Conflict of Laws

A Comparative Approach

FAMILY LAW SUPPLEMENT

Validity of Marriage

Divorce

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Contents

1 Validity of Marriage

The issue of the validity of marriage is primarily an issue of choice of law. While a party could initiate an action to set aside the marriage immediately after its celebration, this rarely happens. Instead, the issue is generally litigated years after, for the purpose of defending divorce proceedings or asserting rights of inheritance in the estate of one of the spouses.[1] However, as the law of the place of celebration often applies at least in part, it is necessary to discuss briefly the jurisdiction to celebrate the marriage.

1 Jurisdiction to celebrate marriage

In most legal systems, marriages are celebrated by non-judicial authorities. In certain jurisdictions, they must nevertheless be public authorities. As such, the territorial scope of their power must be determined just as the power of courts. Certain States have therefore expressly defined the international jurisdiction of their authorities to celebrate marriages.

Belgian Code of Private International Law (2004)

Article 44 *Jurisdiction of the Belgian authorities to celebrate the marriage*

The marriage can be celebrated in Belgium if one of the prospective spouses has the Belgian nationality or has his domicile in Belgium or has since more than three months his habitual residence in Belgium when the marriage is celebrated.

Swiss Law of Private International Law (1987)

Chapter 3 Section 1 Celebration of marriage

Article 43 *Jurisdiction*

1 Swiss authorities have jurisdiction to perform the celebration of marriage if one of the future spouses is domiciled in Switzerland or is a Swiss citizen.

2 Foreign couples without Swiss domicile may also be permitted to marry in Switzerland by the competent authority if the marriage is recognized in the State of the domicile or citizenship of the future spouses.

3 Permission may not be refused solely because a divorce granted or recognized in Switzerland is not recognized abroad.

NOTES AND QUESTIONS

1 Pursuant to public international law, public authorities may not act physically on the territory of other States. These two provisions only define the power of local authorities to celebrate a marriage on the territory of the States which established them. An accepted exception to the rule is the power of consuls to celebrate marriage within the consulate or the embassy of their State.

2 In Japan and Belgium, the law of the place of celebration only governs the formalities regarding the celebration of the marriage, but not the more important substantive requirements which are governed by the law of the nationality of the spouses (see below, 2.2). The relevance of the place of celebration is minimal. Why does the Belgian lawmaker limit the jurisdiction of its authorities? By contrast, Japanese authorities will accept to register

[1] See, e.g., the *Udny v. Udny* and *In the Matter of Daoud Farraj* cases below.

any marriage as long as the spouses are present in Japan, and the Japanese official is satisfied that the marriage would be valid under the law applicable pursuant to Japanese choice of law rules.

3 A limping marriage is a marriage valid in one country, but not in another. How does the Swiss lawmaker address the issue?

4 It is in the United States that the place of celebration has the biggest impact on the applicable law, but there is no similar limitation on the power of local authorities to celebrate marriages: *infra*, 2.3.

2 Choice of law

Marriage is one of the fields of the conflict of laws where choice of law rules have been the most varied. The field is not harmonized in the European Union, and the Hague Convention on Celebration and Recognition of the Validity of Marriages, of 14 March 1978 was only ratified by three States: Australia, the Netherlands and Luxembourg.

2.1 Law of domicile

In England, the status and capacity of persons have traditionally been governed by the law of their domicile. The same rule is followed in many Commonwealth jurisdictions, including Ghana and Kenya.[2]

CASE

High Court of England and Wales, 9 July 1970 *Szechter v. Szechter*[3]

The wife, Nina, was born in Poland in 1940. When very young, she was dispatched by the Germans with her mother to an extermination camp. On the way there her mother threw her out of the railway-train into the snow, thereby saving the child's life but at the cost of permanent injury and ill-health. She was rescued and brought up in Warsaw by a Mrs. Karsov. In August 1966 she was arrested, together with the respondent whose secretary she then was, and the respondent's wife. Her arrest was followed by 10 months' detention under interrogation. At the end of that time, although she remained in custody, she was allowed to see a lawyer, who had been instructed by the respondent. The lawyer put to Nina a plan that the respondent and his wife had devised to help her. The plan was that the respondent and his wife should be divorced, that the respondent should marry Nina and take her to Israel as his wife, there to join the respondent's wife, whom the respondent would then re-marry. Nina agreed to this plan and, pursuant to it, the respondent and his wife were secretly divorced in April 1967. In October 1967, Nina was tried on a charge of 'anti-state activities,' convicted and sentenced to three years' imprisonment. Her health continued to deteriorate and she came to the conclusion that she would not be able to survive three years' imprisonment. On February 2, 1968, Nina and the respondent went through a ceremony of marriage in Mokotow Prison. In September 1968 Nina was released from prison. In November 1968 she and the respondent left Poland and went first to Austria and, in December 1968, they reached England, where they had resided ever since, with the intention of remaining permanently in England, although their permission to reside in England was limited to December 1969, later extended to December 1970. On August 15, 1969, Nina petitioned for a decree declaring that the marriage between her and the respondent was void for duress.

