

LOST IN TRANSLATION: THE FAILURE OF THE INTERSTATE DIVORCE SYSTEM TO ADEQUATELY ADDRESS THE NEEDS OF INTERNATIONAL DIVORCING COUPLES

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I. INTRODUCTION

The last century has seen a great rise in the transnational movement of people due to the increasing ease of migration and travel.¹ This change means that in today's world, more people work, live, and travel abroad. Naturally, this has resulted in increased interactions between people from foreign countries. This rise in migration has led to a corresponding escalation in marriages between couples where at least one spouse is an American citizen and the other is foreign-born or a foreign national from the perspective of the United States.²

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1. The United Nations estimates that there were 213,944,000 international migrant workers in 2010, a 1.8 percent increase since 2005. U.N. DEP'T OF ECON. & SOC. AFFAIRS, INTERNATIONAL MIGRATION 2009, U.N. DOC. ST/ESA/SER.A/288, U.N. Sales No. E.09.XIII.8 (2009), *available at* http://www.un.org/esa/population/publications/2009Migration_Chart/2009IttMig_chart.htm. Compare this with approximately 178,500,000 international migrants in 2000 and 155,500,000 workers in 1990. U.N. DEP'T OF ECON. & SOC. AFFAIRS, POPULATION DIV., TRENDS IN INTERNATIONAL MIGRANT STOCK: THE 2008 REVISION, U.N. Doc. POP/DB/MIG/Stock/Rev.2008 (2009), *available at* <http://esa.un.org/migration/index.asp?panel=1>. Between 2005 and 2010, an estimated 24,359,800 foreign-born people migrated to another country. U.N. DEP'T OF ECON. & SOC. AFFAIRS, INTERNATIONAL MIGRATION 2009, U.N. DOC. ST/ESA/SER.A/288, U.N. Sales No. E.09.XIII.8 (2009).

2. For example, statistics from Switzerland indicate that while the number of marriages per year from 1960 to 2009 have largely remained the same (from 41,575 marriages in 1960 to 41,918 in 2009), the number of Swiss nationals marrying foreigners or foreigners marrying foreigners has risen from 11,864 in 1960 to 20,380 marriages in 2009. SWISS STATISTICAL OFFICE, MARIAGES SELON L'ÂGE ET INDICATEUR CONJONCTUREL DE NUPTIALITÉ [MARRIAGES BY AGE OF MARRIAGE AND FERTILITY RATE], *available at* <http://www.bfs.admin.ch/bfs/portal/en/index/themen/01/06/blank/key/05/01.html> (then

Marriage is difficult for any couple: there are unexpected issues that arise in relation to children, jobs, and finances. But for a couple with strong international ties, distance as well as cultural differences may be particularly burdensome on the marriage and on the issue of domicile. Not surprisingly, the increase in transnational marriage has been accompanied by a corresponding rise in transnational divorce.³

Divorce raises a number of thorny legal issues even in relatively simple cases. For couples with significant assets the potential for prolonged litigation and legal confusion is often multiplied. For many divorces, the overarching issue is how to determine the ownership and distribution of assets.⁴ This issue means that where the couple chooses to live will have large repercussions for both parties upon divorce. In most cases, the domicile of the couple will largely determine how the marital estate will be divided, and which assets comprise the marital estate.⁵ For couples with interstate ties, the division of assets can then differ from state to state. Internationally, this difference in how the couple's assets are divided increases. While different countries can have varied overall policies, they, like the United States, have states or religious divorce regulations within their country that may also have diverging principles.⁶ This leads to even more mixed results.

follow hyperlink to download spreadsheet). In Korea, the number of international marriages rose from 11,605 in 2000 to 36,204 in 2008. Kwan Li Ja (관리자), *Marriage Statistics in 2008*, STATISTICS KOREA (Mar. 31 2009), <http://kostat.go.kr/portal/english/news/1/8/index.board?bmode=read&aSeq=66265>. The United States does not publish statistics on international marriages as a whole within the country, but the Department of Homeland Security does publish the statistics for people obtaining permanent resident status as spouses to U.S. citizens. In 2000, there were 196,405 people who obtained a green card this way; this number increased to 317,129 people in 2009. U.S. DEP'T OF HOMELAND SEC., 2009 YEARBOOK OF IMMIGRATION STATISTICS 18 (2010), available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf.

3. See Edward Lucas, *Money in Misery*, *ECONOMIST*, Feb. 7, 2009, at 26, available at http://www.economist.com/node/13057235?story_id=13057235 (discussing the increase in international divorce and the legal ramifications for international couples).

4. See, e.g., DANIEL F. THOMAS, MARYLAND INSTITUTE FOR CONTINUING PROFESSIONAL EDUCATION OF LAWYERS, MARYLAND DIVORCE & SEPARATION LAW §§ 3.I-3.V.

5. See, e.g., Marsha Garrison, *What's Fair in Divorce Property Distribution: Cross-National Perspectives from Survey Evidence*, 72 LA. L. REV. 57, 58 (2011).

6. For an example of diverging religious laws, see India's five divorce laws: the Hindu Marriage Act of 1955, the Dissolution of Muslim Marriages Act of 1939, the Indian Divorce Act of 1869, the Parsi Marriage and Divorce Act of 1936, and the Special Marriage Act of 1954 (for inter-religious marriages).

For couples divorcing within the United States, litigating or mediating these issues within the country is a burden in and of itself. There are large expenses in hiring attorneys⁷ and there is uncertainty by the lawyers themselves in the correct interpretation of the law. Add in other concerns such as the conflicts of law between states or concurrent suits in different states and suddenly a simple divorce looks much more complicated.⁸ An international component makes the situation even more complex because a court must take into account its lack of power and jurisdiction over the international property or the actions of noncooperative spouses.

Additionally, the country containing a part of the marital assets may have diverging policies with respect to the division of assets. For example, a couple may initially be citizens of different countries, marry in a third country, move to a fourth country, and ultimately own property elsewhere. With all of these international connections, the parties may wonder how to maximize their interest in the assets across these foreign countries. Furthermore, the different rules that countries apply often favor one party over another, so individuals will have incentives to forum shop when they have significant ties to more than one country.⁹ The desire to control the proceedings, especially as to location, becomes a larger issue when parties must litigate in different countries. This also increases the likelihood of a race to the courthouse, with both spouses trying to gain an advantage in the divorce proceeding by filing their action first.¹⁰

To illustrate these issues, take an imaginary couple, Harry and Wynona Smith. Harry is a British citizen who worked abroad in France where he met Wynona, an American citizen. They married in France and bought a house there soon afterward. Harry transferred to the United States where he and Wynonna began splitting their time between New York and France. The couple grew apart with the distance and now the parties are seeking a divorce. Harry and Wynona will individually look at a variety of issues based on which country will divide the assets most favorably to each party. On top of that, each party will likely have procedural issues to examine such as determining the appropriate forum to file for divorce, or which courts have jurisdiction or the ability to divide up their property.

7. A study by the Boston Law Collaborative reported that in the United States, litigated divorce costs averaged \$77,746 and cases resolved before trial had an average cost of \$26,830. Karin Price Mueller, *Pain-Free Divorce Is Possible*, N.J. Star-Ledger, Jan. 18, 2012, http://www.nj.com/inside-jersey/index.ssf/business/pain-free_divorce_is_possible.html.

8. See *infra* Part II.

9. See *infra* Part III.

10. See *infra* Parts II–III.

Finally, each party will also need to determine how courts will ensure the enforcement of these divisions or decrees.

A variation of this hypothetical is where the couple has ties to a country with a very different legal system for marriages and divorce, such as India or China. While the French and the American matrimonial systems are different, the differences as applied to property are likely to be much more pronounced when looking beyond Western countries. Many countries recognize religious divorce proceedings such as the “get” in Judaism¹¹ or the “talaq” in Islam.¹² Moreover, these differences also affect when and how property is characterized during the course of a marriage.¹³

As the above examples illustrate, the increase in international migration and divorce combined with the interstate differences with respect to divorce creates issues for practicing attorneys in the United States that lack legal precedent and guidance. By looking at how states characterize marital property and handle concurrent proceedings, this Note will show that the interstate divorce system does not adequately prepare courts to deal with international divorces. Part II will examine the interstate divorce system as a whole by looking at the marital property regimes in the United States, their interpretation in interstate divorce proceedings, and how courts deal with concurrent interstate divorce suits. Part III will compare this interstate system with the results from international divorce cases to show that the interstate basis yields inconsistent and unfair results for the characterization of marital property and for the method of dealing with concurrent international divorce proceedings.

The interstate divorce system is meant to form a basis for the U.S. courts approach to international divorces. However, the structure of the interstate divorce system creates an even larger “race to the courthouse” problem for international parties seeking to divide the international marital estate more favorably for themselves. It does not equip states to take a

11. A “get,” or rabbinical divorce, is a document that is given after the husband appears before a rabbinical court to seek a divorce which he then presents to his wife. Andrea G. Nadel, Annotation, *Enforceability of Agreement Requiring Spouse’s Co-Operation in Obtaining Religious Bill of Divorce*, 29 A.L.R.4th 746, 1 (1984). The wife must accept the “get” before the divorce is finalized. *Id.*

12. A “talaq” is where the husband divorces the wife by saying the word “talaq” three times. Alan Reed, *Transnational Non-Judicial Divorces: A Comparative Analysis of Recognition Under English and U.S. Jurisprudence*, 18 LOY. L.A. INT’L & COMP. L. REV. 311, 317 (1996). This differs from the American divorce system where one party may not unilaterally divide the property, although one party can seek a default divorce.

