Comparative Law Review

VOLUME 11/2

ISSN: 2038-8993

COMPARATIVE LAW REVIEW
The Comparative Law Review is a biannual journal published by the
I. A. C. L. under the auspices and the hosting of the University of Perugia Department of Law.

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Comparative Law Review is registered at the Courthouse of Monza (Italy) - Nr. 1988 - May, 10th 2010.

COMPARATIVE LAW REVIEW

VOL. 11 /2

Remembering Stefano Rodotà

6
STEFANO RODOTÀ
Of Machines and men. The Road to Identity
Scenes for a Discussion

29
STEFANO RODOTÀ
Interculturalism: Fostering or Hindering Cultural Diversity?
The Experience of Québec

45
ZIA AKHTAR
Conflict of Laws, Choice of the Forum Court in the US,
and the Due Process in Family Law Disputes

73
LUCA E. PERRIELLO
Terminating or Renegotiating? The Aftermath of Covid-19 on Commercial Contracts

106
LUIGI TESTA
Funding Gap and "Budget-oriented Classification" of Forms of Government

139
ANDREA STAZI
"Legal Big Data": From Predictive Justice to Personalised Law?

CONFLICT OF LAWS, CHOICE OF THE FORUM COURT IN THE US, AND THE DUE PROCESS IN FAMILY LAW DISPUTES

Zia Akhtar[1]

TABLE OF CONTENT

INTRODUCTION I. RECOGNISING MARRIAGE INTER STATE II. DUE PROCESS CLAUSE AND SAME SEX UNION III. CHILD CUSTODY AND SUBJECT MATTER JURISDICTION IV. ADOPTION CASES AND CHOICE OF STATE V. SCOTLAND CONCLUSION.

In the United States (US) the family law litigant will have to consider the implications of laws that are federally recognised and those which the state embodies in its own family law statutes. The function of the equal protection clause and due process clause of the Fourteenth Amendment of the Constitution protects the parties in family disputes that reach the court. The operation of the Full Faith and Credit Clause is an important consideration and is central to the question if the court can apply the law of the forum court (lex fori) or that of the state where the dispute emanated. The federal constitution allows the state courts to apply marriage laws of another state. If the issue is procedural then the law of the state will be applied where the dispute that gave rise to the litigation (lex loci). This paper examines the interstate in family law by considering marriages, child custody, and adoption rules and it enquires whether the courts have been sufficiently consistent in interpreting family law of the state in accordance with Article IV, Section 1. There is also a section that compares the law in the US with the application of the lex fori rules in family cases in the Scottish jurisdiction and how that impacts on parties in family law disputes.

INTRODUCTION

In the US the family law procedure is determined by the formalisation and shape of the institution of marriage that embodies the concepts of "conjugality, privacy, and contract".[2] The Supreme Court has applied the Full Faith and Credit Clause (FFCC) to oblige state courts to hear family law claims that arise under sister-state laws.[3] The state court may apply its forum law to the substantive questions of a case whenever (a) the party resisting application of that law has acted in the forum or derived from the forum relatively direct benefits, or (b) there is some weaker connection between the defendant and the forum, and

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[2] Vivian Hamilton, Principles of U.S. Family Law, 75 Fordham L. Rev. 31 (2006). Available at: https://ir.lawnet.fordham.edu/flr/vol75/iss1/2

[3] Article 4 Section 1 of the US Constitution is the provision by which courts of the States of the Union determine if they have jurisdiction in the case. It reads as follows: *Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates 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.*

the forum's interests are relatively strong compared to interests of other states that would be disserved by the application of forum law. [4]

In the US the conflict of law rules are integral to family law disputes settlement because each state has its own legislature and courts system. These rules determine the extent to which courts at state level enforce legal rights, obligations, or claims affecting a non resident alien's assets located within the federal jurisdiction when there is a legal claim. This process arises in family law disputes when there is a marriage, child custody, and adoption where the court has to take into account the distribution of assets and the former partners are in different states. The US Constitution has a framework that bind one State to recognise the law of another and apply it in its own jurisdiction when parties to the dispute have raised it in the courts. The FFCC has given courts a wide discretion and the analysis should consider if they have been consistent in their rulings to provide certainty in family law proceedings.

The operation of FFCC is an important consideration and is central to the question if the court can apply the law of the forum (*lex fori*) which is usually the result when the question is if the court can apply the law of the site of the transaction, or occurrence that gave rise to the litigation initially (*lex loci*). This is usually the procedural law selected when the matter concerns *substantive matters in another state.* The impact of the clause is that if a final judgment is rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, it qualifies for recognition throughout the land.[5]

Since the 1950s the federal -State law has achieved a relatively high degree of consensus supporting a single choice-of-law approach and there has been an effort by states to adopt a common basis to choice of law by adopting a clause of mutual recognition between states. [6] The choice of law doctrine has been subject to relatively limited federal intervention under the FFCC. The privileges and immunities from the federal pre emption doctrine, equal protection, and the commerce clause impact on the constitutional choice-of-law limitations. The Supreme Court has clarified that there is no preexisting "public policy exception" to

[4] Frederic L. Kirgis Jr.,Roles of Due Process and Full Faith and Credit in Choice of Law, 62Cornell L.Rev. 94 (1976) Available at: http://scholarship.law.cornell.edu/clr/vol62/iss1/3

[5] See, *e. g., Matsushita Elec. Industrial Co. v. Epstein,* 516 U. S. 367, 373 (1996)

[6] Professor Symeon Symeonides has observed that there have been consideration, most notably in Louisiana and Oregon, to codify by statute conflict-of-laws rules. However, U.S. conflicts law is still largely judge-made. See generally SYMEON C. SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD (2014).

the full faith and credit due *judgments*. This paper considers the framework of the family laws within the framework of the conflict of law doctrine governed by FFCC and considers its impact on marriages, child custody and adoption. These have been elevated to civil rights in the US Constitution and includes consideration of the equal protection and due process clause. The family law in the US is considered a private law matter and this can be examined by reference to the Supreme Court judgments that have established the parameters of states' approach in family law issues. Section B of the paper considers the law in Scotland to provide a comparative approach in dealing with courts that apply the lex fori principles in family law disputes. The doctrine of *forum non conveniens* originated in the 19 th century in the Scottish courts when they began to formulate principles of its application in common law courts. There has been forum shipping in the UK that has enabled the selection of the forum court by litigants when there is a concurrent power of jurisdiction. The comparative approach will illustrate the difference between the approach of the statute based litigation in the US to the more common law centred litigation of family law disputes in Scotland.

I. RECOGNISING MARRIAGE INTER STATE

Conjugality is a legal status (marriage), but it is also a powerful normative concept in federal and state law.[7] The concept of conjugality explains the rule that the legal status of family can override the actual biological connection based on the notion of stable marital families.[8] This is deemed "a critical social good, and thus preservation of the conjugal relationship and family outweighs recognition of biological parentage".[9] The states have the primary

[7] See, e.g., Martha Albertson Fineman, Our Sacred Institution: The Ideal of the Family in American Law and Society, 1993 Utah L. Rev. 387, 387.

[8] In Michael H. v. Gerald D 491 U.S. 110, 129 (1989) as a result of an extramarital affair, Carole D. gave birth to Victoria D and the issue was the circumstances of her cohabitation with 3 men that made it difficult to determine who was the paternal father. In the first three years of her life, Victoria D. lived with her mother but three different men lived with her mother during this period. The daughter spent less than half of her first three years living with Gerald D, when she became pregnant, her mother's husband and Victoria's legal father, and approximately the same duration living with her biological father whose name was Michael. When Michael sued for visitation rights the case made it to the Supreme Court and the issue was of analysing the extent of an unwed father's right to maintain a relationship with his child. The Court ruled that the states may decide that any child born to a married woman may be treated as a legal child of the marriage so long as husband and wife agree to this and the actual paternity was irrelevant. At 131.