[2] See *Davis v. Randall* (1962) 1 GLR 1 (Ghana) and *In re. an Application by Barbara Simpson Howison* [1959] EA 568, 572–3 (Kenya). In both jurisdictions, the law of the domicile only applies to the essential validity of marriage.

[3] Probate, Divorce and Admiralty Division [1971] P. 286.

The second preliminary question is what is the proper law to apply in order to determine whether an ostensible marriage is defective by reason of duress. There is little direct authority on this matter. But the effect of duress goes to reality of consent and I respectfully agree with the suggestion in rule 32 of Dicey and Morris, *Conflict of Laws*, 8th ed. (1967), p. 271, that no marriage is valid if by the law of either party's domicile one party does not consent to marry the other. This accords with the old distinction between, on the one hand, 'forms and ceremonies,' the validity of which is referable to the lex loci contractus, and, on the other hand, 'essential validity,' by which is meant (even though by, as the editors of *Rayden on Divorce*, 10th ed. (1967) p. 121, remark, 'not a happy terminology') all requirements for a valid marriage other than those relating to forms and ceremonies, for the validity of which reference is made to the lex domicilii of the parties: . . . So far as capacity (also a matter of 'essential validity') is concerned, there can be no doubt that no marriage is valid if by the law of either party's domicile one of the parties is incapable of marrying the other. (. . .)

Both Nina and the respondent were domiciled in Poland at the time of the ceremony of marriage on February 2, 1968. It is therefore for Polish law to answer whether, on the facts as I have found them, the marriage was invalid by reason of duress. (. . .)

NOTES AND QUESTIONS

1. Does the law of the domicile govern all issues regarding the validity of marriage?
2. Which law would govern any argument that there was no consent?
3. In principle, the competence of the law of the domicile requires the marriage be valid under the law of the domicile of each of the spouses. However, English courts have held at the turn of the 20th century that if the marriage takes place in England and one party is domiciled in England, it suffices for the other to have capacity according to English domestic law, even though that other party lacks capacity under the foreign domiciliary law. The goal was to avoid the application of foreign laws which, for instance, prohibited inter racial marriage. Was it necessary to create an exception to the application to the law of the domicile to reach that result? Can you think of another technique which would also have allowed English courts to validate the marriage? See A. Briggs, *The Conflict of Laws* (OUP, 4th ed. 2019) p. 312-313.
4. The formal requirements of a marriage ceremony are governed by the law of the place of celebration of the marriage, the *lex loci celebrationis*. Under the common law doctrine of *renvoi* (see Casebook, p. 90), however, an English court would apply the choice of law rule of the court of the place of celebration, which might designate the law of a third State validating the marriage while the substantive law of the place of celebration would not: *Taczanowska v Taczanowski* [1957] P 301 (CA).

The concept of domicile in English law is peculiar. In the following case, the issue was whether the effect of the second marriage of Colonel Udny in 1854 was to legitimate the child he had a year before with Ann Allat and whether, as a consequence, the child could inherit from him. The law of his domicile governed. But where was his domicile?

CASE

House of Lords, 3 June 1869 *Udny v. Udny*[4]

Facts: John Udny, the father of Colonel Udny, and the grandfather of the defender, was born at Aberdeen, in 1727, of Scottish parents, and his domicil of origin was undoubtedly Scotch. He went to Italy, at what time the evidence did not shew, and for several years prior to 1760 lived at Venice, and was engaged in some kind of business there. In 1761 he was appointed British Consul at Venice, and he held that office till 1777. In that year he was appointed British Consul at Leghorn (*Livorno*), which office he continued to hold until his death, which took place in London, while he was there on leave of absence from Leghorn in 1800. In 1777 he was married to an English lady, Selina Shore Cleveland. There were two children of this marriage, John Robert Udny, the defender's father, who was born in 1770, and a daughter. They were both born at Leghorn. Mrs Udny continued to live at Leghorn with the Consul till 1784, when she went to London, accompanied by her children.

