Resolving conflicts of law arising from same-sex relationships

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Editor's Note: This essay was adapted from Associate Professor Hillel Levin's article Resolving Interstate Conflicts Over Same-Sex Non-Marriage, *63 Fla. L. Rev. 47 (2011).*

As anyone following the news knows, same-sex marriage is a hot topic. President Barack Obama declared his support for same-sex marriage in 2012, the first time a major party's presidential nominee has done so. Public support is at unprecedented levels, and the U.S. Supreme Court is currently considering two cases concerning the legal status of same-sex relationships.

Although the Supreme Court could declare that all states must recognize same-sex marriage, few observers believe that it is quite ready to take that step. Thus, whatever the Supreme Court decides, little is likely to change from the current status quo, which is, in a word, confusing.

The Dilemma

A few states (what I call the "marriage states") permit same-sex couples to wed; some others (the "marriage-like" states) instead offer same-sex couples alternatives that are functionally identical to marriage, or nearly so, but under a different name, like civil unions; still others (the "marriage-lite" states) provide same-sex couples with only a handful of the rights and responsibilities typically associated with marriage; and the majority of states – Georgia included – offer no formal recognition at all to same-sex couples.

Over the next few years, as the country continues to grapple with issues related to same-sex relationships, more states are likely to experiment with these alternative models.

This state of affairs raises complex and novel questions for courts, legislatures and other policymakers in a technical and somewhat esoteric area of the law called conflicts of law.

What happens when a same-sex couple married in a marriage state moves to a marriage-like state; or from a marriage-like to a marriage-lite state; or from a marriage-lite to a marriage state – and so on? Do they keep their rights and responsibilities? Do they lose them as they cross the border? Does it depend, and if so, on what? Consider these examples:

- A same-sex couple marries in Massachusetts (a marriage state) and moves to Delaware (a marriage-like state). One spouse is incapacitated and hospitalized. Can the other spouse direct medical care and make end-of-life decisions? Can he even visit his husband in the hospital? What if the incapacitated spouse dies? Who inherits? Who assumes the decedent's debts?
- The same facts and questions, except that the couple moves to Wisconsin (a marriage-lite state) instead.
- A couple enters into a marriage-like relationship in Delaware and moves to Massachusetts. Before officially getting married, they decide to split up. One member of the couple wishes to marry someone else. Can she? Must she dissolve her union in Delaware first? If so, how and where?
- A couple enters into a marriage-lite relationship in Wisconsin and then moves to Delaware or Massachusetts. What rights, if any, do the members of the couple automatically enjoy in the new state?

These are what I refer to as the marriage/marriage-like/marriage-lite conflicts.

Resolving them is enormously important. As U.S. Supreme Court Justice Robert Jackson argued in *Estin v. Estin* (334 U.S. 541, 553 (1948) (Jackson, J., dissenting)) more than 60 years ago, "[i]f there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom."

In a 2011 article in the *Florida Law Review,* I offered the first analytical framework for resolving all of these marriage/marriage-like/marriage-lite conflicts.

By comparing these marriage conflicts to other kinds of conflicts that present similar patterns, I argued that forum states should, to the degree possible, sever those elements of same-sex relationships entered into in foreign states that are contrary to local policy but accept the remainder.

This approach provides sensible, straightforward and fairly comprehensive rules for addressing the marriage/marriage-like/marriage-lite conflicts, and it also shines a light on how no-recognition states like Georgia ought to treat same-sex couples who have formalized their relationships in other states.

Current Approaches to Solving the Issues

The article began by reviewing the approaches taken by the various states to these questions and demonstrating that the law was in disarray.

For example, consider how states have resolved the most straightforward conflict, that between a marriage and marriage-like state (when a married same-sex couple moves from a marriage state to a marriage-like state). Analytically, states have three options in confronting this problem.

First, they might treat the couple as married. That is, although the forum state would not perform the marriage, it could recognize and adopt the status afforded by the marriage state as a matter of comity.