[9] For a discussion and critique of the Court's opinion in Michael H., see June Carbone and Naomi Cahn, Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty, 11 Wm. & Mary Bill Rts. J. lOll, 1039-50 (2003).

approaches to the presumption of legitimacy which they follow.[10] States have historically promoted conjugality not only by directly supporting that relationship but also by prohibiting intimate sex acts outside of marriage. Such prohibitions have all but disappeared, as courts have extended privacy protections to such acts but some states retain laws (despite a near-certain inability to constitutionally enforce them, and the Supreme Court has prohibited consensual sodomy, fornication, or adultery.[11]

The Supreme Court has declared marriage as a constitutionally protected individual right and has implicitly recognized and respected the concept of marital and family privacy. This has brought the FFC within the framework of the Equal Protection and Due Process Clause of the Fourteenth Amendment. [12] It has given marriage a level of civil rights protection in law and has been ruled upon as such by the Supreme Court.

In *Loving v. Virginia* [13] the impact of the FFCC was in evidence when a mixed couple was convicted under Racial Integrity Act § 20-58 of the Virginia Code. They were barred from marrying in Virginia and they transferred and married under the laws of another state. Upon return they were convicted of a criminal felony in Virginia and were informed that if they moved residence to solemnize their marriage in another state it would still be void under Virginia's law. § 20-59 on ' *Leaving State to evade law'* stated :

" *If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in, and the marriage shall be governed by" the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage*". They married in Washington, District of Columbia but upon returning to Virginia were held to be in breach of its laws. The couple appealed against the state law on miscegenation. In a unanimous decision, the justices found that

[10] Susan Frelich Appleton, Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era, 86 B.U. L. Rev. 227, 228-37 (2006)

[11] See, Lawrence v. Texas, 539 U.S. 558 (2003)). The constitutional validity of any such prohibition is highly doubtful. at 578. See Singson v. Commonwealth, 621 S.E.2d 682, 687 (Va. Ct. App. 2005) (stating that Lawrence did not declare all sodomy statutes facially unconstitutional); see also Utah Code Ann. § 76-5-403(1) (2003).

[12] "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

[13] 388 U.S. 1, 12 (1967).

Virginia's interracial marriage law "violated the 14th Amendment to the Constitution that provides due process and equal protection to all citizens".[14] Chief Justice Earl Warren ruled : "*It could have rested solely on the ground that the statutes discriminated on the basis of race in violation of the Equal Protection Clause... but with this language, the case casts doubt on the validity of much state regulation of marriage.*"[15] The Chief Justice stated further that "*[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual, and cannot be infringed by the state*". [16]

The landmark ruling led to the laws against interracial marriage in 16 U.S. states including Virginia to be annulled. [17] Despite the court's decision, however, some states were gradual in altering their laws. The last state to officially accept the ruling was Alabama, which removed an anti-miscegenation statute by an amendment of Article 667 to its constitution from its state constitution in 2000 after a vote of its citizens.[18] Jeremy W Richter argues that "the Supreme Court ruling in Loving v Virginia had rendered the Alabama criminal statute prohibiting interracial marriage and sexual relationships, the state legislature had no authority to remove the nullified statutes or to otherwise legalize the institution of marriage between black and white persons. Only two avenues were available whereby the removal of the nullified code sections could be effected: drafting a new state constitution or allowing the residents of the State of Alabama to vote on an amendment directly". [19]

The impact of the state amending its laws as Virginia did in the Loving case does not have an automatic effect in terms of application in other states. It is only if the Court passes judgment that it has validity and is then binding on the courts of other states to follow with

[14] At 11-12
[15] At 12
[16] At 9
[17] National Constitution Centre. On this day Supreme Court rejects anti inter racial marriage laws. 22/6/20 https://constitutioncenter.org/blog/today-in-supreme-court-history-loving-v-virginia.
[18] Article IV, S 102 of the Constitution of Alabama of 1901 reads: "Miscegenation laws: The legislature shall never pass any law to authorize or legalize any marriage between any white person and a negro, or descendant of a negro".
[19] Jeremy W. Richter, 2001, A Race Odyssey: Alabama's Anti Miscegenation Statute is Repealed. 14 June 2017 https://www.jeremywrichter.com/2017/06/14/alabama-anti-miscegenation-statute/

their own jurisdiction. While the FFCC has not been stated as the main cause of action Joanna Grossman has observed, "[t]he fact that the Full Faith and Credit Clause has not been invoked in the marriage context does not mean that it could not be."[20]

It is argued that there exists an "entrenched conventional wisdom that the FFCC actually is irrelevant to the question of whether one state must recognize another state's marriage." [21] Marriage, according to this conventional wisdom, is simply another subject for ordinary lawmaking and no different from things like workers' compensation, insurance regulation, gas royalties, or fishing licenses where each state gets to decide policy for itself. The Supreme Court's current Full Faith and Credit Clause jurisprudence prescribes minimal interstate effect for "acts"—that is, ordinary statutory policies—on the principle that a state should not be required "to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate."[22]

Sanders has argued that the FFCC is relevant for the family law and the marriage contract in particular because "*(1) marriage is sui generis as a legal subject, a principle that was underscored by the Court's recent decision in Windsor; (2) accordingly, it misunderstands, even trivializes, marriage to assume that the Supreme Court would and should apply the same rules to marriage that it has applied to things like workers' compensation and insurance regulation; and (3) there is a national interest in uniformity of marital status which supports use of the Full Faith and Credit Clause to prevent states from denying married couples the full benefit of their legal unions in every jurisdiction*".[23]

There has been much debate about interstate recognition of valid marriages and "in recent years, the most controversial applications of the FFCC have involved family law".[24] Each state has different laws about marriage, and the judgments in each state have drawn

[20] Joanna L. Grossman, Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws, 84 OR. L. REV. 433, 454 (2005) (emphasis in the original); see also Gene R. Shreve, Choice of Law and the Forgiving Constitution, 71 IND. L.J. 271, 271 (1996) (observing that the Full Faith and Credit Clause "can easily be read to protect nonforum state interests . . . that are disrupted by parochial state conflicts decisions").

[21] Patrick J. Borchers, The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate, 38 CREIGHTON L. REV. 353, 353 (2005).

[22] Baker v. General Motors Corp., 522 U.S. 222, 232 (1998) (quoting Pacific Emp'rs Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 501 (1939)).

[23] Steve Sanders, "Is the Full Faith and Credit Clause Still "Irrelevant" to Same-Sex Marriage?: Toward a Reconsideration of the Conventional Wisdom," *Indiana Law Journal*: Vol. 89 : Iss. 1 , Article 6. (2014) pp 37-38
Available at: https://www.repository.law.indiana.edu/ilj/vol89/iss1/6.

[24] Stephen E Sachs, Steve Sanders, Article IV, Section 1: Full Faith and Credit Clause. Sachs, Stephen E., *Full Faith and Credit in the Early Congress* (September 2009). Virginia Law Review, Vol. 95, pp. 1201-1279, 2009. Available at SSRN: https://ssrn.com/abstract=1032676

nationwide interest and even the Supreme Court has never alluded to the matter,[25] and it has been the scholars who have drawn to the attention the impact of the Article 4 Section 1 on marriage contracts. It is necessary to evaluate the family law aspects in which this has been invoked and how states have interpreted its terms from the court rulings.

