁸⁶

The Virginia Court of Appeals ultimately found that the PKPA afforded Vermont governing jurisdiction over the custody dispute, and the Virginia Supreme Court upheld that decision.¹⁸⁷ Although the precedential value of this case is unclear,¹⁸⁸ it offers some understanding of the hope a pre-existing custody order in the right state can provide to an otherwise disadvantaged same-sex parent. In this case the court looked to a judicial order as a basis for granting custody rights.¹⁸⁹ Had the Vermont order not existed, Janet would have benefitted from drafting a parenting contract with Lisa while their relationship was still stable.

The situation is somewhat more difficult for a same-sex partner who has played a parental role toward a child but is neither the biological parent nor adoptive parent, and thus has no clear legal role. Custody and visitation claims brought by these individuals confront obstacles arising from statutory definitions of the word “parent,”¹⁹⁰ and a common presumption in favor of decisions made by the biological (or legally adoptive) parent.¹⁹¹

Courts are increasingly moving against the latter trends to focus primarily on what is in the best interest of the child, a long-codified standard in most states. In 2004, a Maine court determined that the biological mother’s former partner was a “de facto” parent to her child and therefore had standing for custody and visitation.¹⁹² The court

¹⁸³ *Id.* at 824.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* The Virginia circuit court found that any claim Janet had to parental status was based on rights Vermont afforded to same-sex couples in civil unions, which were not recognized under Virginia law. Vermont refused to give full faith and credit to the Virginia court’s holding; the parties appealed both decisions. *Id.* at 824–25.

¹⁸⁷ *Id.* at 827.

¹⁸⁸ *Id.* (applying “law of the case” doctrine, the court determined that nothing decided on a first appeal could be reexamined on a second appeal and refused to reach the merits of the case).

¹⁸⁹ *Id.*

¹⁹⁰ See generally Leah C. Battaglioli, Comment, *Modified Best Interest Standard: How States Against Same-Sex Unions Should Adjudicate Child Custody and Visitation Disputes Between Same-Sex Couples*, 54 CATH. U. L. REV. 1235, 1256 (2005) (“For example . . . the court focused on the definition of ‘parent’ under Tennessee law, which is defined as ‘any biological, legal, adoptive parent(s) or . . . stepparents.’” (citing TENN. CODE ANN. § 36-1-102(36) (2001)).

¹⁹¹ See *id.* (“Some courts presumptively favor the biological or adoptive parent’s decision to terminate entirely the former same-sex partner’s visitation rights by denying the former partner standing, unless the biological or adoptive parent is unfit.”).

¹⁹² See *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1146 (Me. 2004).

noted that a de facto parent must “be limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child’s life,” but declined to establish an exact standard of determination for this form of parenthood.¹⁹³ Taking a different approach, in 2001 a Pennsylvania court applied the doctrine of “in loco parentis”¹⁹⁴ to grant the biological mother’s former girlfriend third-party standing for custody.¹⁹⁵ The court found that the partner had established herself as a parent by her interactions with the child, which included taking her to daycare, staying home from work when the child was sick, caring for her exclusively when the biological mother was traveling, and taking vacations with the child and biological mother.¹⁹⁶

Other courts have focused on the biological parent’s actions as indicating an intent to foster a parental relationship between a former partner and child during the marriage. In 2010, Kentucky held a non-legal same-sex parent petitioning for custody to a significantly stricter standard than that seen in the Pennsylvania case.¹⁹⁷ The relevant state statute limited de facto parents to “the primary caregiver for, and financial supporter of, a child who has resided with the person for a period of six (6) months or more if the child is under three years of age.”¹⁹⁸ Applying this language, a state appellate court denied the non-biological parent any parental rights, but the Supreme Court of Kentucky reversed on a finding that the biological parent had waived her superior parental rights when she expressed the intention of becoming a co-parent alongside her partner.¹⁹⁹

In 2000, prior to New Jersey’s legalization of same-sex marriage, a New Jersey court applied a general best interest of the child standard to establish a visitation right as to the biological mother’s former partner who had built a “psychological parent” relationship with the children.²⁰⁰ In addition to focusing on the child’s perspective and needs, the New Jersey court—like Kentucky—also analyzed the actions of the

¹⁹³ *Id.* at 1152.

¹⁹⁴ The phrase “*in loco parentis*” refers to a person who puts oneself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formality of a legal adoption. The status of *in loco parentis* embodies two ideas; first, the assumption of a parental status, and, second, the discharge of parental duties.

T.B. v. L.R.M., 786 A.2d 913, 917–18 (Pa. 2001)(citations omitted).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 915.

¹⁹⁷ See *Mullins v. Picklesimer*, 317 S.W.3d 569, 573 (Ky. 2010).

¹⁹⁸ *Id.* (citing KY. REV. STAT. 403.270(1)(a)).

¹⁹⁹ *Id.* at 580–81.