13. Nadel, *supra* note 11; Reed, *supra* note 12.

more centrist approach when the characterization and distribution of the marital estate raises conflict of laws issues. Further, states must take due process concerns into account rather than relying on the Constitution's Full Faith and Credit Clause¹⁴ to act as an authority when analyzing foreign divorce decrees. This approach leads to inconsistent results.

II. THE INTERSTATE DIVORCE SYSTEM FOR THE CHARACTERIZATION AND DISTRIBUTION OF THE MARITAL ESTATE

A. INTRODUCTION TO THE CHARACTERIZATION OF MARITAL PROPERTY

The two marital property systems in the United States and the state-centric application of these systems means that United States courts are forced to conduct a conflict of laws analysis to determine which states' laws apply to the couple's marital property. For marital property, the fundamental split in the United States is derived from the difference in how states characterize property. This section briefly introduces and explains the different property regimes and results within the United States.

Within the United States there are two main property regimes for married couples: community property and common law.¹⁵ Under both regimes, all property, with the exceptions of gifts, bequests, and devises, acquired after marriage is considered to be part of the marital assets. A spouse's interest in that marital asset is determined according to whether it is considered community property, or subject to equitable distribution.¹⁶ In a community property state, a spouse acquires a half interest in any asset that is acquired after the marriage, regardless of title, unless the asset was acquired by gift, bequest, or devise.¹⁷ In contrast, in a common law state, while title may be relevant for property acquired during the course of the marriage, a court primarily takes the principles of equity into consideration.¹⁸ It may control who has management and ownership rights during the marriage.¹⁹ At the end of the marriage, the property is divided

14. U.S. CONST. art. IV, § 1.

15. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 4.03 cmt. a (2002) (discussing the split between equal-division states and equitable-division states).

16. *Id.*

17. 15A AM. JUR. 2D *Community Property* § 65 (2011). See also, e.g., HARRY D. MILLER & MARVIN B. STARR, MILLER AND STARR CALIFORNIA REAL ESTATE § 12:40 (3d ed. 2006).

18. 24 AM. JUR. 2D *Divorce and Separation* § 467 (2012).

19. See generally Lee R. Russ, Annotation, *Divorce: Equitable Distribution Doctrine*, 41 A.L.R.4th 481 (1985) (discussing the application of the equitable distribution doctrine by

equitably by the court issuing the divorce. The trend amongst common law states is towards a fifty-fifty split, such as how community property states divide the property.²⁰

The Full Faith and Credit Clause provides that while a sister state court does not have the power to directly adjudicate property in another state, it does have the power to determine parties' interest relating to that property which can then be enforced in another state.²¹ Once a state court issues a final judgment, another state can give the decree legal effect when the plaintiff institutes a new suit for the domestication and enforcement of the decree in that state.²² The need for domestication stems from the fact that a state court does not have power to affect property or people beyond its jurisdiction, which is limited to state boundaries.²³ Courts have power over property in their own state, known as in rem jurisdiction.²⁴ For parties, once a court has in personam, or personal jurisdiction, over a party, such as through service on that party or through a minimum contacts test,²⁵ the court has the power to issue a judicial decree as to that person, not just their property in-state, which can then be enforced in another state. If a court fails to have personal jurisdiction over one of the parties, but still issues a decree affecting property in another state, then the other state will not recognize the decree because it fails to meet the requirements of the due process clause.²⁶

various federal and state courts in the United States, many of which take title of property into consideration).

20. 24 AM. JUR. 2D *Divorce and Separation* § 531 (2011).

21. 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."). See, e.g., *Walker v. Walker*, 566 So.2d 1350, 1352 (Fla. Dist. Ct. App. 1990) (granting a Louisiana divorce decree full faith and credit as to property rights even if the Florida courts would have divided the property, which it also had jurisdiction over, differently).

22. 30 AM. JUR. 2D *Executions and Enforcement of Judgments* § 666 (2011). See also, e.g., *Economou v. Economou*, 395 S.E.2d 830, 832 (Ga. Ct. App. 1990) (upholding the domestication of a California divorce decree by the trial court who also complied with the California decree which specified that the wife had an equal interest in the couple's Georgia property).

23. 30 AM. JUR. 2D *Executions and Enforcement of Judgments* § 666 (2011).

24. See 24 AM. JUR. 2D *Divorce and Separation* § 553 (2011).

25. See 24 AM. JUR. 2D *Divorce and Separation* § 170 (2011).

26. 30 AM. JUR. 2D *Executions and Enforcement of Judgments* § 676 (2011).

When it comes to divorce, a court may have jurisdiction to terminate a marriage but not to divide and distribute the marital assets.²⁷ Here, a court has subject matter jurisdiction to dissolve the marriage when one spouse meets the statutory divorce requirements.²⁸ Once the court has subject matter jurisdiction, the court can then grant a divorce.²⁹ However, if the state does not have in rem jurisdiction over the property or in personam jurisdiction over both of the parties, then the court has no power to effect a division of the assets.³⁰ On the other hand, if a court does have in rem jurisdiction, then the court can directly change the title.³¹ If the court has in personam jurisdiction but not in rem jurisdiction over the full property, then, through the Full Faith and Credit Clause, other states must recognize the decree and enforce it.³² It is through this domestication that the courts of the sister state, where the property is located, can change the title so that a party's interest in the property vests.³³

Once a state has jurisdiction over the marital estate, the court must decide how to characterize and divide the property. For community property states, the general principle that states apply when characterizing property is to determine what funds or assets were used to purchase or obtain that asset.³⁴ When a couple remains domiciled in one state but buys real property in another state, then, as between the spouses, the court of the second state will generally find that the property is to be treated by the same community property principles and therefore characterized by the type of funds, community or separate, used to buy the property.³⁵

Further, amongst sister states, property acquired in a community property state is considered to be community property, regardless of the parties' domicile, if the property remains in the community property state.³⁶

27. *Id.* See also *Estin v. Estin*, 334 U.S. 541, 549 (1948) (holding that even though a Nevada divorce decree filed after a New York divorce decree was valid for the dissolving a marital relationship, the Nevada divorce decree could not affect the rights of the parties with respect to their property).

28. See 24 AM. JUR. 2D *Divorce and Separation* § 171 (2011).

29. See *Estin*, 334 U.S. at 549.

30. See 24 AM. JUR. 2D *Divorce and Separation* § 170 (2011).

31. See *id.*

32. *Economou v. Economou*, 395 S.E.2d 830, 832 (Ga. Ct. App. 1990).

33. See *id.*

34. See 15B AM. JUR. 2D *Community Property* §§ 24–29 (2011).

35. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 234 cmt. a, illus. 1 (1971).

36. *Hammonds v. Comm'r*, 106 F.2d 420, 425 (10th Cir. 1939) (“[T]he community property statute in Texas is a real statute; that it operates on things, not persons; and that real property acquired in the state of Texas during coverture by the toil, talent, or productive

Therefore, even when a couple is domiciled in a non-community property state, immovable property that the couple acquires in a community property state is bound by the community property rights of the state where they acquired the property.³⁷

This principle applies to bank accounts, which are considered immovable. For example, the Georgia court in *Wallack v. Wallack* applied Texas community property law to characterize a bank account that the couple had acquired in Texas while they were married.³⁸ After the husband received a default divorce, both of the parties moved to Georgia.³⁹ There, the wife filed an action to claim her half of the bank account.⁴⁰ The Georgia court found the account to be community property under Texas law, since that was where it was located, and the funds in the account were derived from community work.⁴¹ Thus, when a court analyzes property in a different state, the court looks at the underlying location and the funds that were used to acquire that property.

Movable assets, such as personal items, are characterized by current domicile at the time of acquisition.⁴² The asset then retains its character even if there is a change in the marital domicile.⁴³ All movable assets acquired after the change in domicile will then be characterized by the new domicile. While this is important for such items as tangible personal objects, which may have considerable monetary value, in a divorce action the the realty, stock, bank accounts, and other such assets may be just as valuable, if not more.

Another relevant issue is mutability, or how a property changes characterization. Most courts apply a principle of total or partial mutability that often leads to a “race to the courthouse” scenario.⁴⁴ The principles of

faculty of either spouse is community property, irrespective of the residence of the spouses.”).

37. *Id.*

38. *Wallack v. Wallack*, 88 S.E.2d 154, 155–56 (Ga. 1955). *See also Economou*, 395 S.E.2d at 832 (affirming the application of the domicile’s laws (i.e., the vesting of a one half interest) to property in another state by the domicile’s court).

39. *See Wallack*, 88 S.E.2d at 156.

40. *See id.*

41. *Id.*

42. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 259 (1971).