II. DUE PROCESS CLAUSE AND SAME SEX UNION

By tradition every state honored a marriage legally contracted in any other state. However, the issues concerning the same sex marriages concerned state jurisdiction and whether courts in one state will agree to this form of marriage in another state. This was because it raised issues about the sanctity of marriage or if this was a civil rights matter that the federal government could legislate by enacting a law to legalise same sex union.

However, in 1993, the Hawaii Supreme Court held that Hawaii's statute restricting legal marriage to parties of the opposite sex establishes a sex-based classification, which is subject to strict scrutiny if challenged on equal protection grounds. In *Baehr v. Lewin*, [26] a member of a civil union Nina Baehr sued the state of Hawaii, alleging that the state's refusal to issue her and her same-sex partner a marriage license amounted to illegal discrimination. The Hawaiian Supreme Court drew an analogy to *Loving v. Virginia*, where the U.S. Supreme Court ruled that laws based on racial classifications were unconstitutional.

The Court stated that the Hawaiian statute prohibiting gay marriage violated Hawaii Constitution's equal-protection clause and was subject to "strict scrutiny," meaning it was unconstitutional unless it was "justified by compelling state interests" and was "narrowly drawn to avoid unnecessary abridgements of the [plaintiffs'] constitutional rights".[27] It also found that the law prohibiting same-sex marriage discriminated on the basis of sex and therefore violated the Hawaiian Constitution. Under the state's Equal Rights Amendment, the state would have to establish a compelling state interest supporting such a ban, a fairly strict standard.[28] Although the court did not directly rule that the state's prohibition of same-

[25] Even the federal circuit court have not accepted it and at least one federal district court has rejected a full faith and credit argument for interstate recognition of a same-sex marriage. Wilson v. Ake, 354 F. Supp. 2d 1298, 1303–04 (M.D. Fla. 2005).
[26] (1993) 852 P.2d 44, 74 Haw. 530.
[27] HAW. CONST. art. I, § 6 (1978) ("The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.")
[28] Ibid at 50

sex marriages was illegal, it left little doubt of its skepticism regarding the proposition. The court remanded the case to a lower court to determine whether the state could prove this compelling state interest in prohibiting same-sex marriage.

This was the first time, a state Supreme Court had ruled that gay couples might have the right to marry. Although its immediate impact was only in Hawaii, the decision in *Baehr v. Lewin* encouraged the gay rights supporters and discouraged opponents throughout the country. The primary reason for these responses was the provision in the Article IV, Section 1, of the US Constitution that has the framework for recognising the judgments in one state and giving effect to them in other states where the parties reside and the ruling has same effect.

This sets out the principle that the FFCC shall be given in each state to the public Acts, Records and judicial proceedings of every other state. The Clause requires states to grant full weight to legal actions in other states, including marriages, divorces, and other family-related situations. Both opponents and proponents of gay marriage realized that the Full Faith and Credit Clause of the Constitution might mean that if same-sex marriages were legal in Hawaii, the marriages would be entitled to legal recognition in other states as well.

Although the court did not recognize a constitutional right to same-sex marriage, it raised the possibility that a successful equal protection challenge to the state's marriage laws could eventually lead to state-sanctioned same-sex marriages. In response to the *Baehr* case, Congress in 1996 passed the Defense of Marriage Act (110 Stat. § 2419), (DOMA) which defines marriage as a union of a man and a woman for federal purposes and expressly grants states the right to refuse to recognize a same-sex marriage performed in another state. Section 3 of the Act defined marriage for federal purposes as the union of one man and one woman, and allowed states to refuse to recognize same-sex marriages granted under the laws of other states. DOMA, in conjunction with other statutes, had barred same-sex married couples from being recognized as "spouses" for purposes of federal laws, effectively barring them from receiving federal marriage benefits.

The FFCC and the conflict of laws doctrine invites on all states to recognize marriages except for those that are “evasive” which are those where a couple briefly transfer their

domicile state to procure a marriage they could not consummate in their own state. [29] However, DOMA's enactment did not prevent individual states from recognizing same-sex marriage, but it imposed constraints and disallowed welfare benefits to all legally married same-sex couples. The mini-DOMA states applied the so-called "public policy exception" to the place of celebration rule, which was meant to be applied to evasive marriages,[30] they have abandoned the comity required by a sensible choice of law regime and made "protection" of their own marriage policies "the first (and often final) principle."[31] It has been argued that it is unjust for a mini- DOMA state to declare void a non-evasive couple who migrated from one state to another state.[32]

However, this defence was based on the FFCC on grounds that that states "are free to disregard the laws of sister states which compete for application,"[33] on account that they had always been permitted to do so. There is no provision in the Constitution that "creates a public policy exception to the full faith and credit mandate. The development of this exception has come solely from the common law . . . ." [34]

Larry Kramer has argued The States are allowed to not follow the FFCC against marriages they do not accept as valid because there is no constitutional rule to prevent the "chaotic results" that can happen when choice of law is left "almost entirely in the hands of state

[29] See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971) ("A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.").
[30] See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971). For more on states' abuse of the public policy exception, see Sanders, supra note 21, at 1435–41.
[31] Lynn D. Wardle, From Slavery to Same-Sex Marriage: Comity Versus Public Policy in Inter-jurisdictional Recognition of Controversial Domestic Relations, 2008 B.Y.U. L. REV. 1855, 1919 (2008).
[32] See, e.g., Stanley E. Cox, Nine Questions About Same-Sex Marriage Conflicts, 40 NEW ENG. L. REV. 361, 377–79 (2006) (arguing that the public policy exception is unconstitutional and observing that "[i]f it is not intolerable that a couple can be married and not married at the same time, it is at least supremely frustrating"); Andrew Koppelman, Against Blanket Interstate Nonrecognition of Same-Sex Marriage, 17 YALE J.L. & FEMINISM 205, 208 (2005) (observing that such a rule "produces absurd and cruel results," is inconsistent with federalism, and likely violates equal protection); Linda Silberman, Same- Sex Marriage: Refining the Conflict of Laws Analysis, 153 U. PA. L. REV. 2195, 2214 (2005) (arguing that "[s]tates with 'defense of marriage' acts should not further their own policies at the expense of the legitimate interests of other states and the reasonable expectations of the parties" and that "states that choose to prohibit same-sex marriage should not undermine the rights of newly-arriving couples from established marriages in other states")
[33] L. Lynn Hogue, State Common-Law Choice-of-Law Doctrine and Same-Sex "Marriage": How Will States Enforce the Public Policy Exception?, 32 CREIGHTON L. REV. 29, 38 (1998).
[34] Emily J. Sack, The Retreat From DOMA: The Public Policy of Same-Sex Marriage and a Theory of Congressional Power Under the Full Faith and Credit Clause, 38 CREIGHTON L. REV. 507, 523 (2005).

courts."[35] The FFCC is not involved and the Court has recognized a few relatively narrow policy-based exceptions to the states' obligations to enforce the judgments of other states' courts. The "*evolution of judgments recognition law in the United States from federal common law to state common and statutory law in the early twentieth century now results in significant substantive law differences from state to state*".[36] *This inference can be drawn by the recent decisions that indicate the problems created by "those substantive law differences" and in "state law differences in applying both constitutional principles of due process to questions of personal jurisdiction in the recognizing court" and the "doctrine of forum non conveniens" create further "opportunities for forum shopp1ing and manipulation in ways that create inefficiencies and inequities*". [37]

In *United States v. Windsor* [38] the appellant Edie sought a refund of the estate tax she was forced to pay after her partner died because the state did not recognise her marriage despite 44 years of coexistence as a gay couple. Edie alleged that DOMA violates the Equal Protection principles of the Constitution because it recognized existing marriages of heterosexual couples, but not of same-sex couples, despite the fact that New York State treats all marriages the same. The Supreme Court declared that section three of the so-called "Defense of Marriage Act" (DOMA) is unconstitutional and that the federal government cannot discriminate against married lesbian and gay couples for the purposes of determining federal benefits and protections. The Court held

"*DOMA's principal effect is to identify and make unequal a subset of state-sanctioned marriages. It contrives to deprive some couples married under the laws of their State, but not others, of both rights and responsibilities, creating two contradictory marriage regimes within the same State. It also forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect*". [39]

This case overruled the most significant clause of DOMA which enabled each state to refuse to recognize other states' acts, records, and judicial proceedings purporting to validate same-sex marriages. The Act specifically allowed each state to deny rights and claims arising from

[35] Larry Kramer, Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception, 106 YALE L.J. 1965, 1978 (1997).
[36] Ronald A Barrett, The Continuing Evolution of US judgments Recognition law, 55 Columbia Journal of Transnational Law 277 pp 277 – 34.jtl.columbia.edu › uploads › sites › 2017/05 › Brand_55-CJTL-277.