²⁰⁰ At the heart of the psychological parent cases is a recognition that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them. That interest, for constitutional as well as social purposes, lies in the emotional bonds that develop between family members as a result of shared daily life.

V.C. v. M.J.B., 748 A.2d 539, 550 (N.J. 2000).

child's biological parents and their implication for the overall parenting scheme.²⁰¹ The court found that when a legal parent has given parental authority to a non-legal parent and the actions have had a lasting effect on the child's life, then the best interest of the child takes priority over the preferences of the biological parent.²⁰²

As mentioned above, unlike property and support rights, parenting rights for separated same-sex couples are virtually nondependent on the means by which a couple has dissolved their union.²⁰³ This difference has its pros and cons. On the positive side, pursuing an annulment is not a complication; courts are unlikely to determine parenthood based on whether or not a legal marriage ever existed. On the negative side, same-sex parents will find that they are essentially compelled to anticipate the end of their relationship because contracted parenting agreements are the most effective and reliable means of protecting a non-legal parent's rights in a contentious family breakdown. While this may seem troubling, it is simply a variation on the traditional prenuptial agreement, and a preferable alternative to losing one's role as a parent.

D. Federal Benefits

The issue of federal benefits for same-sex couples is somewhat unclear because of its youth, but it is not a weak link in the argument for annulment as a strong alternative to same-sex divorce. The Supreme Court's ruling in *Windsor* enforced the recognition of same-sex marriages for federal benefits purposes.²⁰⁴ Some of these benefits extend to divorced spouses, heterosexual and homosexual alike.²⁰⁵ For example, the Social Security Administration (SSA) will share social security benefits with the beneficiary's former spouse when the marriage has been terminated through divorce, provided the former spouse meets certain qualifications.²⁰⁶ However, the SSA does not entirely disclose annulled spouses from receiving benefits; in certain circumstances, and provided specific evidence of the marital voidance, annulment may still allow for social security entitlement.²⁰⁷

²⁰¹ *Id.* at 551–52.

²⁰² *Id.* at 551 (citation omitted).

²⁰³ *See supra* Part III.C.

²⁰⁴ *United States v. Windsor*, 133 S.Ct. 2675, 2695–96 (2013).

²⁰⁵ *See How Does a Divorced Spouse Qualify for Benefits?*, SOC. SEC. ADMIN. (10/31/2013 03:37 AM), <http://faq.ssa.gov/ica/support/KBAnswer.asp?questionID=1984&hitOffset=425+423+422+357+356+352+351+345+331+322+317+316+312+311+307+293+290+289+282+270+251+244+243+233+218+194+185+184+180+175+154+145+138+137+134+124+120+107+102+101+92+87+83+70+59+35+21+17+16+13+8+6+5+4+2&docID=6513>.

²⁰⁶ The divorced spouse must: (1) have been married to the benefitted spouse for at least ten years; (2) be at least sixty-two years old; (3) be unmarried; (4) not be entitled to his or her own higher Social Security benefit. *Id.*

²⁰⁷ *GN00305.135 When Annulment Permits Initial Entitlement or Reentitlement*, SOC. SEC. ADMIN. (Mar. 28, 2012), <https://secure.ssa.gov/poms.nsf/lnx/0200305135>.

Other agencies similarly allocate benefits to annulled couples on par with their divorced counterparts, albeit in varying degrees. The Federal Office of Personnel Management (OPM) will afford health insurance to the former spouse of a federal employee whose marriage has been terminated through annulment.²⁰⁸ Under OPM's policy, ex-spouses of former federal employees may be eligible for continuing benefits through the Spouse Equity Act.²⁰⁹ While the office of the employed spouse definitively determines eligibility, the right to be considered extends equally to marriages that have ended as a result of divorce or annulment.²¹⁰ The government's Thrift Savings Plan, a contribution-based retirement fund for Federal employees, also allows for the division of an account upon court order "at any stage of a divorce, annulment, or legal separation."²¹¹

Yet other benefits get nullified along with the marriage. For instance, the Internal Revenue Service instructs taxpayers that "[i]f [an individual] obtain[s] a court decree of annulment, which holds that no valid marriage ever existed, [the individual is] considered unmarried even if [he or she] filed joint returns for earlier years."²¹² At such an early stage in the federal recognition of same-sex marriages, it remains to be seen whether the government will develop its approach to annulled unions given the inaccessibility of divorce for many couples. It seems likely, though, that if the government acknowledges same-sex marriage as a legal relationship on equal footing with heterosexual marriage, then same-sex couples who have annulled their marriages will inherit the same rights available to opposite sex couples whose unions have been declared void. That is, benefits determined on an agency-specific basis.