Second, they could decline to recognize the relationship altogether. In other words, because the forum state does not permit same-sex couples to marry, it could simply reject the relationship entirely and maintain that the couple must formally enter into the forum state's marriage-like union if they are to receive the benefits of such a relationship.

Third, they could opt not to recognize the marriage as such, but instead automatically provide the maximum recognition for the couple afforded in the forum state. For example, a marriage-like state such as Delaware could automatically treat a same-sex couple lawfully married in Massachusetts as though it had already entered into Delaware's marriage alternative.

Unfortunately, as my research showed, states have been all over the map concerning this question.

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The various other conflict patterns – marriage-like/marriage, marriage/marriage-lite, marriage-lite/marriage, etc. – raise even more possibilities, and states are to an even greater degree split, confused or unclear in how to resolve them.

The central insight in my article is that the conflicts presented by the states' differing approaches to same-sex relationships are not actually novel, but that legal scholars and judges have been looking to the wrong precedents.

The typical approach offered by legal scholars and judges focuses on what are called the incidents of marriage cases. These are cases in which an interracial couple, first cousins or a polygamous group married in a forum that permitted their union, but litigation related to the union subsequently arose in a forum that rejects such relationships.

It is easy to see why these cases are attractive to scholars and judges as starting points for resolving the marriage/marriage-like/marriage-lite conflicts. After all, they too consider conflicts questions arising from different states' marriage recognition laws.

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As I show, though, the incidents of marriage cases are of limited utility.

To begin with, they are notoriously fragmentary and inconsistent. Scholars have struggled to make sense of these cases and to develop generally applicable rules, and doing so is something like recreating a complex statutory scheme by referencing a small number of cases in which the statute was applied.

Further, scholars inevitably make contestable claims about how to categorize cases and what to learn from them. These cases are too few, too thinly reasoned, and too inconsistent to offer much insight.

More fundamentally, the incidents of marriage cases are not, on close examination, sufficiently similar to the marriage/marriage-like/marriage-lite conflicts to reason from them. In those earlier cases, the states' possible approaches were strictly binary – states either recognized the relationships in question as marriages or they rejected them as nothing – whereas the possibilities in the same-sex relationship context run along a spectrum.

Therefore, mechanically applying the principles from the marriage/no-recognition conflicts in the incidents of marriage context to the marriage/marriage-like/marriage-lite conflicts in the same-sex relationship context makes little sense and does not comport with the technical doctrines of conflicts law.

Using Conflicts of Law Doctrines and Principles as a Solution

I suggest that in a variety of overlooked cases, conflicts of law doctrines and principles have developed that shed light on the marriage/marriage-like/marriage-lite conflicts context.

First, consider a simple problem that arises with respect to contracts. Parties sometimes enter into a contract in a foreign state that contains a clause that a forum state adjudicating the contract deems unenforceable and contrary to public policy. Should the court in the forum state (1) put aside its objections to the problematic clause on the grounds that it should give full force to a sister state's law; (2) reject the contract entirely; or (3) sever the unenforceable clause and give full force to what is left of the contract?

It should be immediately apparent that these possible resolutions mirror the options we identified in the marriage/marriage-like context.

In these contract disputes, courts often sever the unenforceable provision such that the remainder of the contract will be valid and enforceable. In other words, the court will conform the contract, where possible, to local law and policy. In so doing, a state can uphold its interest in enforcing agreements between parties while simultaneously affirming its opposition to the particular provision in question.

Consider a second example, this time from family law. The states vary somewhat with regard to precisely which rights travel along with marriage. Some states are community property states, while others are common law states.

If a couple were to move from the first kind to the second, the latter would recognize the couple as married, but would typically apply its own law were a dispute about the property to arise. In other words, the mere fact that the forum state might not recognize one aspect of the relationship is not enough for the state to refuse to recognize the relationship altogether. Once again, we find the forum state rejecting that which conflicts with its policies and embracing that which it can.

We can readily apply the lessons from these relatively uncontroversial cases to the marriage/marriage-like/marriage-lite conflicts context. Simply put, states should reject those elements of a solemnized relationship that offend their public policy and accept those that conform to it.