[37] Ibid.
[38] 133 S Ct. 2675 (2013)
[39] Pp. 20–26.

same-sex marriages created in other states and aimed to displace impact of the FFCC in these areas. This case led to further litigation and there was an appeal that reached the Supreme Court that had to decide upon the same sex marriages as to being of universal effect across all states and the issue of whether a state could refuse to sanction a marriage domiciled in another state was settled.

In *Obergefell v. Hodges* [40] groups of same-sex couples litigated against their relevant state agencies in Ohio, Michigan, Kentucky, and Tennessee to challenge the constitutionality of those states' bans on same-sex marriage or recognition of same-sex marriages that occurred in jurisdictions that had legalized the same such marriages. The plaintiffs in each instance argued that the states' statutes violated the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment, and set of plaintiffs also brought claims under the Civil Rights Act. The issue reached the Supreme Court after the US Court of Appeals for the Sixth Circuit, which treated these separate lawsuits as a consolidated claim, reversed held that the states' bans on same-sex marriage and refusal to accept as legal marriages performed in other states did not violate the couples' Fourteenth Amendment rights to equal protection and due process.

The issue was does the Equal Protection Clause and the Due Process Clause under the Fourteenth Amendment require a state to license a marriage between two people of the same sex and would it require a state to recognize a marriage between two people of the same sex that was legally licensed and performed in another state. In a 5-4 decision for the same sex marriages as legally valid under the Full Faith and Credit Clause and as grounds for equal protection the Supreme validated the marriages within the states inter se bringing it on the same level as a marriage between opposite sex couples. The Court found that same-sex marriage bans are a violation of the 14th Amendment under both Due Process and Equal Protection clauses.

Justice Kennedy in ruling for the majority stated that "the First Amendment ensures that religions, those who adhere to religious doctrines, and others have protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths". [41] Furthermore, that " The Fourteenth Amendment requires States to recognize same- sex marriages validly performed out of State. Since same-sex couples may now exercise the fundamental right to marry in all States, there is no lawful basis for a State to refuse to

[40] 576 US - (2015).
[41] at 23-27.

recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character". [42] Justice Kennedy concluded that " because marriage is a fundamental right, the government needs a compelling reason to deny it to some people".[43] Justice Scalia in his dissenting opinion stated that the supremacy of the Constitution permitted self rule to the states in order for them to exercise laws except those where "Regulation of domestic relations which is an area that has long been regarded as virtually exclusive province of the state ". [44]

The decision in this case changed "the conventional wisdom among those legal scholars who considered the Full Faith and Credit Clause as of no impact to couples whose marriages were not recognized, because marriage is simply another subject for ordinary state lawmaking".[45] It was not separable from any other act of state legislature such as workers' compensation schemes, insurance regulation, or industrial investment where, under the Supreme Court had allowed each state to enact its own legislation. However, the perspective in the decision that legalised this as a valid union for states to register took into consideration the factors such as the incidental interests such as marriage property, adoptions, and inheritance rights. This cover a broader landscape in which law and equity is part of the process and is essential in formulating the marital relationship whatever its composition.[46]

III. CHILD CUSTODY AND SUBJECT MATTER JURISDICTION

The US Congress has utilised its FFCC in certain specific contexts related to not only marriage, but also divorce, and children. The federal circuits courts are not definite on another question of family law on the application of Article 4 Section 1 to the extent and in what manner should one state be required to recognize an adoption procured by a couple in another state. The adoptions are finalized by court judgments and there is opinion "*that any adoption should be recognized by all other states for all purposes, even if it violates the public policy of*

[42] at 27-28.
[43] at 28.
[44] at 16.
[45] Prior to this ruling many states refused to recognize same-sex marriages performed in other states, sometimes even going as far as to declare such marriages "void" or "invalid." *See* Steve Sanders, *The Constitutional Right to (Keep Your) Same-sex Marriage*, 110 Mich. L. Rev. 1421 (2012)
[46] Steve Sanders, *Is the Full Faith and Credit Clause Still 'Irrelevant' to Same-Sex Marriage?: Toward a Reconsideration of the Conventional Wisdom*, 89 Ind. L. J. 95 (2014).

the 'receiving' state (because, for example, it involves an unmarried couple)".[47] This view has been advanced to promote more certainty and stability in the parent-child relationship.

There is a distinction in the interpretation by the courts between recognition of an out-of-state judgment or record and enforcement of an out-of-state judgment or record.[48] The precise obligations that FFCC credit imposes on state actors is dependent on this separation. The court formulated the full faith and credit framework that could conceivably accommodate all types of state records. This supports the theory of recognition and enforcement that was set out by the Supreme Court's decision in *Baker v. Gen. Motors Corp* where Justice Ginsburg had ruled that these principles can be reconciled. These were that the obligation of states should *recognize* another state's judgment is "exacting", [49] and secondly that states are not obligated to "adopt the practices of other States regarding the time, manner, and mechanisms for *enforcing* judgments. [50]

This is particularly the case in divorce and child custody matters where the valid certification issue by the court becomes part of its record and is applicable across states. A public policy exception exists with regard to state statutes, as "The Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate."[51]

The Uniform Child Custody Jurisdiction Enforcement Act ("UCCJEA") 1997 (28 US Code) governs the law for child custody cases based on the hierarchy of four principles, for taking jurisdiction over initial child custody determinations. The UCCJEA was drafted in 1997 to help reconcile differences between the UCCJA and federal laws such as the Parental Kidnapping Prevention Act (PKPA) 1980[52].It prevents any state from exercising

[47] *See* Thomas M. Joraanstad, *Half Faith and Credit?: The Fifth Circuit Upholds Louisiana's Refusal to Issue a Revised Birth Certificate*, 19 Wm. & Mary J. Women & L. 421 (2013).
[48] David Engdahl, The Classic Rule of Faith and Credit, 118 *YALE L.J.* 1584 (2009)https://digitalcommons.law.seattleu.edu/faculty/154
[49] Baker v. Gen. Motors Corp., 522 U.S. 222, 234 (1998), 522 U.S. at 232–35.
[50] *Ibid* at 233.
[51] Ibid *at* 232 (quoting Pac. Employers Ins. Co. v. Indus. Accident Comm'n 306 U.S. 493, 501 (1939).
[52] The PKPA forced every state to give full faith and credit to any custody decree, no matter in which state the decision was rendered, provided it met due process and the PKPA jurisdictional requirements. The PKPA also prevented other states from modifying a custody order issued by any other state, with only a few exceptions The PKPA requires that, before a court can decide any custody matter, reason able notice and opportunity to be heard has been given to all contestants, parents whose parental rights have not been

modification jurisdiction when there is already a pending proceeding in a state in accordance with the PKPA/UCCJA, (the previous statute before UUCJEA) [53] and further gives the original state the right to exclusive jurisdiction to modify any of its orders provided the child or one of the contestants continued to reside in that state.[54]