43. *Id.*

44. For an in-depth discussion of the analysis behind whether courts should be applying total immutability, total mutability, or partial mutability see J. Thomas Oldham, *What if the Beckhams Move to L.A. and Divorce? Martial Property Rights of Mobile Spouses when They Divorce in the United States*, 42 FAM. L.Q. 263 (2008) (arguing that

total and partial mutability are important at divorce because they dictate how a court is likely to choose the law (or laws) that will characterize the division of property.⁴⁵ Therefore, the forums more likely to apply the laws from another state in regards to marital assets might be more desirable to one party than the other.

Partial mutability provides that when a couple moves domiciles, all property acquired at the new domicile is governed by the new jurisdiction. Likewise, all property acquired at a previous domicile is governed by the laws of the previous domicile.⁴⁶ Where a state has a partial mutability approach, this doctrine means that the court will apply the law of the previous domicile to the property that was acquired there.⁴⁷ While this seems to protect the justified expectations of the parties, as established by the conflict of law analysis, this also potentially leads to the court analyzing laws from multiple jurisdictions.⁴⁸ Currently, this is applied by a minority of American states due to the difficulties in determining domiciles accurately, and applying the laws of many jurisdictions.⁴⁹

The dominant view is that total mutability should apply where only the law of the state adjudicating the divorce applies to the marital assets.⁵⁰ However, this interpretation does not mean that the state refuses to recognize property interests that are different than its own, but rather, the state will apply its methods of characterization and processes for characterizing foreign property.⁵¹ Realistically, this means that common law states will recognize property bought in community property states, or bought with community funds in their state, as retaining that characterization. However they will decide it in accordance with their laws and not through the full application of the laws of that community property state.⁵²

partial mutability should be applied since people will then have a reasonable expectation that when they are domiciled in a country or state, their rights within that state will not be taken away irrespective of where the party divorces).

45. *Id.* at 267.

46. *Id.* at 268.

47. *Id.*

48. *Id.*

49. *See id.* at 268 n.21. Oldham gives several examples including *McHugh v. McHugh*, which found that a court must apply Maryland law to characterize property in Maryland owned by Idaho residents who had been previously domiciled in Maryland. *McHugh v. McHugh*, 699 P.2d 1361, 1361–63 (Idaho 1985).

50. *See Oldham*, *supra* note 44, at 268–69.

51. *Id.* at 269.

52. *See Depas v. Mayo*, 11 Mo. 314 (1848).

These attributes show that the more practical view is the majority view—that of total mutability. While this does promote uniformity and ease of application within the forum, it also promotes a “race to the courthouse” as each party will try to secure the best forum and subsequent choice of laws.

B. INTERSTATE CONFLICT OF LAW ANALYSIS FOR THE
CHARACTERIZATION AND DISTRIBUTION OF THE MARITAL ESTATE

The above issues are relevant when a couple not only owns property in another state, but also may have significant ties there. A court will often undergo a conflict of laws analysis for couples that have changed domiciles over the course of their marriage, or filed for divorce in a jurisdiction where they were not domiciled during the marriage.⁵³ There are three main approaches for a court in determining what law to apply in these types of situations: (1) law of the marital domicile, (2) law of the asset location, or (3) law of the contact/substantial interest theory, which weighs the interest of the respective states to the marital estate.⁵⁴

The first two approaches are strict, uniformly applied, doctrines that tend to be applied in the same manner every time and yield more consistent results.⁵⁵ Conversely, the contact theory is a balancing approach that allows for different results.⁵⁶ A strict law of the marital domicile would always result in the application of the laws of whichever state a couple married and first resided in. While this would present a uniform approach, no state has approved this approach because it does not take into account any other state’s interest—despite later having extensive contact with the couple or the marital estate. A strict, location-based law occurs when the court characterizes the property relying solely on which state it is in, irrespective of the parties’ domicile. This approach, however, may require the court to have to apply and interpret the laws of multiple states. This also leads to dissimilar and non-uniform results within a state.

The main approach taken by courts is that of the contact theory.⁵⁷ Here, a court weighs the respective interests of states that have ties to the couple and their marital assets. The court then applies the laws of the state

53. See ROBERT C. LAWRENCE, PRACTISING LAW INSTITUTE, INTERNATIONAL TAX AND ESTATE PLANNING: A PRACTICAL GUIDE FOR MULTINATIONAL INVESTORS 4:4.2 (2010).

54. See *id.*

55. *Id.* at 4-36–4-38.

56. *Id.* at 4-36.

57. See generally *id.*

that has the largest interest. However, the state must not have a statute directing a court to apply a specific set of laws in that circumstance for this approach to apply.

The majority of states will use the contact theory when there is no statute on point.⁵⁸ This means that the courts will engage in a conflict of law analysis among the interested states. This analysis builds from the *Restatement (Second) of Conflicts of Laws* model.⁵⁹ This model weighs the following factors: the needs of the interstate system, the relevant policies of the forum and interested states, the protection of justified expectations, basic legal policies for that field, predictability and uniformity of a result, and ease in the application of that law in order to arrive at a solution that fits the interstate needs.⁶⁰ After weighing those factors, the court will decide which state's law is most appropriate for that specific situation.

When moving from a common law state to a community property state, the community property state generally has a statute on point.⁶¹ Specifically, the community property estate will apply a quasi-community property standard to the assets in the common law state.⁶² This extends to property acquired in another state that would have been community property if the couple had been domiciled in a community property state at the time of acquisition.⁶³ During the marriage, the rights of the parties in the property will not change, as to hold otherwise would violate due process.⁶⁴ However, when the marriage terminates, either by the death of one of the spouses or through divorce, the property then becomes community property with a one-half interest vesting in each spouse.⁶⁵

Barring a direct statute, a court analyzing property in multiple jurisdictions will engage in a conflict of laws analysis.⁶⁶ Despite the presence of a quasi-community property statute, a court may still want to use the conflict of laws analysis when another state has a large interest in the couple's marital assets, such as a state where the couple was previously

58. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 258 (1971).

59. *See id.* at § 6 (1971).

60. *Id.*

61. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-318 (2012).

62. 15B. AM. JUR. 2D *Community Property* § 12 (2011).

63. *See id.*

64. *Id.*

65. *See, e.g.*, 39A TEX. JUR. 3D *Family Law* § 710 (2012).

66. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

domiciled.⁶⁷ However, the differences in weighing the factors and applying the conflict of laws analysis are visible from state to state. These different approaches can be seen in *In re Marriage of Roesch*⁶⁸ and *Martin v. Martin*.⁶⁹

In *Roesch*, a couple was married and lived in Pennsylvania for a significant amount of time before one spouse moved to California.⁷⁰ The California spouse then filed for divorce and a California appellate court found that a California district court's application of California's quasi-community property laws was "improper."⁷¹ The appellate court determined that Pennsylvania had a more substantial interest in distributing the property because the wife still lived in Pennsylvania and the majority of the marital assets remained there.⁷² Therefore Pennsylvania had the overriding interest in having its policies applied to the marital estate, and the court applied Pennsylvania law to determine the distribution of the assets.⁷³

Other courts have found the opposite result when doing either the conflicts of laws analysis or weighing their own interests. In *Martin*, for example, an Arizona court of appeals explicitly declined to follow the *Roesch* court's approach when the couple had been domiciled in California, but bought a house for retirement in Arizona.⁷⁴ The wife moved into the home while the husband continued living in California, "intending to join his wife . . . upon his planned retirement."⁷⁵ The wife eventually filed for divorce in Arizona.⁷⁶ The husband argued that California law should apply to his post-separation earnings, but the court found that "factors such as uniformity of result and judicial economy favored application of our quasi-

67. See, e.g., *In re Marriage of Roesch*, 147 Cal. Rptr. 586, 593 (Ct. App. 1978). For an example of another state's conflict of laws analysis see the blended Louisiana approach. See, e.g., Jasmine B. Bertrand, Comment, *What's Mine Is Mine Is Mine: The Inequitable Intersection of Louisiana's Choice-of-Law Provisions and the Movables of Migratory Spouses*, 79 TUL. L. REV. 493, 495-504 (2004).

68. *Roesch*, 147 Cal. Rptr. 586.

69. *Martin v. Martin*, 752 P.2d 1026 (Ariz. Ct. App. 1986).

70. *Roesch*, 147 Cal. Rptr. at 588-89.

71. *Id.* at 593. *Roesch* has since been overruled by statute with respect to its supporting analysis, but it is still good law for the conflict of law analysis between Pennsylvania and California. See, e.g., *Fredericks v. Fredericks*, 277 Cal. Rptr. 107, 108-09 (Ct. App. 1991); *In re Marriage of Fransen*, 190 Cal. Rptr. 885, 891 (Ct. App. 1983).

72. *Roesch*, 147 Cal. Rptr. at 593.

73. *Id.*

74. *Martin*, 752 P.2d at 1028, 1031.

75. *Id.* at 1028.