John Robert Udny, the Consul's son, lived with his mother in London from 1784 till 1794, when he was sent to Edinburgh University. He remained there from 1794 to 1797. He entered the army in 1797, and continued in it till 1812. In 1802 (his father having died in 1800) he succeeded to Udny. In 1812 he married Miss Emily Fitzhugh, an Englishwoman, and in the same year retired from the army. From 1812 to 1845 he lived in a house in Grosvenor Street, London, which he rented. That was the sole residence which he had during these thirty-three years, except occasional country houses in England. His wife and family lived with him in that house. There was no house on the Udny estate. He, however, came to Scotland nearly every year to look after his estate, and he exercised his rights and discharged his duties as a landowner. He was a freeholder in the county of Aberdeen from 1802, and a justice of the peace, a deputy-lieutenant, and a member of various clubs and associations in that county. He had no employment or occupation in London beyond what a taste for the turf gave him. In 1845, in consequence of pecuniary embarrassments, he went to reside at Boulogne, and while there, his wife being dead, he lived with Ann Allat, the defender's mother. In May 1853 the defender was born, and the Colonel and Ann Allat left Boulogne, and came to Scotland in the month of November in that year, and after residing in Ormiston, in Haddingtonshire, for about six weeks, they were married on 2nd January 1854. After that date the Colonel continued to reside in Scotland till 1861, when he died in Edinburgh. (. . .)

Lord Westbury—

The law of England, and of almost all civilised countries ascribes to each individual at his birth two distinct legal states or conditions; one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, which may be called his political status; another by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political status, for the political status may depend upon different laws in different countries, whereas the civil status is governed universally by one specific principle. Domicil or the place of settled residence of an individual is the criterion established by law for the purpose of determining the civil condition of the person, for it is on this basis that the personal rights of the parties,—that is, the law which determines his majority or his minority, marriage, succession, testacy or intestacy,—must depend. Every man has ascribed to him by law a domicil, which is a fiction or creation of international law, and depends on rules which,

[4] (1869) 7 M. (H.L.) 89.

being mainly derived from the Roman law, are common to the jurisprudence of all civilised nations. It is a settled principle that no man shall be without a domicil, and to secure this result the law attributes to every individual as soon as he is born the domicil of the father if the child be legitimate, or the domicil of the mother if illegitimate. This has been called the domicil of origin, and it is involuntary. Other domicils are domicils of choice, for as soon as the individual is *sui juris*, it is competent to him to elect and assume another domicil, the continuance of which depends upon his will and act. When another domicil is put on, the domicil of origin is for that purpose relinquished, and remains in abeyance during the continuance of the domicil. But as the domicil of origin is the creature of law, and independent of the will of the party, it would be inconsistent with the principles on which it is by law created and ascribed to suppose that it is capable of being, by the mere act of the party, entirely obliterated and extinguished. It revives and exists whenever there is no other domicil, and it does not require to be regained or reconstituted *animo at facto* in the manner which is necessary for the acquisition of a new domicil of choice.

Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with the unlimited intention of continuing to reside there. This is a description of the circumstances which create or constitute a domicil, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief of illness. And it must be residence fixed not for any defined period or particular purpose, but general and indefinite in its future duration. It is true that residence, originally temporary, or intended only for a limited period, may afterwards become general and unlimited, and in such a case, so soon as the change of purpose or the *animus manendi* can be inferred, the fact of domicil is established.

The domicil of origin may be extinguished by act of law, as, for example, by sentence of death, exile, and perhaps outlawry, but it cannot be destroyed by the act of the party.

(. . .)

The application of these general rules to the circumstances of the present case is very simple. My Lords, I concur with my noble and learned friend that the father of Colonel Udny, the Consul at Leghorn and afterwards at Venice, and again at Leghorn, did not, by his residence there in that capacity, lose his Scotch domicil. Colonel Udny was therefore a Scotchman by birth. But I am certainly inclined to think that when Colonel Udny, to use the ordinary phrase, settled in life, and took a long lease of a house in Grosvenor Street, and made that the place of abode of himself and his wife and children, becoming in point of fact subject to the municipal duties of a resident in that locality, and remained there for a period, I think, of thirty-two years, there being no impediment, in point of occupation or duty, to prevent his going to reside in his native country—under these circumstances, I should come to the conclusion, if it were necessary to decide the point, that Colonel Udny undoubtedly acquired an English domicil. But if he did so he eventually relinquished that English domicil in the most effectual way by selling or surrendering the lease of his house, selling his furniture, discharging his servants, and leaving London in a manner which would leave not the least doubt that he never intended to return there for the purpose of residence. If, therefore, he acquired an English domicil, he abandoned it absolutely *animo et facto*. Its acquisition being a thing of choice, was equally put an end to by choice. He lost it the

moment he set foot on the steamer to go to Boulogne, and he reacquired his domicil of origin. The rest is plain. The marriage, and the consequences of that marriage, must be determined by the law of the country of his domicil.