It also augments the Violence Against Women Act (VAWA) 1994 in terms of state jurisdiction that may lead determination where the child custody has to take place as a consequence of marital violence. [55] The UCCJEA is a uniform state law regarding jurisdiction in child custody cases. It specifies which court should decide a custody case, but not how the court should decide the case. The particular state's court is empowered to determine child custody matters only if one of these for tests is met. The four tests, in order of priority, are: 1) the child's "home state," 2) a "significant connection" between state and parties to a child custody dispute, 3) "emergency" jurisdiction when the child is present and the child's welfare is threatened, and 4) presence of the child in the event there is no other state with another sound basis for taking jurisdiction.[56]

The determinations for child custody cases is determined by the child's "home state" - the state where the child has lived for the past six, consecutive months.[57] Every state in the US has adopted the UCCJEA and the voluntary adoption by the states recognized FFCC but formulated its own procedures under the state civil code by which a state would make the initial custody determination for the child.

s1738A states a) "*The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State*".

terminated and to anyone actually having physical custody of the child. See 28 U.S.C. § 1738A(e). Specifically, for initial custody determinations, the PKPA prioritizes home state jurisdiction over significant continuing jurisdiction and otherwise repeats the temporary and no other state jurisdictional requirements of the UCCJA. See id. § 1738A(c).

[53] 28 U.S.C. § 1738A(d).

[54] The U.S. Supreme Court held that the PKPA does not create a cause of action in federal court to resolve which of two competing custody decrees is valid, thereby ending the litigation that was creeping into federal court to resolve these disputes. See Thompson v. Thompson, 484 U.S. 174 (1988).

[55] VAWA §§ 2265-2266 (1994) states (requiring states to honor and enforce orders of protection, including ex parte orders). Although the full faith and credit mandate of VAWA specifically exempts custody orders, certain practice orders, including stay- away from a child orders, might be inconsistent with the UCCJA.

[56] § 201(a).

[57] See the previous statute UCCJA § 3(a)(2) which states that "it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection training, and personal relationships"

The impact of this is that under the UCCJEA each state has to follow in custody proceedings by creating subject- matter jurisdiction over the child, i.e. jurisdiction that is based on the relationship between the child and the state. The court may exercise significant connection jurisdiction only if there is no home state and two conditions are met: (1) the child and the child's parents, or the child and at least one parent or a person acting as a parent, must have "a significant connection with the state other than mere physical presence"; and (2) "substantial evidence must be available in the state concerning the child's "care, protection, training, and personal relationships."[58] After the court makes a child custody determination, it has continuing jurisdiction over the case, with the exception of two circumstances. Firstly, the state will no longer have jurisdiction over the case if the child or his parents is no longer connected with the state, and secondly, the state will lose jurisdiction if another court determines that the child and his/her parent does not live in the original state anymore. [59]

The UCCJEA provides a general legal framework for recognition and enforcement of foreign custody and visitation decrees originating from foreign jurisdictions. It specifies that a decree made by a party to the Hague Convention on the Civil Aspects of International Child Abduction will be enforced and the United State is a party to Hague Convention on the Civil Aspects of International Child Abduction. Section 105 binds the US to the broader scope of treaty obligations and domestic law that predated the development of the Act, and influenced its formulation.[60]

IV. ADOPTION CASES AND CHOICE OF STATE

The Uniform Adoption Act 1994 sets down that the best interests of the child will be the only consideration. [61] The choice-of-law to be applied during an adoption proceeding is usually the law of the forum.[62] However, the instances of adoption, such as the parent's right to discipline the child and the child's inheritance rights, "are governed by the law of

[58] §201(a)(2).
[59] § 204
[60] The United States has been a party to the Convention on the Civil Aspects of Child Abduction since 1988.
[61] § 3-703(a) cmt., 9 U.L.A. 94 (1994) (—A judicial determination that a proposed adoption will be in the best interest of the minor adoptee is an essential—and ultimately the most important—prerequisite to the granting of the adoption.‖)
[62] L. L. Mcdougal III ET AL., American Conflicts Law § 223, at 781 (5th ed. 2001).

the state in which the parent and child are living when the issue arises, even though the adoption may have taken place in another state".[63]

The adoption can only be created by the legal relationship of parent and child that is created with the issuance of a judicial decree.[64] The court must determine a biological parent's consent (or waiver) and a child's best interests before any legal rights or obligations transfer.[65] Notwithstanding, a common standard of best interests, the state adoption statutes do not specify the term with precision.[66] Its consequence is that the courts have the power to evaluate and certify the adoptions.[67]

The application of the FFCC in interstate jurisdiction has to take into consideration the best interests which lacks any uniform statutory description,[68] and adoption law reflects varying state policies regarding domestic relations and family law.[69] Nevertheless, attempts to achieve uniformity among state adoption law and procedures have largely faltered.[70]

Terry argues that it has become a matter of debate "whether the Full Faith and Credit Clause governs the incidents of adoption".[71] There are different approaches one "*asserts that the incidental rights of adoption fall within an enforcement framework and are therefore outside the exacting full faith and credit owed to judgments.*[72] *Another approach asserts that an adoption's incidental rights fall*

[63] See Ralph U. Whitten, Choice of Law, Jurisdiction, and Judgment Issues in Interstate Adoption Cases, 31 CAP. U. L. REV. 803, 804 (2003), at 807.

[64] Joan Heifetz Hollinger et al, Adoption Law and Practice §§ 3.01–4 (2008)

[65] Ibid § 1.01[2][a]–[b].

[66] Ibid § 4.01[1]

[67] Ibid § 4.01[1] (noting that ―most adoption statutes do not include a list of specific factors to be considered in making a best interests determination‖); see also In re L.W., 613 A.2d 350, 355 (D.C. 1992) (asserting that a court's determination as to the ―best interests‖ of a child must be fact-specific because ―magic formulas have no place in decisions designed to salvage human values‖ (citing Lemay v. Lemay, 247 A.2d 189, 191 (N.H. 1968))

[68] Ibid § 4.01[1

[69] Compare FLA. STAT. ANN. § 63.042 (West 2003) (prohibiting any homosexual person from adopting), invalidated by Florida Dep't of Children & Families v. Adoption of X.X.G., 45 So. 3d 79 (Fla. 2010), and G.S. v. T.B., 985 So. 2d 978, 983 (Fla. 2008) (describing the goal of Florida's adoption scheme as a ―stable, permanent, and loving environment‖ for an adopted child), with In re M.M.D., 662 A.2d 837, 857 (D.C. 1995) (describing the purpose of the District of Columbia's adoption statute as to ―provide a loving, nurturing home‖ and concluding that a committed, unmarried same-sex couple could fulfill this purpose).

[70] Joan Heifetz Hollinger, The Uniform Adoption Act: Reporter's Ruminations, 30 FAM. L.Q. 345, 345, 377 (1996) (describing the process of drafting the Uniform Adoption Act of 1994 as ―bitterly divisive‖ and acknowledging that the Act faced immediate ―intense criticism‖ from lobbying groups).

[71] Pamela K. Terry, E Pluribus Unum? The Full Faith and Credit Clause and Meaningful Recognition of Out-of- State Adoptions, 80 Fordham L. Rev. 3093 (2012). p 3119. Available at: https://ir.lawnet.fordham.edu/flr/vol80/iss6/23.