76. *Id.*

community property law” over applying California’s laws.⁷⁷ The court reasoned that the confusion that would result from applying the law of multiple domiciles outweighed another state’s interest in having its laws applied.⁷⁸ However, states respect sister states’ property regimes with regard to assets that are brought into their own state with specifically characterized funds. Despite the outcome in *Martin*, states generally recognize another state’s property regime if funds from that property are used to buy property in another state, such as in *Depas v. Mayo*.⁷⁹ In *Depas* a Louisiana couple moved briefly to Missouri, a common law state, and bought property there.⁸⁰ They purchased the property with community funds since Louisiana is a community property state, but they placed the title entirely in the husband’s name.⁸¹ The couple divorced in Louisiana, but the wife brought suit for the division of the property in Missouri.⁸² The Missouri Supreme Court held that since the couple used community property funds to buy the property, Louisiana law was controlling and the wife acquired a one-half interest that the husband had held in a resulting trust for her.⁸³

These different approaches set the stage for a “race to the courthouse.” Because even states with similar property regimes, such as California and Arizona, will undergo a different conflict of law analysis as to how to characterize property, it makes a difference which state the parties choose to file in. This inevitably leads to parties filing concurrent suits. What happens to the property then?

States have responded to this question by taking a variety of approaches to characterize the property of couples who have changed domiciles. Generally, states are inclined to favor their own application of laws, especially when it is clear that the court has in personam and in rem jurisdiction (at least partially) such as in *Martin*.⁸⁴ On the other hand, courts are also willing to engage in a conflict of law analysis. While the court in *Martin* ultimately decided to apply Arizona law, it examined and weighed the conflict of law analysis factors advocated by the

77. *Id.* at 1031.

78. *Id.*

79. *Depas v. Mayo*, 11 Mo. 314 (1848).

80. *Id.* at 316–17.

81. *Id.*

82. *Id.* at 317.

83. *Id.* at 319.

84. *See Martin v. Martin*, 752 P.2d 1026 (Ariz. Ct. App. 1986).

*Restatement.*⁸⁵ Trial courts have discretion to weigh factors. This results in situations that began under identical circumstances leading to two different results, based on the court and the states involved. A common illustration would be one court applying its own laws while another court applies the laws of a sister state. However this is not a failure of the system, merely a necessary byproduct of judicial discretion.

C. CONCURRENT SUITS IN SISTER STATES

Parties may file concurrent suits for a variety of reasons including convenience in location or familiarity. Often, however, it is the result of each party wanting to have the benefit of favorable laws. Between sister states, when concurrent actions are filed in different courts there is likely to be case law or statutes guiding the court. This authority guides the court as to when it should dismiss an action and provides various factors for courts to weigh.⁸⁶ But, if a court believes that it has proper jurisdiction of the suit, the court is under no obligation to dismiss a suit merely because another suit has already been filed in another jurisdiction.⁸⁷

A court considering dismissal is likely to analyze the other proceeding and respective state interests to determine the proper forum. For example, in *Schulmeisters v. Schulmeisters*, a wife filed for divorce in New York and, during the proceedings, the husband filed for divorce in New Jersey.⁸⁸ The husband sought only the dissolution of marriage.⁸⁹ The New Jersey superior court in *Schulmeisters* found that the New York court had priority over the couple because the wife had filed that case before the husband filed in New Jersey and there was in personam jurisdiction over both of the parties.⁹⁰ In addition, the court had in rem jurisdiction over the couple's marital estate.⁹¹ The court went on to state that "[i]t is inconsistent with inter-state harmony to allow courts in other states to control the prosecution of a case instituted in a sister state. Courts which first obtain jurisdiction of a case should ordinarily be allowed to finally adjudicate that cause without

85. *Id.* at 1030–33.

86. *See* 24 AM. JUR. 2D *Divorce* § 123 (2010). *See also, e.g.*, N.Y. C.P.L.R. 3211(a) (MCKINNEY 2006).

87. *See* 16 AM. JUR. 2D *Conflict of Laws* § 11 (2012).

88. *Schulmeisters v. Schulmeisters*, 656 A.2d 1312, 1313–14 (N.J. Super. Ct. Ch. Div. 1993).

89. *Id.*

90. *Id.*

91. *See id.* at 1314.

interference from courts of other states.”⁹² However, the court also noted that any decision of a court to stay proceedings while other proceedings were being determined was in the court’s discretion.⁹³ The court went on to set out a framework for examining which court acquired jurisdiction first—in this case it determined that the New York court had done so—and then determining if the other court could adequately give the parties relief.⁹⁴ Under this analysis, the New Jersey superior court concluded that the New York court was able to give adequate relief to the parties, so the decision was correct.⁹⁵

A court presiding over an ongoing suit may be forced to recognize a sister state’s divorce if two suits have been filed concurrently and one reaches its conclusion faster. In *Nielsen v. Nielsen*, a husband and wife were initially domiciled in Florida when the wife left the husband and moved to Connecticut.⁹⁶ Then, both she and her husband filed for divorce in their respective states.⁹⁷ The husband received a default divorce and filed suit in Connecticut to domesticate the divorce and divide the marital property that the wife had in Connecticut.⁹⁸ The husband filed a domestication suit while his wife’s divorce suit was still proceeding.⁹⁹ The wife moved to dismiss the husband’s domestication suit which the Connecticut trial court granted.¹⁰⁰ The Connecticut appeals court found that because the two suits were in fact litigating different issues (the husband’s suit was about the domestication of the divorce decree, while the wife’s

92. *Id.* The court further cited to the Supreme Court of New Jersey’s opinion in *O’Loughlin v. O’Loughlin*, that:

Considerations of comity forbid interference with the prosecution of a proceeding in a foreign jurisdiction capable of affording adequate relief and doing complete justice, unless there be a special equity sufficient in conscience to stay the hand of the defendant. The question is not the existence of the power but the propriety of its exercise in the given case. The rule of comity is grounded in the policy of avoiding conflicts of jurisdiction, unless upon strong grounds, and the general principle that the court which first acquires jurisdiction of the issue has precedence.

O’Loughlin v. O’Loughlin, 78 A.2d 64, 67 (N.J. 1951).

93. *Schulmeisters*, 656 A.2d at 1315 (noting that “[t]he granting of such an application rests, of course, in the sound discretion of the court” (citing *Fairchild v. Fairchild*, 34 A. 10 (N.J. 1895))).

94. *Id.*

95. *Id.*

96. *Nielsen v. Nielsen*, 491 A.2d 1112, 1113–14 (Conn. App. Ct. 1985).

97. *Id.*

98. *Id.* at 1114.

99. *Id.*

100. *Id.*

was about divorce), the husband's suit could not be dismissed.¹⁰¹ Rather, it was in the state's interest to avoid "unnecessary litigation," and so the court held that the suits ought to be consolidated in Florida.¹⁰² However, based on the Full Faith and Credit clause, the results of the Florida litigation would then have been barred from re-litigation in Connecticut.

Contrary to *Schulmeisters*, a court is not required to stay proceedings on behalf of another state if the court finds that it has a stronger interest.¹⁰³ This may lead to two actions proceeding simultaneously. Whichever suit finishes first will be the one accorded deference by both states.¹⁰⁴ In *Nowell v. Nowell*, a couple married in Maryland before moving to New York, and then Connecticut.¹⁰⁵ The wife filed for divorce in Connecticut and while that proceeding was pending, the husband moved to Texas where he also filed for divorce.¹⁰⁶ The Texas district court issued an injunction against the wife's Connecticut proceeding as did the Connecticut court for the husband in his proceeding.¹⁰⁷ The wife moved for dismissal in Texas, which the Texas court overruled before issuing a dissolution judgment.¹⁰⁸ Using the Texas judgment, the husband tried to dismiss the Connecticut proceeding under res judicata, which the Connecticut trial court rejected before issuing its own divorce judgment.¹⁰⁹ The Connecticut Supreme Court found that the Texas judgment was not currently a bar to the Connecticut judgment since the Texas judgment was not considered a final judgment since the Texas judgment was on appeal.¹¹⁰ However, Connecticut law provided that once a final judgment was delivered, the husband could then move to vacate the Connecticut judgment, which the court would then be forced to recognize.¹¹¹

101. *Id.* at 1115.

102. *Id.*

103. *See, e.g.,* *Nowell v. Nowell*, 254 A.2d 889, 892 (Conn. 1969).

104. For an example of a case in which a court found that two cases may proceed simultaneously and the one to finish first may in fact bar the other one through res judicata, see *Guardian Life Ins. Co. of Am. v. Kortz*, 151 F.2d 582, 585 (10th Cir. 1945). One suit was filed in federal court and one suit was filed in state court; both courts had the right to decide to not stay their own proceedings. *Id.*

105. *Nowell*, 254 A.2d at 892

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 893.

110. *Id.* at 894.

111. *Id.*

Nowell is by no means unique. The mere presence of another suit in a different jurisdiction does not guarantee that the court will dismiss or stay the proceedings. For example, *Texas Jurisprudence* states that “[c]ourts of sister states are regarded as foreign to each other so that a suit pending in one state may not be pleaded in abatement of a suit on the same cause of action or involving the same subject matter brought in another state.”¹¹² It goes on to further note that

Though the mere pendency of a suit in one state is not a ground for abating a suit in another state between the same parties and involving the same subject matter, as a matter of comity, it is customary for the court in which the later action is instituted to stay proceedings therein . . .¹¹³

Therefore, this doctrine indicates that while there is often a presumption that a later court in a different state will respect the proceedings going on in the earlier state, such as what occurred in *Schulmeisters*, there is no guarantee.