Thus, for the marriage/marriage-like conflict, the forum state should refuse to apply the marriage label to the couple, but it should extend all of the benefits that it would offer to similarly situated same-sex couples under local law. In other words, it should treat the couple as having automatically entered into its marriage-like alternative.

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The same rule should apply in the marriage/marriage-lite and marriage-like/marriage-lite conflicts cases. That is, the marriage-lite forum state should not recognize the marriage or marriage-like label, or even the full array of rights and responsibilities that the couple attained under the foreign state's marriage or marriage-like scheme. It should, however, extend all of the benefits that it offers to same-sex couples within its own marriage-lite alternative and that are subsumed within the marriage or marriage-like relationship into which the couple already entered.

Similarly, with respect to the marriage-like/marriage conflict (where a couple enters into a marriage-like relationship and then finds themselves in a marriage state), the marriage state should automatically treat the couple as though they were married. Once again, the marriage state would simply be conforming the relationship to local law.

However, with respect to the marriage-lite/marriage-like and marriage-lite/marriage conflicts, the marriage and marriage-like forum states should refuse to extend any recognition to the couple that has entered elsewhere into a marriage-lite relationship.

This is because (1) marriage-lite relationships offend the policies of marriage and marriage-like states, such that the state should not recognize the marriage-lite status itself, and (2) the couple has not shown any interest in undertaking the much more robust marriage-like or marriage relationship. That is, the marriage-like or marriage forum cannot sever some piece of the marriage-lite relationship that it objects to and thus leave some larger piece that it can recognize; there is simply no equivalence in the relationships.

However, there is one critical exception to this rule: if the marriage or marriage-like forum state would allow individuals to enter into a contractual relationship governing the specific right at issue independently of a marriage or marriage alternative relationship, then it should recognize the foreign marriage-lite relationship's granting of that right.

For instance, if the forum state permits individuals to appoint someone to make end-of-life decisions independently of marriage (as all states do), and if the foreign marriage-lite relationship provides for end-of-life decision-making, then the forum state should affirm that aspect of the relationship as a contractual matter.

Finally, this approach yields important insights even for states, like Georgia, that decline to recognize any form of same-sex relationship.

The truth is that even no-recognition states have laws that recognize, or at least protect, some aspects of same-sex relationships.

Same-sex couples can provide for each other in their wills, and these wills are respected in no-recognition states. Likewise, no-recognition states respect legal agreements directing decision-making in the event of incapacity, contracts governing property division and other private agreements into which same-sex couples may enter.

Therefore, no-recognition states should automatically treat couples who have lawfully entered into marriage, marriage-like, and marriage-lite relationships in other states as though they had entered into whatever private contracts would be included in those unions and by forum law. That is, a same-sex couple that marries in Massachusetts and moves to Georgia should automatically have whatever rights and responsibilities Georgia independently allows same-sex couples to privately contract for and that are inherent in Massachusetts marriage law.

Of course, this is only a small subset of the rights and responsibilities that accrue to married couples; but they are very real nonetheless.

In my view, this approach is fairly intuitive and offers a more comprehensive and straightforward approach than those offered by others. But it will likely make very few partisans in the same-sex marriage debates happy.

Those who wish to see same-sex marriage spread throughout the country may well prefer an argument that every state is required to recognize a same-sex marriage lawfully performed in another state.

On the other side, some who oppose same-sex marriage and other forms of recognition may protest that my approach allows a sort of "creep" in the recognition of same-sex relationships, requiring states that have expressly rejected same-sex marriage to recognize such relationships in some cases.

To partisans of these debates, I simply suggest that conflicts law, given its opacity, complexity and technicality, is not the appropriate terrain on which to fight the marriage wars.

Indeed, I hope all states will recognize same-sex marriage one day soon, but based on equality – not through conflicts law.

Resolving these conflicts requires careful attention to the most technical areas of the law, creative problem-solving and the application of common sense. In other words, it requires good lawyering.