E. Overall Status of Post-Annulment Rights

As the preceding discussion explains, courts do not streamline post-annulment rights in the same way that divorce proceedings allow for the straightforward settling of a couple's affairs.²¹³ This does not, however, mean that parties to an annulment are without judicial means to separate their property, establish support obligations, confirm parental roles, or receive federal benefits arising from marital status. To claim

²⁰⁸ *Termination, Conversion and Temporary Continuation of Coverage*, OFFICE OF PERS. MGMT., <https://www.opm.gov/healthcare-insurance/healthcare/reference-materials/reference/termination-conversion-and-temporary-continuation-of-coverage/#formerspous> (last visited Oct. 23, 2014).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Changes in Your Family Status: Divorce, Annulment, and Legal Separation*, THRIFT SAV. PLAN, <https://www.tsp.gov/lifeevents/spouse/separation.shtml> (last visited Oct. 23, 2014).

²¹² *Filing Status*, INTERNAL REVENUE SERV., http://www.irs.gov/publications/p17/ch02.html#en_US_2013_publink1000170740 (last visited Oct. 23, 2014). Taxpayers in this situation are additionally required to file amended tax returns as "single" or "head of household status" for all tax years covered by the annulment. *Id.*

²¹³ *See supra* Parts III.A–D.

these rights, though, a couple on the verge of annulment will best situate themselves for equitable treatment if they can demonstrate that their relationship was overtly characterized by some level of codependency and mutual contribution or, in some cases, one party's sacrifice in expectation of the other party's support.²¹⁴ In other words, the couple must demonstrate that they lived as married people, even though the state did not recognize their marriage. These hybrid claims that will involve various combinations of palimony, de facto parenthood, contract law, and equitable distribution are not ideal, but certainly many same-sex couples would find these mechanisms preferable to remaining trapped in an unwanted marriage, unable to attain legal acknowledgment as married but still also unable to extricate themselves from that status.

CONCLUSION

Same-sex marriages are at risk for injury from the same sorts of interpersonal disagreements and emotional conflicts that heterosexual couples face. People are people, and there is no reason for anyone to believe that same-sex couples will lead a statistically more blissful married life than opposite-sex couples.²¹⁵ Unfortunately, courts in mini-DOMA states have perceived the dissolution of a homosexual marriage as embodying more meaning than just the disbanding of a family.²¹⁶ States that oppose the legalization of same-sex marriage are apprehensive that requests for divorce by same-sex couples wed rightfully in another jurisdiction are actually an underhanded means of compelling the state to acquiesce to the legitimacy of a marriage between two women or two men.²¹⁷ The United States is a country built on certain core principles, and an unavoidable effect of that philosophy is that in times of controversy two or more of these well-founded and ingrained principles will collide. The issue of same-sex divorce comes down to a war between individual rights and federalist ideals.²¹⁸

Given the iron fist of the public policy exception,²¹⁹ it seems possible that a national legalization of same-sex divorce will occur only as the product of a national legalization of same-sex marriage. The proposed interim solutions to this problem

²¹⁴ See *supra* notes 147–54 and accompanying text.

²¹⁵ See Green, *supra* note 9.

²¹⁶ See Talbot, *supra* note 27.

²¹⁷ See Lithwick & West, *supra* note 14.

²¹⁸ While same-sex relationships are relatively new to the federalism debate, divorce itself is not. The law has always construed domestic concerns as the realm of the individual states, and from the beginning of American history the colonies were dramatically divided in their approaches to marital dissolution. See Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381, 383–84 (2007).

²¹⁹ See Koppelman, *supra* note 28, at 936 (noting that the public policy doctrine has its roots in the Middle Ages).

require a large dose of patience.²²⁰ They call for revisions of state statutes and radically different interpretations of jurisdiction, a fundamental concept in American civil procedure.²²¹ This Note instead draws attention to annulment as an accessible and competent alternative to divorce that already exists within statutory law and presents no affront to federalism or the public policy exception.

This Note does not mean to suggest that annulment is a perfect means of marital dissolution for same-sex couples. Indeed such a method of dissolving a union requires the couple to accept a court's declaration that their marriage never existed.²²² For people who waited years for the opportunity to wed legally, this legal fiction may seem more like a punishment than a release from a failed marriage. This Note seeks to acknowledge that feeling, and the very reasonable reluctance to which it may lead, while simultaneously emphasizing annulment as the most efficient and practical vehicle for terminating a same-sex union in a ruling that will earn full faith and credit across state lines. For as long as the marriage laws in this country remain dissonant, and "[d]ivorces are made in heaven,"²²³ a declaration of annulment will offer same-sex couples a jurisdictionally consistent process for escaping a failed relationship and the troublesome consequences of a marriage trap.

²²⁰ See *supra* notes 15–26 and accompanying text.

²²¹ See *supra* notes 15–26 and accompanying text.

²²² As discussed throughout this Note, the legal definition of annulment provides that "[a]n annulment establishes that the marital status never existed." BLACK'S LAW DICTIONARY 106 (9th ed. 2009); see also Wedgwood, *supra* note 80.

²²³ See WILDE, *supra* note 1, at 255.