[72] See, e.g., Adar v. Smith, 639 F.3d 146, 161 (5th Cir.)

within the Clause's mandate of evenhanded enforcement.[73] *At least one court has declined to apply full faith and credit analysis to the issuance of revised birth certificates*".

In *Davenport v. Little-Bowser*[74] the Virginia Supreme Court held that the state registrar could not refuse to reissue a birth certificate with both names of an out-of-state adoptive same-sex couple when the relevant statute referred to only to the adoptive parents and the intended parents.[75]

The state initially argued that other birth certificate regulations referring to mother and father supported a restrictive reading of the adoption provision.[76] Furthermore, the state of Virginia argued that the state restriction of adoption to single individuals or to married couples maintained its application.[77] The Virginia Supreme Court held that a plain reading of the statute invalidated the state's arguments.[78] It refused to accept the plaintiff's FFCC claims, and affirmed that the only issue in this case is the enforcement was Virginia Adoption code.[79]

The FFCC has been invoked where an individual bring a federal cause of action against state executive officials for alleged violations in an across the state adoption case. In *Finstuen v. Crutcher*,[80] two same sex couples resident in Oklahoma, Lucy and Jennifer Doel adopted children in another state. Upon the Doels' return the Oklahoma State Department of Health (OSDH) refused to issue a revised birth certificate listing both parents, and instead issued a certificate that named only Lucy Doel as E's mother.[81] In 2004, the Oklahoma Attorney General issued an opinion stating that the FFCC required the OSDH to issue revised birth

[73] See Rhonda Wasserman, Are You Still My Mother? Interstate Recognition of Adoptions by Gays and Lesbians, 58 AM. U. L. REV. 1, 3–4 (2008) (identifying the tension between family, state, and federal interests). (arguing that ―just as states must recognize sister-state adoptions regardless of public policy objections, they must afford sister-state adoptions the same incidents they afford to local adoptions‖). Wasserman concludes that state, federal, and— especially in the adoption context—a child's ―overriding interest in stable family relationships, outweigh a single state's interest in denying recognition or enforcement to out-of-state adoption decrees), at 82 ; compare with Lynn D. Wardle, A Critical Analysis of Interstate Recognition of Lesbigay Adoptions, 3 AVE MARIA L. REV. 561, 598–99 (2005) (concluding that a state may decline to recognize or enforce incidental rights of sister-state adoption judgments that violate a strong, conflicting policy of the state).
[74] Davenport v Little and Bowser 611 S.E.2d at 371–72
[75] at 371–72
[76] Ibid
[77] at 372
[78] Ibid
[79] Ibid
[80] 496 F.3d 1139 (10th Cir. 2007).
[81] at 1142

certificates in accordance with the parental relationship in the legal adoption even if the parents were ineligible to adopt in Oklahoma.[82]

The Oklahoma state amended its adoption code to prohibit any state agency or court from recognizing a sister-state adoption by two individuals of the same sex.[83] The Doels then appealed but were again refused a new birth certificate for E that included both mothers' names.[84] They then petitioned in the federal court against three state executive officials: the OSDH Commissioner, the Governor, and the Attorney General.[85]The complaint was of breaches of the F FCC, the Equal Protection Clause, and the Due Process Clause, and the ability to move around of their own will.[86]

The U.S. District Court for the Western District of Oklahoma granted judgment for the plaintiffs under these constitutional provisions and ruled that the OSDH Commissioner, Dr. Michael Crutchen had to issue a new birth certificate listing both parents‘ names.[87] He appealed and the Court held that that the Commissioner‘s conduct in enforcing the amendment violated the state‘s obligation under the FFCC to recognize a sister-state's judgment.[88] The Court also ruled that Dr. Crutcher was an appropriately named defendant because the petitioners could litigate against a state officer responsible to the enforcement of a challenged law.[89]

The Court drew on the Supreme Court‘s precedent in *Baker v. General Motor Corp.* that there is "—no roving ‗public policy exception‘ to the full faith and credit due judgments" [90], and that the state of Oklahoma was under the obligation to recognize the Doels‘ California adoption decree.[91] By this ruling the court confirmed that "adoption decrees were final judgments and, therefore, were entitled to the unequivocal‖ mandate of the Full Faith and

[82]Ibid.
[83] at 1146 (quoting OKLA. STAT. tit. 10, § 7502-1.4(A) (2007) (—[T]his state, any of its agencies, or any court of this state shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction.‖)).
[84] Ibid.
[85] at 1142.
[86] Finstuen v. Edmondson, 497 F. Supp. 2d 1295, 1300 (W.D. Okla. 2006), affirmed in part, rev'd in part on other grounds sub nom. Finstuen, 496 F.3d 1139.
[87] Ibid. at 1315.
[88] Ibid. at 1156. The Tenth Circuit declined to address the Doels‘ additional due process and equal protection claims.
[89] Ibid. at 1148–49.
[90] Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998).
[91]Finstuen, 496 F.3d at 1152.

Credit Clause".[92] The primacy of the FFCC was accepted as the Court dismissed the defendant's contention that in requiring Oklahoma to issue a birth certificate when the California adoption decree was produced amounted to the extraterritorial application of California law.[93]

The FFCC was invoked in the determination that by not allowing California effective jurisdiction but instead it was requiring that state executive officials apply Oklahoma law in an evenhanded manner.[94] In not being to provide equal protection the amended statute of Oklahoma violated the FFCC because it expressly denied the validity of the out-of- state adoption decrees as in these circumstances.[95] It had "improperly conflate[d] [a state's] obligation to give full faith and credit to a sister state's judgment with its authority to apply its own state laws in deciding what state-specific rights and responsibilities flow from that judgment".[96]

The substantive effect entitled to a sister-state's laws has complicated the Clause's since its earliest interpretation and it has been asserted that the modern full faith and credit doctrine has significantly diverged from what the framers intended.[97] This is because of the variables present in its interpretation that make it onerous for the courts to apply it in the given cases in family law. This is particularly noticeable in the realm of law where a state has to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.

In *Adar v. Smith* [98] Mickey Smith and Oren Adar were an unmarried, same-sex couple who adopted Louisiana-born child and went through a legal adoption in the state of Louisiana. They brought a law suit against the Louisiana Registrar after she refused to issue a revised

[92] Ibid.
[93] Ibid at 1153.
[94] Ibid at 1153–54 (quoting Baker v. Gen. Motors Corp., 522 U.S. 222, 234–35 (1998)).
[95] Ibid. at 1156.
[96] Ibid 1153
[97] David E. Engdahl, The Classic Rule of Faith and Credit, 118 YALE L.J. 1584, 1586–92 (2009) (arguing that the classic full faith and credit rule, concerning evidentiary sufficiency, has been obscured and forgotten because of judicial error and insufficient critical commentary); Also see Stephen E. Sachs, Full Faith and Credit in the Early Congress, 95 VA. L. REV. 1201, 1278–79 (2009) (contends that the Clause contained only an evidentiary framework, and that —[o]ver the past 200 years, courts have made ever more of the spirit of the Clause and of its implementing statute, but in doing so they have rendered the doctrine less and less coherent‖); Whitten, supra note 20, at 257 (—[M]odern Supreme Court decisions have . . . gone far beyond the original understanding of the provision . . . [and] there is little chance that the Supreme Court will revise its current interpretation of the Clause to return to the original meaning . . .
[98] 639 F 3d. 146 (2011) (5 th Circuit 2010) (en banc), cert. denied, 132 S. Ct. 400 (2011)

birth certificate for the couple‘s adopted child.[99] in New York in 2006.[100] In the adoption proceedings, Smith and Adar also changed J‘s name from the one registered on his original birth certificate.[101] The couple then sought to have J‘s Louisiana birth certificate reissued with both fathers‘ names overriding those of J‘s biological parents.[102] Section 40 of Louisiana‘s adoption code permitted the grant of a new birth certificate with the names of the adoptive parents upon the production of a properly executed out-of-state adoption decree.[103]