NOTES AND QUESTIONS

1 Under English law, a person may only have one domicile: it can be either the domicile of origin or the domicile of choice.

2 In this case, where was the domicile of the father of Colonel Udny when he lived in Italy? Where was the domicile of Colonel Udny when he lived in London after 1812? When he left London to go to France? Did he acquire a domicile of choice when he lived in France from 1845 until 1853? Are the reasons why Colonel Udny left for France relevant?

3 The English concept of domicile was developed in Victorian times, when many Englishmen lived abroad to govern the Empire. Is it still suited to modern times? Attempts were made to abolish the presumption of the continuance of the domicile of origin, but none of them succeeded.[5]

4 How different are the concepts of domicile of origin and nationality?

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A few civil law jurisdictions also apply the law of the domicile to the 'essential validity' of marriage and the law of the place of celebration to the formal validity of marriage: see, e.g., Art. 3083 and 3088 of the Quebec Civil Code. However, they do not rely on such a peculiar concept of domicile. Indeed, China has a similar rule, but it relies on the common habitual residence of the spouses.

Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (2010)

Article 21 Conditions of marriage are governed by the law of the parties' common habitual residence. Absent common habitual residence, the law of their common nationality shall be applied. Absent common nationality, the law of the place where the marriage is concluded shall be applied, if the marriage is concluded in a party's habitual residence or in the country of a party's nationality.

Article 22 Formalities of marriage are valid if they conform to the law of the place where the marriage is concluded, or the law of a party's habitual residence or nationality.

2.2 Law of nationality

In the civil law tradition, the status and capacity of persons have traditionally been governed by the law of their nationality.

Belgian Code of Private International Law (2004)

Article 46. *Law applicable to the formation of marriage*

Subject to article 47, the conditions regarding the validity of the marriage are governed, for each spouse, by the law of the State of the spouse's nationality when the marriage is celebrated. (. . .)

Article 47. *Law applicable to the formal validity of the marriage*

§ 1. The formalities regarding the celebration of the marriage are governed by the law of the State on the territory of which the marriage is celebrated.

§ 2. That law determines if and according to which specific rules:

1 that State requires a declaration and publicity in advance of the marriage;

2 that State requires the determination and registration of the deed of marriage;

[5] Rogerson, p. 27.

3 a marriage celebrated before a religious authority has legal effect;
4 a marriage can take place by proxy.

NOTES

1 As in England, the law of the nationality only governs the essential validity of marriage. The law of the place of celebration governs the formal validity of marriage. The same distinction and rules are found in France and Japan.[6]

2 Characterizing particular requirements as belonging to substantive or formal validity is not always easy. Article 47 §2 expressly identifies issues belonging to formal validity. In most jurisdictions, however, characterization is left to courts, as in France: see the *Caraslanis* case in the Casebook, p. 74.

3 In many jurisdictions, the application of the law of the place of celebration is perceived as a convenient rule allowing the parties to comport with local requirements where it might not be possible to comply with the requirements of their national law. This explains why it might be expressly allowed to apply, with respect to formal requirements, either the local law or the law of the nationality of the parties,[7] and that certain jurisdictions expressly allow foreigners to marry on their territory pursuant to foreign formal requirements.[8]

4 If the future spouses hold different nationalities, the substantive validity of the marriage is governed by two different laws. For requirements which are personal to each spouse such as minimum age, the two laws can be applied distributively, i.e. respectively to each spouse. By contrast, for requirements which are concerned with the relationship itself such as the maximum number of spouses or difference of sex, the two laws must be applied cumulatively, which means that, in effect, the more conservative law prevails.

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The application of the law of the nationality raises an issue where the relevant persons hold several nationalities. How does German law resolve this issue?

Introductory Act to the German Civil Code

Article 5 *Personal status*

(1) If referral is made to the law of a country of which a person is a national and where this person is a bi- or multinational, the law applicable shall be that of the country with which the person has the closest connection, especially through his or her habitual residence or through the course of his or her life. If such person is also a German national, that legal status shall prevail.

(2) If a person is stateless or if his nationality cannot be identified, the law of that country is applicable in which the person has his or her habitual residence or, in the absence thereof, his or her residence.