For divorcing couples, this result creates an incentive to file early because a trial court has broad discretion over motions to dismiss or stay proceedings. While there are no requirements that a court must dismiss proceedings merely when another proceeding is filed in another state, the cases above seem to illustrate that, in general, a court is more likely to dismiss the proceedings when the other suit has been filed first and the other court has greater jurisdiction or ability to deliver relief to the parties. If that does not work, it seems clear that the spouse that first receives a final judgment will be the one to dictate the outcome since the Full, Faith and Credit clause requires enforcement.

At best, this system is haphazard and often results in inequitable or unpredictable outcomes between sister states. Despite all of these issues, this is the only workable system for courts to resolve interstate issues while also protecting their policies.

In *Martin*, the court clearly felt that Arizona law should characterize part of the marital property.¹¹⁴ The court concluded that since one of their residents was accorded an interest in that asset, if the court applied another state’s law, the state’s laws would be evaded as to this resident.¹¹⁵ While it might be argued that the husband also had an interest in applying California

112. 1 TEX. JUR. 3D *Actions* § 187 (2011).

113. *Id.*

114. *Martin v. Martin*, 752 P.2d 1026, 1031 (Ariz. Ct. App. 1986).

115. *Id.* at 1031–32.

law, for a court in Arizona weighing equally valid claims, the court had a legitimate reason to choose the one that promoted ease and in-state uniformity. Moreover, as in *Schulmeisters*, states that have a significant relationship to the marital estate have an interest in ensuring that the state's laws are respected. When the state has a significant relationship, the only way that a state can ensure this protection is to apply its own laws.

The interstate system handles the above issues by first undergoing a conflict of law analysis, then by characterizing property. When there are concurrent suits, states have a more generous view of deferring to other jurisdictions when the other suit meets certain state policy requirements. When that fails, the first suit to finish and domesticate will be accorded legal force, thus giving a final and predictable solution.

The unfortunate result of states weighing interests differently means that, although states will undergo a conflict of laws analysis when more than one state has an interest, as between sister states each state or court can come out a different way. Unsurprisingly, states are more likely to weigh their own interest more heavily, but upon occasion they will find that the other states' interests are more substantial and apply the other state's laws.

III. INTERNATIONAL DIVORCE PROCEEDINGS AND THE ISSUES OF CHARACTERIZATION OF INTERNATIONAL PROPERTY, CONCURRENT SUITS, AND CONFLICT OF LAW ANALYSIS

A. CONFLICT OF LAW ANALYSIS FOR DIVISION OF THE INTERNATIONAL MARITAL ESTATE

Courts also apply the previously discussed interstate procedure when facing international divorce cases.¹¹⁶ The results here, however, are much more divergent. States, when finding that they have jurisdiction, are likely to exclusively apply their state law.¹¹⁷ This leads to even greater unpredictability when there are concurrent suits. However this bias is necessary because the underlying set up of the interstate system is geared to ensure that states can adequately protect their policies toward the characterization and allocation of the international marital estate.¹¹⁸

116. *See, e.g.*, *Ismail v. Ismail*, 702 S.W.2d 216, 219 (Tex. App. 1985) (applying quasi-community property laws to international assets).

117. *See id.* *See also* *Sinha v. Sinha*, 834 A.2d 600, 604–06 (Pa. Super. Ct. 2003).

118. *See, e.g.*, *Ismail*, 702 S.W.2d at 221 (“Texas obviously has a significant interest in controlling the disposition of property located within its boundaries, and indeed, Texas

Internationally, the characterization of property varies greatly from country to country. Some countries, like Mexico, require the couple to opt into one of two property regimes at the time of marriage.¹¹⁹ These two options include a completely separate property regime (“separación de bienes”) or a universal community property regime (“sociedad conyugal”).¹²⁰ Other countries, Pakistan for example, may provide for a completely separate property regime where the non-earning spouse cannot gain an interest in the other spouse’s property and may only be entitled to alimony or a lump sum upon divorce.¹²¹

The first step for a court undergoing a conflict of laws analysis for international divorces is deciding whether the court should exercise jurisdiction. This is the most important step for international issues because even when a state has jurisdiction, the court may not exercise jurisdiction over a person or the marital assets when it would be “unreasonable” to do so.¹²² Factors bearing on reasonableness include the connection between the parties and the state adjudicating, as well as the factors used for interstate conflict of laws analysis.¹²³ The most relevant factors in an international setting are often the protection of justified expectations, predictability of the result, and the ease in the application of the law to be applied.¹²⁴

When a state finds that it would be unreasonable to apply its laws over another country’s laws, it does not necessarily apply the foreign country’s laws. Rather, a court will generally find *forum non conveniens*.¹²⁵ Within sister states, even though courts in different states may not know another state’s specific laws, they are often familiar with the underlying legal structure. They may also have applied that state’s laws in the past. For

follows the general rule that marital rights of spouses in real property are determined by the law of the place where the land is situated.”).

119. JORGE A. VARGAS, MEXICAN LEGAL DICTIONARY 109, 643 (2009–2010).

120. *Id.* The marriage community property regime incorporates all assets of the spouses regardless of when they were acquired. *Id.*

121. This can, for example, be seen in countries such as Pakistan that allow “gets” which limit the spouse’s alimony to a lump sum available in case of a divorce. *See, e.g., Chaudry v. Chaudry*, 388 A.2d 1000, 1003–04 (N.J. Super. Ct. App. Div. 1978).

122. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 403(1) (1987).

123. *See generally* Oldham, *supra* note 44 (discussing factors used for conflict of laws analysis).

124. *Id.*

125. *See, e.g., Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981) and more generally notes 126–127.

foreign countries, an American court may have little to no familiarity with that country's laws and would have to rely heavily upon expert testimony regarding the country's laws if the American court applied the laws of another country.

Forum non conveniens may still be the most appropriate solution even when there are significant contacts to the state. This is because the burden of analyzing and evaluating foreign law would put a strain on the court and could ultimately lead to dramatic differences in international divorce resolutions. In one case, *In re Marriage of Ollervides*, the court found that while the case met the basic qualifications for jurisdiction because the wife and husband lived in California, the court declined to exercise jurisdiction over the proceedings on the basis of forum non conveniens.¹²⁶ In this case, the couple had temporarily lived in California where they had marital assets, and then later each independently moved back to California after separating.¹²⁷ The court applied a forum non conveniens and conflict of law analysis and found that even though they had lived in California, the interpretation of Mexican law, difficulty of producing witnesses in California, and the couple's past ties to Mexico necessitated that the proceedings take place in Mexico.¹²⁸ Therefore, even though the court had jurisdiction over the couple as well part of the marital estate, the court declined to exercise jurisdiction.¹²⁹ This was because the parties reasonably expected Mexican law to apply as they had opted into a property regime at the time of marriage. Accordingly, Mexico's interest in having the matter adjudicated by their courts was much greater than California's.¹³⁰

Where it is less clear that one place has a more substantial interest, factors such as public policy and protection of state property interests encourage courts to find that their laws characterize the marital estate. For example, in *Sinha v. Sinha*, after finding that it had the basic grounds to grant a divorce, a Pennsylvania superior court applied an interests-oriented analysis.¹³¹ The court stated that it was not enough to have jurisdiction to

126. *In re Marriage of Ollervides*, No. D053672, 2009 Cal. App. Unpub. LEXIS 3486, *10–12 (Ct. App. May 1, 2009). See also *Piper Aircraft Co.*, 454 U.S. at 249 (“[D]ismissal will ordinarily be appropriate where trial in the plaintiff’s chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice.”).

127. *Ollervides*, 2009 Cal. App. Unpub. LEXIS at *5.

128. *Id.* at *10–11.

129. *Id.* at *11.

130. *Id.* at *6–12.

131. *Sinha v. Sinha*, 834 A.2d 600, 604–05 (Pa. Super. Ct. 2003).

grant the divorce; it was also important that the court only grant the divorce if the state had a large enough interest in having its laws applied.¹³² Essentially, the court found that it should only exercise jurisdiction if it also had the right to apply its own laws. The court was evaluating a divorce proceeding where the husband and wife had been married in India and then moved to the United States where they both held jobs.¹³³ The husband filed for divorce in India and the wife filed for divorce in Pennsylvania.¹³⁴ The court stated that while both parties were citizens of India and had been married there, “it [was] of greater importance that husband and wife [were] domiciled and employed in Pennsylvania.”¹³⁵ The court noted another important factor was that both parties had firmly established contacts with the state; for example, both parties worked in Pennsylvania.¹³⁶

Another significant issue for the court was the future of the individual parties.¹³⁷ The court noted, “their connections with Pennsylvania concern the present and future.”¹³⁸ For the *Sinha* court, once the basic jurisdictional requirements were met, the extensive current and future ties to Pennsylvania indicated that Pennsylvania had a greater interest in characterizing the property than did their previous domicile, India.¹³⁹

After a court determines that it has the ability to exercise jurisdiction, it must then decide which law to apply. Forum non conveniens indicates that the state must weigh a series of factors including the ability to litigate in the other domicile, including what law governs the claim.¹⁴⁰ Further, because due process must be comported with, a court may not dismiss a case based on the doctrine of forum non conveniens if the foreign country would not allow proper litigation of the claim, the foreign country’s courts do not comport with due process or the law of the foreign country would not give the parties due process.¹⁴¹ Therefore, when a court finds that

132. *Id.* at 604.