The state 's decision was upheld and it was not required to issue a new birth certificate recognizing two unmarried men as the parents of a Louisiana-born child whom they had adopted in New York. The appeals court reasoned that the FFCC binds state courts but not non-judicial officials actors such as the administrative staff who oversee a state's birth records. Therefore, Louisiana was not bound but the out of state adoption procedures that were not carried out within its jurisdiction. [104] The Court ruled that while Louisiana must recognize under the Clause the preclusive effect of a sister-state adoption judgment granted to a same-sex couple, the Louisiana statute providing for the reissuance of the adopted child‘s birth certificate was governed by Louisiana law and, therefore, permitted the exclusion of the couple);

The Court made a distinction between recognizing the existence of the parental relationship, which the Registrar had done, and was abided to enforce under the FFCC as it had the force of law being certified in another state and reissuing the birth certificate, which was construed as a separate act of enforcement.[105] The judgment stated that in issuing a revised birth certificate was part of enforcement and did not come under the mandate of the FFCC. [106] The Supreme Court ruling was invoked for the principle that the FFCC does not compel a state to substitute the legislative acts of other states for its own statutes concerning a subject matter jurisdiction where it is competent to legislate.‘[107]

V. SCOTLAND

[99] at 149–50.
[100] Ibid. at 149. The Louisiana Registrar‘s surname was also Smith. Id. at 146, 149.
[101] Id. at 167 (Wiener, J., dissenting).
[102] Id. at 149 (majority opinion).
[103] See LA. REV. STAT. ANN. § 40:76(A), (C) (1990).
[104] At 161 citing Estin v Estin 334 US 541 (1948) at 554
[105] *Adar v. Smith*, 639 F 3d. 146 (2011) at 159 (—The Registrar acknowledged that even though she would not issue the requested birth certificate with both names, the Registrar recognizes [Adar and Smith] as the legal parents of their adopted child.‖)
[106] Ibid. at 160.
[107] Ibid. (quoting Sun Oil Co. v. Wortman, 486 U.S. 717, 722 (1988) (quoting Pac. Emp‘rs Ins. Co. v. Indus. Accident Comm‘n, 306 U.S. 493, 501 (1939)).

1) Concurrent jurisdiction and choice of court

The concept of *forum non conveniens* emanates from the Scottish legal system before its adoption in the common law world. This is a process by which common law courts provide a mechanism through which on the defendant's application to relinquish its established jurisdiction in favour of a more appropriate forum elsewhere. The allocation of the case for an appropriate forum or lex fori for the subject matter of the dispute the lex causae can be determined by the courts. [108] There has been concern that forum shopping based on court selection is increasing and there needs to be prevention by the courts in cases of concurrent jurisdiction and that Scottish courts should be less inclined to hear such dispute.

The existence of concurrent legal systems requires the evaluation of different schools of jurisprudence which need to be evaluated for laws that impact on disputes involving foreign parties. It is generally accepted that these are multi dimensional and they fall separately into a system of jurisprudence with their own corpus juris.[109] In Scotland the courts apply the common law principle of the forum non conveniens that enables the court to exercise a discretion as to which law to apply in a given case.

The European courts, by contrast, have adopted the HCCH 1953, which states, in Article 1 that "its purpose is to work for the progressive unification of the rules of private international law". [110] This applies in civil law countries and is generally the accepted model in civil law countries. [111] It has been of assistance in the implementation of multilateral

[108] Janeen M. Carruthers, Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages, *The International and Comparative Law Quarterly,* Vol. 53, No. 3 (Jul., 2004), pp. 691-711

[109] Konrad Zweigert, Hein Kötz classify the different groups of jurisprudence into the Roman family; German family ; Common law family, Nordic family, Family of the laws of the Far East (China and Japan) and the Religious family (Jewish, Muslim and Hindu law) *An Introduction to Comparative Law*, translation from the German original: *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* by Tony Weir, 3rd edition; Oxford, 1998, page 11 ; P Arminjon, B Nolde and M Wolff in Traite de droit compare 1 Paris, 1950 page 49 classified them without regard to the geographical factors and set them out in seven groups which were the French group that applied the Napoleonic Code; German group; Scandinavain group; English group; Islamic group and the Hindu group. Åke Malmström reviews the existing classifications of legal systems and legal families and concludes that within the Western (European–American) legal group four legal families can be distinguished: the legal systems of Continental Europe (with a German and a Romanistic subgroup), the Latin–American system, the Nordic (Scandinavian) system and the Common Law system. The Systems of Legal Systems, Notes on a Problem of Classifications in Comparative Law, 13 Scandinavian Studies in Law, 1969, pp 127

[110] Statute of the Hague Conference on Private International Law15/7/55 http://www.hcch.net/index-en.php?act=conventions.text.&aid=29

[111] Ibid

conventions promoting the harmonisation of conflict of laws principles in diverse subject matters within private international law. The HCCH has adopted 38 international conventions since its Statue was enacted in 1951 which brought about the framework for the adoption of conflict of law rules, jurisdiction and applicable law rules of maintenance obligations, matrimonial and inheritance. [112]

Although forum shopping may frequently be an international exercise between competing jurisdictions, often there are purely domestic UK cases where both the Scottish and English courts have concurrent jurisdiction. The Scotland and English law are separate legal streams for the purpose of substantive law and their court structure.[113] The Civil Jurisdiction and Judgements Act 1982 Section 20 requires the UK courts to have regard to the Court of Justice of the EU (CJEU) case law when applying Schedule 8 of the Act which deals with the allocation of jurisdiction within Scotland. There is a process of concurrent jurisdiction which is overriding and in which the parties can exercise their choice of law. This allows the selection by the litigants to select the court where they consider the forum to be better suited to their needs.

There is a need to carefully consider whether Scotland or England is the most convenient forum for issues that arise when there is concurrent jurisdiction. The failure to ascertain can result in the Court unilaterally dismissing an action on the basis of the principle of forum non conveniens, which can apply to any intra UK action. It is in broad terms, of no relevance to cases where the competing jurisdictions are EU member states, as forum non conveniens is excluded by the terms of the Brussels Regulation (Regulation 1215/2012). However it remains a proposition for the courts within the UK to consider and for them to apply in favour of one party or another.

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[112] The Member States of the EU have adopted the Hague Conference and in June 2005 the 20th Diplomatic Session of the Conference led to the major developments that were facilitated the Regional Economic Integration Organisations. The Conference has opened for ratification the Hague Convention on Choice of Court Agreements, under which states agree to recognise and enforce decisions by the courts of another signatory state if the dispute was governed by a valid choice of court agreement concluded between the parties to the dispute. The 21st Diplomatic Session of the Conference, held in November 2007 led to the adoption of two new instruments which were the International Recovery of Child Support and Other Forms of Family Maintenance and the Protocol of the same duration on the Law Applicable to Maintenance Obligations.

[113] The Civil Jurisdiction & Judgements Act 1982 allocates jurisdiction to the UK's three separate legal systems: England & Wales, Scotland and Northern Ireland. In terms of purely UK cases, Section 49 of the Act provides that nothing in it shall prevent any Court from staying or dismissing any proceedings on the grounds of FNC or otherwise. There are 2 sets of proceedings brought in the English courts, claiming damages for personal injuries alleged to be sustained in Scotland due to the defender's negligence.