(3) If referral is made to the law of a country in which a person has his or her residence or habitual residence and a person without or under restricted capacity to contract changes his or her residence without the consent of his or her legal representative, the application of another law does not ensue from this change alone.

NOTE

The distinction between persons holding several foreign nationalities and persons holding the nationality of the forum and a foreign nationality is widely accepted, and so are the two solutions offered by Art. 5(1).[9]

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[6] See Arts. 202–1 and 202–2 of the French Civil Code, Art. 24 of the Japanese Act on the General Rules of Application of Laws.

[7] See Art. 28 of the Italian PIL Act (1995); Art. 46 of the Tunisian Code of PIL (1998). See also Art. 49 of the Polish PIL Act (2011), allowing also the celebration of the marriage according to the law of the common residence of the spouses.

[8] See Art. 13(3) of the Introductory Act to the German Civil Code; Art. 10:30 of the Dutch Civil Code.

[9] See Art. 38 of the Japanese Act on the General Rules of Application of Laws; Art. 3 of the Belgian Code of PIL (2004); Art. 2 of the Polish PIL Act (2011).

One of the consequences of the application of the law of the nationality is that immigrants remain governed by their law of origin (as long as they do not acquire local nationality). As a result, those immigrants might have the right to marry in circumstances unknown to the local law, or conversely be forbidden to contract certain kinds of marriages which are allowed under the local law.

Compare the four following provisions and explain which problem was identified by the relevant lawmaker, and how it was resolved:

Dutch Civil Code

Article 10:28 *Recognition of the contracting of a marriage*

A marriage is contracted:

a. if each of the prospective spouses meets the requirements for entering into a marriage set by Dutch law and one of them is exclusively or also of Dutch nationality or has his habitual residence in the Netherlands, or;

b. if each of the prospective spouses meets the requirements for entering into a marriage of the State of his nationality.

Introductory Act to the German Civil Code

Article 13 *Marriage*

(1) The conditions for the conclusion of marriage are, as regards each person engaged to be married, governed by the law of the country of which he or she is a national.

(2) If under this law, a requirement is not fulfilled, German law shall apply to that extent, if:

1. the habitual residence of one of the persons engaged to be married is within the country or one of them is a German national;
2. the persons engaged to be married have taken reasonable steps to fulfill the requirement; and
3. it is incompatible with the freedom of marriage to refuse the conclusion of the marriage; in particular, the previous marriage of a person engaged to be married shall not be held against him or her if it is nullified by a decision issued or recognized here or the spouse of the person engaged to be married has been declared dead. (. . .)

Japanese Act on the General Rules of Application of Laws (2006)

Article 24 *Formation and Formalities of Marriage*

(1) For each party, the formation of a marriage shall be governed by his or her national law.

(2) The formalities of a marriage shall be governed by the law of the place of the ceremony (*lex loci celebrationis*).

(3) Notwithstanding the preceding paragraph, formalities that satisfy the requirements of either of the parties' national law shall be effective, unless the marriage is celebrated in Japan and one of the parties is a Japanese national.

Belgian Code of Private International Law (2004)

Article 46. *Law applicable to the formation of marriage*

(. . .) A provision of the law designated by para 1, which prohibits the marriage between two natural persons of the same sex, is not applicable if one of the natural persons has the nationality of a State of which the law allows such marriage or has his habitual residence on the territory of such State.

NOTES AND QUESTIONS

1 Article 10:28 of the Dutch Civil Code originates from the 1978 Hague Convention on Celebration and Recognition of the Validity of Marriages. It is also found in Art. 171 of the Luxembourg Civil Code.

2 Is the choice of law rule in the Netherlands and Germany really that the law of nationality governs the

substantive validity of marriage? Can you reformulate the rule more accurately?
3 What is the goal of the Japanese lawmaker? Is it different from the goal of the Dutch and German lawmakers?
4 What is the goal of the Belgian lawmaker? France has adopted a similar rule in Art. 202--1 §2 of the Civil Code. A constitutional challenge that it violated equality before the law was rejected by French courts. Do you agree?

All those statutory provisions aim at validating marriages which might not comply with the law of the nationality of one of the spouses. However, application of foreign law can also lead to the opposite problem.