133. *Id.* at 601–02.

134. *Id.* at 602.

135. *Id.* at 606.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 604–06.

140. *See, e.g., Doroti v. Doroti*, 342 A.2d 18, 22–23 (D.C. 1975) (“we are persuaded that no court could find that the inconvenience demonstrated on this court by appellee outweighs appellant’s interest in having her claim, which is governed by American law, considered and determined by an American court”).

141. 20 AM. JUR. 2D *Courts* § 124 (2012); 24 AM. JUR. 2D *Divorce and Separation* § 194 (2012).

forum non conveniens applies, the court is likely to find that it comports with due process for parties to litigate in the alternate place of domicile.¹⁴² Alternatively, if a court finds that forum non conveniens does not apply, then the court may find that it comports with due process to apply their state law to the marital property—for community property states, this means quasi-community property is applicable to couples who were domiciled somewhere else and then relocated to a community property state.¹⁴³

For community property states, the quasi-community property statute will largely dictate the division of the international marital estates. While a court may first engage in a forum non conveniens analysis, once it determines that the court is a suitable location, the quasi-community property doctrine will dictate the outcome.¹⁴⁴ In *Ismail v. Ismail*, two Egyptian nationals moved from Egypt to Texas where they bought property before moving back to Egypt.¹⁴⁵ The wife later returned to Texas and, while there, the husband started divorce proceedings in Egypt.¹⁴⁶ The wife then filed for divorce in Texas where the court awarded her the marital assets in Texas and awarded the husband the considerably larger marital assets in Egypt.¹⁴⁷ The husband appealed the division of the marital assets in Texas.¹⁴⁸ The Texas appellate court determined that the Texas trial court's distribution was entirely within its discretion.¹⁴⁹ The reasoning behind this ruling was that in Texas, "the court may consider the value of real property lying outside of Texas in an equitable division of property. Texas courts do not assert jurisdiction to determine title to such land but may consider the foreign investment when dividing property."¹⁵⁰ Therefore, while the Texas court wanted to effect an equal division of property, it realized that there may be significant practical difficulties in enforcing its judgment in the foreign jurisdiction.¹⁵¹ Thus, its solution for an equal division of property was to award the wife all of the assets within

142. 24 AM. JUR. 2D *Divorce and Separation* § 194 (2012). See also, e.g., *In re Marriage of Ollervides*, No. D053672, 2009 Cal. App. Unpub. LEXIS 3486 (Ct. App. May 1, 2009).

143. See, e.g., *Ismail v. Ismail*, 702 S.W.2d 216, 219–22 (Tex. App. 1985).

144. See *id.* at 219–23.

145. *Id.* at 218.

146. *Id.*

147. *Id.* at 218–19.

148. *Id.*

149. *Id.* at 222.

150. *Id.*

151. See *id.*

its jurisdiction, leaving those assets outside of the jurisdiction to the husband.

Furthermore, the court found that there was no need to perform a traditional choice of law analysis since the quasi-community property statute guided Texas courts' decisions.¹⁵² The court instead engaged in a forum non conveniens analysis and found that the couple's connections to Texas made application of Texas's laws reasonable.¹⁵³ In addition, the court determined that the wife would be unable to pursue a divorce in Egypt.¹⁵⁴ This resulted in the court overruling the husband's objections to the forum non conveniens.¹⁵⁵

This stance on forum non conveniens seems logical for the courts when one looks at certain types of foreign property regimes. For example, if a court is faced with a property regime that is essentially a contracted agreement, such as the property regime in *Ollervides*,¹⁵⁶ and the couple does not have sufficient ties to the state, then a court would likely find that it should be applying the laws of another country. While a court could apply the laws of another country if it chose, the differences between the legal systems and the inconveniences of litigating away from witnesses or experts would almost always lead to a much harder and more expensive proceeding than an action in the other forum.

However, this also means that unlike the interstate system, there is no middle ground for divorce litigation. Either a court will apply its own laws for the international marital estate or they will dismiss it to the other country's courts. This all or nothing attitude means that similar jurisdictions may reach very different results such as what occurred in *Ismail* and *Ollervides*, where divergent forum non conveniens results appeared in different community property states.

Courts also seem to give weight to situations in which one party's ability to instigate or participate in divorce proceedings is hindered. This issue was especially relevant in *Sinha* and *Ismail*. In *Ismail*, the wife could

152. *Id.* at 222–23 (discussing TEX. FAM. CODE ANN. § 3.63(b) (West 1997) which was replaced by TEX. FAM. CODE ANN. § 7.002 (West 2003)).

153. *Id.* at 223.

154. *Id.* (“An additional important consideration here is whether the forum may properly apply its own law to the controversy. If United States (Texas) law is applicable, the American court should retain jurisdiction rather than grant a dismissal on the ground on *forum non conveniens*.”).

155. *Id.*

156. *See In re Marriage of Ollervides*, No. D053672, 2009 Cal. App. Unpub. LEXIS 3486 (Ct. App. May 1, 2009).

not independently seek a divorce in Egypt, and lived in Texas.¹⁵⁷ In *Sinha*, both parties were living in Pennsylvania and had lived there for some time.¹⁵⁸ For the wife in *Sinha*, the inconvenience of travelling to India for the trial outweighed the potential benefits.¹⁵⁹

Once the forum has been decided, courts must decide which country's laws should apply. As the *Ismail* court stated, if the couple has sufficient ties to the forum, then the state acquires an interest in dividing the property according to its laws.¹⁶⁰ Therefore, the application of the state's laws will never be per se unreasonable. Moreover, courts are inclined to apply their law and have a disincentive to apply another country's laws. This means that in practice a court will likely never apply foreign law for the division of an international marital estate. Application of the laws of the forum state rather than the previous domiciliary is the result of the same issues discussed in *Martin*, but on a larger scale.¹⁶¹ These results show that uniformity of results and judicial ease are much more powerful factors in international divorces than in the interstate system.

B. CONCURRENT SUITS IN INTERNATIONAL JURISDICTIONS AND THE PRESERVATION OF STATE INTERESTS AS WELL AS THE RESPECT OF COMITY

The reality of divorce is that it is often a race to the courthouse between the spouses. Each of the spouses files their petition in the jurisdiction that they believe will be most advantageous to them. This is because states, once finding jurisdiction over the international parties, tend to determine that they have enough contact to apply their own law.¹⁶²

Courts must also deal with cases where the parties have filed concurrent suits. Likewise, they may be confronted with a foreign divorce decree, which may or may not have a property distribution, presented for domestication in an American court. In addition to the foreign divorce decree being used for domestication, it may also be raised as a bar to the instigation of a divorce suit in the United States upon the basis of res judicata. Furthermore, it may also arise when one party argues for an anti-suit injunction on behalf of the proceeding in the other country, such as in

157. *Ismail*, 702 S.W.2d at 222.

158. *Sinha v. Sinha*, 834 A.2d 600, 604 (Sup. Ct. Pa. 2003).

159. *Id.* at 606.

160. *Ismail*, 702 S.W.2d at 222.

161. *See supra* Part II.B.

162. *See supra* Part III.A.

Ollervides.¹⁶³ In such cases, courts examine whether they should recognize the foreign judicial decree or whether the state's interests outweigh the foreign country's interests in deciding the action.¹⁶⁴

The requirement of comports with due process also means that courts are more likely to factor due process concerns into their evaluations of foreign divorce proceedings. Therefore, because there is no Full Faith and Credit Clause to regulate international decrees like interstate cases, there is a greater amount of uncertainty for concurrent divorce suits. Sister state courts may apply a weighted comity and jurisdictional analysis, as in *Schulmeisters* for simultaneous proceedings, and find that the court that first exercised proper jurisdiction is the proper forum.¹⁶⁵ For international cases however, courts are much more inclined to use their discretion to deny comity or stay proceedings when the proceedings were initiated in a foreign country.

For example, in *Maraj v. Maraj*, the husband first filed divorce proceedings in Trinidad and Tobago after which the wife filed for divorce in Florida.¹⁶⁶ The husband moved for a dismissal in Florida on the basis of a concurrent suit pending, which the Florida trial court denied and the appellate court affirmed.¹⁶⁷ The appellate court found that it was within the trial court's discretion to deny a stay of proceedings as the couple had lived in Florida for several years and had significant assets within the state.¹⁶⁸

A New York court similarly demonstrated this refusal to defer in *Mary F.B. v. David B.* in which a wife filed for divorce in New York after her husband filed for divorce in France.¹⁶⁹ At that time, the wife was an American citizen living in France while the husband was living in New York.¹⁷⁰ He then moved to dismiss the New York proceedings¹⁷¹ since the proceedings in France had been filed first and the court had already issued a temporary order of support to the wife.¹⁷² The state court found that not

163. See *In re Marriage of Ollervides*, No. D053672, 2009 Cal. App. Unpub. LEXIS 3486 (Ct. App. May 1, 2009).

164. See *id.*

165. *Schulmeisters v. Schulmeisters*, 656 A.2d 1312, 1313–14 (N.J. Super. Ct. Ch. Div. 1993).