In *RAB v MIB* [114] there was a family matter in which after divorce the mother had taken the child from Scotland to England and the father resided in Scotland. The father appealed in the Scottish courts as part of defended divorce proceedings against the findings that the Scottish courts were a forum non conveniens. This was for the purpose of deciding residence of a child where the mother had wrongfully removed her and relocated to England. The Court ruled that "*the English courts do consider themselves to have jurisdiction and that there is accordingly another court of competent jurisdiction enabled to consider and rule upon child welfare matters raised in these divorce proceedings*".[115]

The Court stated further in dismissing the appeal that there was the "undisputed fact that the jurisdiction of the Sheriff Court in Aberdeen in this divorce action is not open to question. Moreover, Aberdeen was the location of the habitual residence of both parties prior to the separation. At no time did the parties live together in England". Therefore, there was a nexus and Aberdeen had a "primary closer connection to all the members of the family" than the county court in England. The ruling affirmed that the court that had terminated the marriage has a "primary jurisdiction respecting the arrangements for the children of the marriage". [116]

The effect of the decision is to affirm that, in a purely domestic case, where there is no international element and the competing jurisdictions are England and Wales, Scotland, or Northern Ireland the court has power to stay a claim on the ground of *forum non conveniens*.. Further, such a power is available to the court, whether or not an application challenging jurisdiction is made by the defendant. The principle allows a flexibility to the courts in making the decision about which jurisdiction the parties should be adjudged in terms of the issues that involve the court exercising the power to stay proceedings in deciding the forum court.

2) Internal rules and international Conventions

[114] [2008] CSIH 52
[115] Para 18
[116] Para 27

The Scottish court has the power to strike out a claim on the grounds that the more appropriate forum is the English court and vice versa. As this would not involve an international element to the legal relationship, the Brussels Regime governing the courts of a particular EU Member State is not relevant. The applicable rules for allocation of jurisdiction within the UK would be the CJJA 1982 s 49, which expressly preserves the doctrine of *forum non conveniens* in domestic cases. There are also a discretionary power available to the courts where the litigants are non UK nationals and have commenced action in a foreign court.

In *RH v RH* [117] the parents and child were American citizens and the only connection with Scotland was the defendant commencing studies at St Andrews University in autumn 2015. The parties separated and the present proceedings were raised in April 2016. There was an action already pending for residence of a child raised in Dundee was that was sisted or adjourned due to legal proceedings continuing in Tennessee. The defendant was provided with the necessary visa and the claimant and child joined him soon afterwards in Scotland. There was an interregnum after which the defendant launched proceedings in Tennessee which were still in process when the law suit was filed in Scotland.

The adjournment was appealed and the Sherriff Appeal Court and the Sheriff Principal Murray noted that in considering s 14(2) of the Family Law Act 1986, and in particular the appropriateness of matters being determined in another court, the appeal court was not bound to sist but exercised a discretion having regard to the principles of *forum non conveniens.*[118] After some days the defender instituted proceedings in Tennessee which were sub judice. The sist was appealed and the SAC allowed the appeal. The welfare of the child was the paramount consideration in the context of which Scottish court was the more appropriate forum to hear the case in the interests of the parties and justice. In cases involving children there were five factors: habitual residence, convenience for the bulk of the evidence, ability to determine urgent matters expeditiously and with thorough

[117] SAC (Civ) 31 2017

[118] This distinguished the case from RAB v MIB where an authoritative determination on jurisdiction had been made by the Court of Appeal. The sheriff had erred in concluding that the respondent had established there was another court of competent jurisdiction because she had failed to give proper weight to the fact that the proceedings in Tennessee were subject to jurisdictional challenge on appeal. Para 18.

consideration, the circumstances of the actions being raised, and where the children presently were and how they arrived. [119]

The habitual residence was of considerable importance and that in the present instance was within the jurisdiction of Dundee Sheriff Court. The Sherriff had " *fallen into error in not having sufficient regard to habitual residence which weighs heavily in our view where the paramount consideration is ultimately the welfare of the child. The sheriff appears to have been deflected from the importance of habitual residence by focusing on what she described as the precarious nature of the appellant's residence in the United Kingdom* ".[120]

The Court held that the "welfare of the child is a very significant factor "and even if the decision of the Dundee Court is temporary if the appellant and the child left the jurisdiction this was "highly advantageous position to make a determination while the child and appellant are habitually resident within its jurisdiction".[121] The Court had to take into consideration that the "Tennessee Chancery Court could find in the favour of the appellant that would allow the substantive matters to be reopened" that would "materially change the circumstances of the case".[122]

The case was remitted back to the Sherriff Court at Dundee to take account the errors of law in the judgment arrived at previously. This had to include the habitual residence, the existing commitment and place of activity of the parties and the fact that case in Tennessee was still hearing the proceedings. The concurrent jurisdiction in this case did not prevent the *forum non convenie*ns to be heard in the local courts where the parties were temporarily resident. The Scottish courts have held that the doctrine of *forum non conveniens* applies when proceedings are issued in England against a party domiciled in Scotland in relation to harm suffered both in the UK and abroad. The principle established is that the deemed service rule in CPR 6.14 only comes into affect when parties should take steps subsequent to service. The relevant law was EU Regulation (Regulation 1215/2012 "Brussels Recast")

[119] Para 36
[120] Para 37
[121] Para 43
[122] Para 44

which provides, subject to some exceptions, that a person living in a EU Member State should be sued in their own Member State.[123]

The purpose of the Regulation is that judgments should be enforceable in other EU Member States without legal hurdles. This regulation is a very significant step and it regulates the conflict of laws in the EU, applicable to its members, Articles 29 to 34 of the Brussels Recast contains the basis of *lis pendens* and related actions due to this. This is a means to avoid duplication of legal proceedings by the plea of *lis pendens* and according to this principle, it is not permissible to initiate new proceedings if litigation between the same parties and involving the same dispute is already pending.[124] The European legislation on conflicts of jurisdiction has taken account of this fact and adopted the lis pendens concept as a way to harmonise jurisdiction that is being extended across borders and will apply if the same action is brought in the courts of different Member States .

CONCLUSION

The Full Faith and Credit Clause prescribed by the US Constitution is integrated with the due process and equal protection clause in family law cases which necessarily allows considerable choice of forum law. This process serves to an important purpose because the latter combines a check on power excesses by individual states with a regard to fundamental fairness to those who stand to be disadvantaged , while the former provides the functional legal requirements of a nonunitary (federal) national framework in which states must coexist in relative harmony. These are indispensible procedural requirements in family law cases.

In marriage, child custody and adoption the FFCC has the effect of a res judicata ruling which happens even the litigation was pursued in another state and concerned the subject matter of marriage. This is a rule for state courts, for them to execute the judgments of sister states within their own jurisdiction. There is no inherent public policy to enforce this clause in the private cause of action relating to marriage even if it raises public law issues. Those who are deemed to breach the clause are always state courts and not individual officers who are delegated the task of implementation such as state executive officials who have no liability for lack of enforcement.

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[123] Article 39 of Recast states : 'A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required'.

[124] J. Eisengraber, 'Lis Alibi Pendens Under The Brussels I Regulation-How To Minimise -Torpedo Litigaiton – And Other Unwanted Effects Of The -Fisrt-Come First-Served Rule' Centre for European Legal Studies, Exeter Papers in European Law No, 2004, p. 5. http://law.exeter.ac.uk/cels/documents/papepr_llm_03_04_dissertation_Eisengraeber_001.pdf 4.

The Supreme Court rulings have raised civil rights issues in relation to marriage and its judgments are applicable in all the states. The conflict of law rules are an essential factor in the cases where the private international law has an impact on the rulings depending on the courts powers. This provides a substantive and procedural rights in family proceedings and the forum is responsible for the exercise of the rights in the constitutional framework and international conventions.