Dutch Civil Code

Article 10:29 *Contracting of a marriage in conflict with public order*

– 1. Irrespective of what is provided for in Article 10:28, no marriage can be contracted if the contracting of that marriage could not be accepted on the basis of Article 10:6 (i.e. incompatible with Dutch public order), and in any case if:

a. the prospective spouses have not reached the age of fifteen years;
b. the prospective spouses are related to each other by blood or by adoption in the direct line or, by blood, as brother and sister;
c. the free consent of one of the prospective spouses is missing or the mental capacity of one of them is so disturbed that he is unable to determine his own will or to understand the significance of his declarations;
d. the marriage would be in conflict with the rule that a person may only be united in marriage with one other person at the same time;
e. the marriage would be in conflict with the rule that a person who wants to enter into a marriage may not simultaneously be registered as a partner in a registered partnership.

– 2. The contracting of a marriage cannot be refused on the ground that there is an impediment to this marriage under the law of the State of which one of the prospective spouses has the nationality, if that impediment cannot be accepted on the basis of Article 10:6 (i.e. if the impediment itself is contrary to Dutch public order).

NOTES

1 Article 10:29 defines the content of Dutch public policy with respect to marriage. In many countries, this will be left to courts, as in France (see *supra* p. 141).
2 The Dutch lawmaker has defined Dutch public order in absolute terms. Other jurisdictions limit the operation of their public policy exception to cases with a strong connection with the forum (see Casebook, p. 131).

2.3 Law of place of celebration

The traditional choice of law rule in the United States is that the law of the place of celebration of marriage governs all aspects of the validity of marriage. Contrary to the rest of the world, the rule does not distinguish between formal and substantive validity: one single law governs both.

CASE

Court of Appeals of New York, 14 July 1953 *In the Matter of the Estate of Fannie May, Deceased*[10]

Lewis, C.J.

In this proceeding, involving the administration of the estate of Fannie May, deceased, we are to determine whether the marriage in 1913 between the respondent Sam May and the decedent, who was his niece by the half blood — which marriage was celebrated in Rhode Island, where concededly such marriage is valid — is to be given legal effect in New York where statute law declares incestuous and void a marriage between uncle and niece.

The question thus presented arises from proof of the following facts: The petitioner Alice May Greenberg, one of six children born of the Rhode Island marriage of Sam and Fannie May, petitioned in 1951 for letters of administration of the estate of her mother Fannie May, who had died in 1945. Thereupon, the respondent Sam May, who asserts the validity of his marriage to the decedent, filed an objection to the issuance to petitioner of such letters of administration upon the ground that he is the surviving husband of the decedent and accordingly, under section 118 of the Surrogate's Court Act, he has the paramount right to administer her estate. Contemporaneously with, and in support of the objection filed by Sam May, his daughter Sirel Lenrow and his sons Harry May and Morris B. May — who are children of the challenged marriage — filed objections to the issuance of letters of administration to their sister, the petitioner, and by such objections consented that letters of administration be issued to their father Sam May.

The petitioner, supported by her sisters Ruth Weisbrout and Evelyn May, contended throughout this proceeding that her father is not the surviving spouse of her mother because, although their marriage was valid in Rhode Island, the marriage never had validity in New York where they were then resident and where they retained their residence until the decedent's death.

The record shows that for a period of more than five years prior to his marriage to decedent the respondent Sam May had resided in Portage, Wisconsin; that he came to New York in December, 1912, and within a month thereafter he and the decedent — both of whom were adherents of the Jewish faith — went to Providence, Rhode Island, where, on January 21, 1913, they entered into a ceremonial marriage performed by and at the home of a Jewish rabbi. The certificate issued upon that marriage gave the age of each party as twenty-six years and the residence of each as 'New York, N. Y.' Two weeks after their marriage in Rhode Island the respondent May and the decedent returned to Ulster County, New York, where they lived as man and wife for thirty-two years until the decedent's death in 1945. Meantime the six children were born who are parties to this proceeding.

A further significant item of proof — to which more particular reference will be made — was the fact that in Rhode Island on January 21, 1913, the date of the marriage here involved, there were effective statutes which prohibited the marriage of an uncle and a

[10] 305 N.Y. 486 (1953).

niece, excluding, however, those instances — of which the present case is one — where the marriage solemnized is between persons of the Jewish faith within the degrees of affinity and consanguinity allowed by their religion.

In Surrogate's Court, where letters of administration were granted to the petitioner, the Surrogate ruled that although the marriage of Sam May and the decedent in Rhode Island in 1913 was valid in that State, such marriage was not only void in New York as opposed to natural law but is contrary to the provisions of subdivision 3 of section 5 of the Domestic Relations Law. Accordingly the Surrogate concluded that Sam May did not qualify in this jurisdiction for letters of administration as the surviving spouse of the decedent.