166. *Maraj v. Maraj*, 642 So.2d 1103, 1104 (Fla. Dist. Ct. App. 1994).

167. *Id.*

168. *Id.*

169. *Mary F.B. v. David B.*, 447 N.Y.S.2d 375, 376 (Fam. Ct. 1982).

170. *Id.*

171. *Id.*

172. *Id.*

only was the wife allowed to file the proceeding against her husband, but also that the New York court was allowed to maintain the action and exercise jurisdiction over the marital estate despite the concurrent proceedings.¹⁷³ The court also evaluated forum non conveniens but found that since the inconvenience of litigating in New York was only burdensome to the wife since the husband already lived there, it was not substantial enough to dismiss.¹⁷⁴

Maraj and *Mary* illustrate how reluctant courts are to dismiss a divorce proceeding even when another court may still meet the requirements set forth in the interstate analysis. In both *Maraj* and *Mary*, the proceedings were initially filed in the foreign jurisdiction but the American courts nonetheless found that it was well within the trial court's discretion to find that the state had an equally significant interest in having the case adjudicated in that forum. These decisions imply that courts are more inclined to use their discretion in continuing their proceedings rather than dismissing them, unlike in interstate actions.

This bias toward the state continues even when a foreign proceeding has already resulted in a divorce decree. In *Sanchez v. Palau*, a wife relocated to Texas from Mexico after a Mexican court refused to grant her a divorce from her husband.¹⁷⁵ After filing for divorce in Texas, her husband concurrently filed for divorce in Mexico, obtaining a divorce decree before the proceedings had finished in Texas.¹⁷⁶ Despite the wife's motions, another court in Texas domesticated the Mexican decree, which she then appealed.¹⁷⁷ The Texas Court of Appeals found that the "plain language of the [Uniform Foreign Country Money Judgment Recognition Act] does not authorize the trial court to recognize the 2008 Mexican divorce decree."¹⁷⁸ The court reasoned that since the Mexican divorce pertained only to the status of the marriage and was not itself a money judgment, it did not fall under the proviso of the act.¹⁷⁹ Therefore, in this case, the court found that while the Mexican divorce was not automatically invalid, it would nonetheless assert jurisdiction over the case since there was no requirement that it must recognize the Mexican divorce decree. Specifically, it was not required to recognize the decree with respect to the

173. *Id.* at 378.

174. *Id.* at 377.

175. *Sanchez v. Palau*, 317 S.W.3d 780, 782 (Tex. App. 2010).

176. *Id.* at 782–83.

177. *Id.* at 784.

178. *Id.* at 786.

179. *Id.* at 782.

assets in Texas.¹⁸⁰ Thus, it was incorrect for the trial court to recognize and domesticate the Mexican decree.¹⁸¹

While the court could have simply listed discretion as a reason to refuse to recognize the Mexican divorce decree, it listed other reasons as well. The view stated by the *Sanchez* court was also predicated on two other factors it found to be important: the inapplicability of the Uniform Foreign Country Money Judgment Recognition Act (“UFCMJRA”) and the bad faith actions of the husband.¹⁸² The *Sanchez* court viewed the husband’s actions as an attempt to thwart the proceedings in Texas.¹⁸³ Since the decree obtained in Mexico was not, in and of itself, recognized in the United States, the court was not required to give deference to the concurrent suit over its marital property.¹⁸⁴ Therefore, the court was free to apply its own state laws to divide the property in the remanded proceedings.¹⁸⁵

Ensuring protection of its interests and implementation of its laws is of utmost importance to courts. In one instance, a court can decide to stay proceedings in its jurisdiction for ongoing proceedings in another country; however, the court can also specifically reserve the right to modify a judgment if it feels its interests are not adequately represented. This was precisely the case in *Zwerling v. Zwerling*, where the court engaged in the conflict of laws analysis and determined that the correct forum was Israel—where the wife had already filed and commenced divorce proceedings.¹⁸⁶ In this case, the family had moved to Israel but the husband soon returned to New York.¹⁸⁷ Two years later, the wife filed for religious divorce proceedings in Israel.¹⁸⁸ The husband then filed for divorce in New York and received a default divorce judgment.¹⁸⁹ The New York appellate court declined to exercise jurisdiction over any of the couple’s property, stating that it “should more appropriately be addressed in the matrimonial proceedings currently before the Rabbinical Court of Israel.”¹⁹⁰

180. *Id.*

181. *Id.*

182. *Id.* at 782–84.

183. *Id.* at 782.

184. *Id.* at 786.

185. *Id.*

186. *Zwerling v. Zwerling*, 636 N.Y.S.2d 595, 602 (Sup. Ct. 1995).

187. *Id.* at 597.

188. *Id.* at 597–98.

189. *Id.* at 597.

190. *Id.* at 602.

Thus, the court found that Israel had the greater interest between the two jurisdictions in dividing the couple's marital assets. However, the court decided to reserve the ability to modify any future Israeli judgment.¹⁹¹ This was predicated on the future Israeli judgment dividing up the property in a way that sufficiently respected New York's equitable distribution and principles.¹⁹² This rare flexibility seems to preserve both parties' interests while keeping justice and the state's policies in mind. It is this decision that most closely echoes what occurs for interstate concurrent suits. However, the lack of similar decisions indicates that it is an atypical result.

C. AFFORDING FOREIGN DIVORCE OR DISTRIBUTION DECREES COMITY

The two main issues a court faces when recognizing a foreign judicial decree are the protection of its property policies and ensuring respect for due process. It is with these principles in mind that a state looks to foreign divorce decrees in concurrent suits. It is here that the international divorce system has a parallel to the Full Faith and Credit Clause. When a court finds that due process has been met, it is likely to domesticate that decree, much like the interstate system.¹⁹³ The main authority for the recognition of foreign judicial decrees is the doctrine of comity. The court in *Hilton v. Guyot* clearly stated the concept of comity as "[a] judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is recognized as valid in every country, unless contrary to the policy of its own law."¹⁹⁴ Therefore, in concurrent proceedings, one party may attempt to introduce a foreign decree if the foreign court arrives at a judgment before the American court.

This comity mandate does not create an underlying presumption of validity for foreign divorce decrees. Courts are clear that when recognition would negatively impact the interest of the state or its citizens, the court is fully justified in refusing to accept it.¹⁹⁵ Conversely, when a decree does not adversely affect a state's public policy or property interests, *Hilton* indicates that these factors are prima facie evidence for comity.¹⁹⁶

191. *Id.*

192. *Id.*

193. *See, e.g.,* *Dart v. Dart*, 568 N.W.2d 353 (Mich. Ct. App. 1997).

194. *Hilton v. Guyot*, 159 U.S. 113, 145 (1895).

195. *Aleem v. Aleem*, 947 A.2d 489, 499–500 (Md. 2008).

196. *Hilton*, 159 U.S. at 168 ("In holding such a judgment . . . we do not proceed upon any theory of retaliation upon one person by reason of injustice done to another, but upon the broad ground that international law is founded upon mutuality and reciprocity . . . by the comity of our own country, which it is our judicial duty to known and to declare, the judgment is not entitled to be considered conclusive.").

However, the court is still not required to give the decree comity. In order to decide which path a court must take, the court must first engage in an analysis of how the decree affects its interests.

A court will generally domesticate a decree when it meets two requirements: due process and protection of state interest. For example, in *Chaudry v. Chaudry*, a New Jersey appellate court refused to allow a Pakistani wife to petition for support or a portion of the marital assets after her husband had already received a divorce in Pakistan.¹⁹⁷ The court found that the divorce decree should have been recognized by the principles of comity because Pakistan had the largest connection to the couple, and the divorce proceedings were rendered with due process. The court found this lack of connection despite the fact that the wife and husband had previously lived in New Jersey and the husband still resided there.¹⁹⁸ The Pakistani dissolution of marriage was governed by an ante-nuptial agreement.¹⁹⁹ This, as in *Ollervides*,²⁰⁰ meant that Pakistani law would govern the distribution of the marital assets.²⁰¹ The court further found that the wife was fully represented in the divorce action in Pakistan and had been before an impartial tribunal, thus satisfying the due process requirements.²⁰² The court ultimately declined to exercise jurisdiction over the subject matter because of a lack of connection to the state.²⁰³ The court noted:

For the purpose of this opinion, we assume, without deciding, that where there is a sufficiently strong nexus between the marriage and this State—e.g., where the parties have lived here for a substantial period of time—a claim for alimony and equitable distribution may properly be considered, in the court’s discretion, after a judgment of divorce elsewhere . . . even though such relief could not have been obtained in the state or country granting the divorce.²⁰⁴

The court engaged in a brief analysis of the couple’s “nexus” to the state, but ultimately determined that the wife’s ties to the state were not strong enough for her to bring the suit.²⁰⁵ Rather than decide that the courts

197. *Chaudry v. Chaudry*, 388 A.2d 1000, 1003 (N.J. Super. Ct. App. Div. 1978).