At the Appellate Division the order of the Surrogate was reversed on the law and the proceeding was remitted to Surrogate's Court with direction that letters of administration upon decedent's estate be granted to Sam May who was held to be the surviving spouse of the decedent. In reaching that decision the Appellate Division concluded that the 1913 marriage of Sam May and the decedent in Rhode Island, being concededly valid in that State, is valid in New York where the degree of consanguinity of uncle and niece is not so close as to be repugnant to our concept of natural law, and that the statute (Domestic Relations Law, § 5, subd. 3) — which declares such a marriage to be incestuous and void — lacks express language which gives it extraterritorial force. The case comes to us upon appeal as of right by the petitioner and her two sisters Ruth Weisbrout and Evelyn May.

We regard the law as settled that, subject to two exceptions presently to be considered, and in the absence of a statute expressly regulating within the domiciliary State marriages solemnized abroad, the legality of a marriage between persons sui juris is to be determined by the law of the place where it is celebrated. (*Van Voorhis v. Brintnall*, 86 N. Y. 18, 24; Restatement, Conflict of Laws, §§ 121, 131, 132; Story on Conflict of Laws [7th ed.], § 113; 2 Beale. Conflict of Laws, pp. 669–670)

In *Van Voorhis v. Brintnall* (*supra*) the decision turned upon the civil status in this State of a divorced husband and his second wife whom he had married in Connecticut to evade the prohibition of a judgment of divorce which, pursuant to New York law then prevailing, forbade his remarriage until the death of his former wife. In reaching its decision, which held valid the Connecticut marriage there involved, this court noted the fact that in the much earlier case of *Decouche v. Savetier* (3 Johns. Ch. 190, 211 [1817]), Chancellor KENT had recognized the general principle 'that the rights dependent upon nuptial contracts, are to be determined by the lex loci.' Incidental to the decision in *Van Voorhis v. Brintnall* (*supra*) which followed the general rule that 'recognizes as valid a marriage considered valid in the place where celebrated' (id., p. 25), this court gave careful consideration to, and held against the application of two exceptions to that rule — viz., cases within the prohibition of positive law; and cases involving polygamy or incest in a degree regarded generally as within the prohibition of natural law.

We think the Appellate Division in the case at bar rightly held that the principle of law which ruled *Van Voorhis v. Brintnall* and kindred cases cited (*supra*) was decisive of the present case and that neither of the two exceptions to that general rule is here applicable.

The statute of New York upon which the appellants rely is subdivision 3 of section 5 of the Domestic Relations Law which, insofar as relevant to our problem, provides:

§ 5. Incestuous and void marriages.

A marriage is incestuous and void whether the relatives are legitimate or illegitimate between either:

3. An uncle and niece or an aunt and nephew.

If a marriage prohibited by the foregoing provisions of this section be solemnized it shall be void, and the parties thereto shall each be fined not less than fifty nor more than one hundred dollars and may, in the discretion of the court in addition to said fine, be imprisoned for a term not exceeding six months. Any person who shall knowingly and wilfully solemnize such marriage, or procure or aid in the solemnization of the same, shall be deemed guilty of a misdemeanor and shall be fined or imprisoned in like manner.

Although the New York statute quoted above declares to be incestuous and void a marriage between an uncle and a niece and imposes penal measures upon the parties thereto, it is important to note that the statute does not by express terms regulate a marriage solemnized in another State where, as in our present case, the marriage was concededly legal. In the case at hand, as we have seen, the parties to the challenged marriage were adherents of the Jewish faith which, according to Biblical law and Jewish tradition — made the subject of proof in this case — permits a marriage between an uncle and a niece; they were married by a Jewish rabbi in the State of Rhode Island where, on the date of such marriage in 1913 and ever since, a statute forbidding the marriage of an uncle and a niece was expressly qualified by the following statutory exceptions appearing in 1913 in Rhode Island General Laws:

§ 4. The provisions of the preceding sections shall not extend to, or in any way affect, any marriage which shall be solemnized among the Jews, within the degrees of affinity or consanguinity allowed by their religion. . . .
§ 9. Any marriage which may be had and solemnized among the people called Quakers, or Friends, in the manner and form used or practised in their societies, or among persons professing the Jewish religion, according to their rites and ceremonies, shall be good and valid in law; and wherever the words 'minister' and 'elder' are used in this chapter, they shall be held to include all of the persons connected with the society of Friends, or Quakers, and with the Jewish religion, who perform or have charge of the marriage ceremony according to their rites and ceremonies.