198. *Id.*

199. *Id.* at 1004.

200. *See In re Marriage of Ollervides*, No. D053672, 2009 Cal. App. Unpub. LEXIS 3486 (Ct. App. May 1, 2009).

201. *Chaudry*, 388 A.2d at 1007–08.

202. *Id.* at 1004–05.

203. *Id.* at 1006.

204. *Id.*

205. *Id.*

both had concurrent jurisdiction, as in *Ismail*, the New Jersey court stressed that Pakistan was the appropriate court to decide the case.²⁰⁶

This decision seems largely predicated on the fact that a final judgment had already been entered and, since the due process requirements were met, the decision should be respected. In *Ismail*, the court was dealing with a concurrent suit,²⁰⁷ not one that had already been decided. Further, in *Ismail*, the Texas court was distributing the property in Texas, where the couple had significant assets and the instigating party resided.²⁰⁸ In contrast, the wife in *Chaudry* still resided in India where the husband had petitioned for, and received, the divorce.²⁰⁹ It was after the husband had already filed for divorce in India when the wife petitioned for divorce in Pennsylvania.²¹⁰

Dart v. Dart also recognized comity when due process was fulfilled in the foreign court.²¹¹ In *Dart*, a Michigan appellate court found that a British court's distribution of marital assets was a final judgment.²¹² Thus, it was subject to enforcement in Michigan under the UFMJRA and principles of comity with respect to the division of assets, money judgment, and child support.²¹³ This result derived from a race to the courthouse between the two parties.²¹⁴ The husband had initially filed for divorce in England and, almost immediately afterwards, the wife filed for divorce in Michigan.²¹⁵ The parties eventually fully litigated the case in England and signed a settlement.²¹⁶ The Michigan appellate court stated that it would only deem foreign judgments "not conclusive" if they were "rendered under a system that does not provide impartial tribunals or procedures compatible with due process of law."²¹⁷ The court went on to point out that different adjudications of property are often a result of judicial discretion.²¹⁸

The key issue that the courts focused on in *Dart* and *Chaudry* was the ability of the party to be fairly represented in the previous action, so as to

206. *Id.*

207. *Ismail v. Ismail*, 702 S.W.2d 216, 218–19 (Tex. App. 1985).

208. *Id.* at 218.

209. *Chaudry*, 388 A.2d at 1003.

210. *Id.*

211. *Dart v. Dart*, 568 N.W.2d 353 (Mich. Ct. App. 1997).

212. *Id.* at 358.

213. *Id.* at 357.

214. *Id.* at 355.

215. *Id.*

216. *Id.*

217. *Dart*, 568 N.W.2d at 356.

218. *Id.* at 357.

comport with the idea of fairness and due process. As the court noted in *Dart*, “[h]ere, however, it cannot reasonably be argued that plaintiff was denied due process because she was represented by counsel, given an opportunity to be heard, and presented evidence on her own behalf.”²¹⁹ Because the British judicial decree met the finality requirement and comported with due process, the *Dart* court felt that the judgment was entitled to recognition under UFCMJRA.²²⁰ The UFCMJRA is a model code that recognizes foreign money judgments provided that the judgments meet certain requirements such as impartial tribunals and notice.²²¹ It exempts money judgments as related to matrimonial affairs, but some courts, such in *Dart*, have interpreted the adoption of the UFCMJRA to permissively allow the court to recognize matrimonial money judgments on a case-by-case basis.²²²

This issue also arose in *Downs v. Yuen*, where the court noted that “[e]ven if the subject judgment is, at least in part, one ‘for support’ within the meaning of [UFCMJRA], and therefore, at least in part, not enforceable . . . there is no reason why the judgment should not be enforced under general principles of comity.”²²³ The court noted that the reason monetary divorce judgments are not included is “to acknowledge their unique status” so that the state can ensure it complies with state policy given the fact that family matters are so variable.²²⁴ But the enactment is still a step towards a more internationally uniform system. New York is not alone in this approach: fourteen states have enacted the UFCMJRA, including California, North Carolina, Washington, Hawaii, Iowa and Michigan.²²⁵

The courts are more willing to find that their state interest in protecting public policy bars recognition of the foreign divorce decree when the divorce decree divides the assets in that state, seeks a financial judgment rather than is a simple decree of dissolution, or fails to offer one party due process.²²⁶ This also promotes multiple filings for a different

219. *Id.* at 356.

220. *Id.*

221. UNIF. FOREIGN-COUNTRY MONEY JUDGMENT RECOGNITION ACT § 4 (2011), U.L.A. § 4 (2011).

222. UNIF. FOREIGN-COUNTRY MONEY JUDGMENT RECOGNITION ACT § 3(b)(c) (2011), U.L.A. § 3 (2011).

223. *Downs v. Yuen*, 748 N.Y.S. 2d 131 (App. Div. 2002).

224. *Id.*

225. UNIF. FOREIGN-COUNTRY MONEY JUDGMENT RECOGNITION ACT refs. & annots., U.L.A. Refs. & Annots. (2009).

226. JEREMY D. MORLEY, INT’L FAMILY LAW PRACTICE, § 5:4.

reason, as a subset of parties may actually need to file for divorce or distribution of assets in multiple jurisdictions. For example, in *De La Guardia v. De La Guardia*, a wife filed for divorce in Florida after obtaining a dissolution decree in Paraguay.²²⁷ The husband argued that the Paraguayan divorce decree should bar the wife's Florida petition for divorce under the basis of res judicata.²²⁸ However, the trial court found that the Paraguayan decree was only "valid as to the assets listed in that decree . . . [and] did not distribute assets and property located outside the country of Paraguay."²²⁹ Therefore the court divided the property equitably, which the appellate court subsequently affirmed.²³⁰ The court also took fairness into account when deciding if res judicata should bar a new suit. Because the spouses could not have their interests adequately addressed in another country, the spouses had to file in multiple countries. The lack of an international divorce system means that redundant cases, such as this one, are more and more likely to occur.²³¹

IV. CONCLUSION

A court faces numerous issues when dealing with a divorcing couple with international ties. While interstate property differences set a good basis for courts to approach international property issues, the way that courts view interstate and international systems should be fundamentally different. In interstate divorce cases, while differences between the states or races to the courthouse may lead to unfair results, the system as a whole works to accord justice to each party's expectations based on the couple's domicile. Moreover, states have fairly predictable rules about the characterization of property. Therefore, while discretion may create diverging results amongst courts, marital property bought with community property funds or in a community property state is likely to be viewed as community property. When a party files in a jurisdiction that cannot claim to have the larger interest in a couple's marital estate, barring a statute on point, a court feels comfortable applying another state's law to properly characterize and divide the marital assets. In effect, the majority of state courts have a greater willingness to compromise by applying another

227. *De La Guardia v. De La Guardia*, 536 So. 2d 1115 (Fla. Dist. Ct. App. 1988).

228. *Id.* at 1116.

229. *Id.* at 1116 n.1.

230. *Id.* at 1117.

231. *See, e.g., Ismail v. Ismail*, 702 S.W.2d 216, 218–19 (Tex. App. 1985) where the parties litigated in both Texas and Egypt since neither country had power over the property in the other country.

state's laws or characterizations. It is through this system that fairness and justice can be best served.

This principle is not as easily applied when an international marital estate is involved. The divergent results in *Ismail* and *Ollervides* illustrate that courts are generally only in a position to exercise jurisdiction over part of the marital estate and can only divide it partially or dismiss the suit entirely. While this is convenient for courts, it does not give full weight to parties' justified expectations and overall concerns for fairness. There is no assurance for states that their policies will be respected if they dismiss the proceeding for continuation in another country. Conversely, states may be attempting to exert jurisdiction over property although they cannot meaningfully effect a change in title. Also, states may exercise their own law when the laws of another country with a more substantial interest would promote fairness just as equally and meet the parties' expectations.

Therefore, the end result is generally a one-sided outcome, rather than a compromise or integrated system. Just as the United States is not required to recognize a foreign decree, other countries are not required to recognize an American divorce decree. Countries are keenly aware of this and take steps to protect their policies and interests knowing that other countries will probably do the same. Additionally, there is uncertainty due to the inconsistent recognition of foreign judicial decrees. While the Full Faith and Credit Clause provides a guiding mechanism for the recognition of foreign sister state judgments, there is no direct analogy in the international divorce cases. There is no guarantee that a court will recognize a foreign judicial decree, although there are factors that make it more likely. For example, courts' discretion toward recognition of a foreign proceeding or decree is more favorable when the foreign court comports with due process.

These factors ultimately mean that there is a significantly greater likelihood of receiving an unfair result for at least one of the parties. However, until there is an overriding international system in place or states are more comfortable interpreting foreign law, these conflict of law analyses and decisions logically result from the expansion of the interstate divorce system.