As section 5 of the New York Domestic Relations Law (quoted, *supra*) does not expressly declare void a marriage of its domiciliaries solemnized in a foreign State where such marriage is valid, the statute's scope should not be extended by judicial construction. (*Van Voorhis v. Brintnall*, *supra*, p. 33.) Indeed, had the Legislature been so disposed it could have declared by appropriate enactment that marriages contracted in another State — which if entered into here would be void — shall have no force in this State. (*Putnam v. Putnam*, 25 Mass. 433, 435.) Although examples of such legislation are not wanting, we find none in New York which serve to give subdivision 3 of section 5 of the Domestic Relations Law extraterritorial effectiveness. (*Van Voorhis v. Brintnall*, *supra*, pp. 25–37.) Accordingly, as to the first exception to the general rule that a marriage valid where performed is valid everywhere, we conclude that, absent any New York statute expressing clearly the Legislature's intent to regulate within this State marriages of its domiciliaries solemnized abroad, there is no 'positive law' in this jurisdiction which serves to interdict the 1913 marriage in Rhode Island of the respondent Sam May and the decedent.

As to the application of the second exception to the marriage here involved — between

persons of the Jewish faith whose kinship was not in the direct ascending or descending line of consanguinity and who were not brother and sister — we conclude that such marriage, solemnized, as it was, in accord with the ritual of the Jewish faith in a State whose legislative body has declared such a marriage to be 'good and valid in law', was not offensive to the public sense of morality to a degree regarded generally with abhorrence and thus was not within the inhibitions of natural law.

NOTES AND QUESTIONS

1 The origin of the application of the law of the place of celebration is to be found in an analogy between marriage and contract. The traditional rule in contractual matters was the application of the law of the place of contracting (Casebook, p. 408). The rule was applied to marriage contracts, and led to the application of the law of the place of celebration. In a country of immigrants, it had the great virtue of enabling new immigrants, and later settlers travelling west, to marry freely unencumbered by restrictions of the law of their previous communities.[11]

2 Does the rule indirectly give freedom of choice to the parties? It all depends on the jurisdictional rule that the local authority will apply for assessing in which situations it can celebrate a marriage. If American authorities, as Swiss or Belgian authorities, would only celebrate marriage for couples of residents or nationals (*supra*, 1), they would refuse to marry parties with no connection with the forum. But this is not the case in the United States. Local authorities will typically celebrate the marriage of any couple requesting it; indeed, in some states, marriage can validly be celebrated in presence of a clergyman only.[12] In effect, therefore, the American choice of law rule enables couples to freely choose the law governing the validity of marriage: they can 'vote with their feet', that is, designate the applicable law by travelling to a state whose law they prefer.

3 Logically, couples living in states where they could not marry have looked for more liberal states and travelled to get married there. The states of their common domicile (often both before and after the celebration of the marriage) have sometimes developed tools to sanction what they perceived as an evasion of their law. A few states adopted the *Uniform Marriage Evasion Act* 1913.[13] Sometimes, the different rule applied by the state of celebration of the marriage was regarded as contrary to public policy. But, in most cases, the state of the common domicile has accepted the marriage celebrated out of state as valid.[14]

4 The freedom which the choice of law rule in effect affords to the parties is puzzling. Why would the state of the common domicile accept that its law be so easily circumvented? Is it that courts are more liberal than the lawmakers, and welcome a narrowing of the scope of the local mandatory rules?[15] One problem with the rule is that, although all residents of conservative states may travel to other states, in practice only rich and affluent people might take advantage of the rule.[16]

5 Is the rule generating a healthy legislative competition? Where conservative states see high numbers of residents travelling abroad to get married, is this creating an incentive to change the law? Is it to be welcomed? Are conservative rules always worse than liberal rules?
Could states change their law for the purpose of attracting out-of-state couples who may spend significant sums of money locally? When New York introduced same-sex marriage in 2011, the New York Senate's Independent Democratic Conference calculated that it would bring US$ 311 million in revenues to the local economy and to the state, including marriage license fees (3m), sales tax (22m), wedding revenue and tourism (283m) and hotel occupancy taxes (259,000). The rule has long had the potential of creating a market for marriage in the United States.[17]

6 The rule is consistent with the old American choice of law doctrine of vested rights. As the marriage was constituted by its celebration, it seemed logical to apply the law of the place of marriage to the formation of this relationship. What would be the result of a governmental interest analysis?

[11] Peter M. North, 'Development of Rules of Private International Law in the Field of Family Law' (1980) 166 Collected Courses of the Hague Academy of International Law 22.

[12] See *infra* the *Daoud Farraj* case.

[13] See Casebook, p. 82.

[14] R. Weintraub, *Commentary on the Conflict of Laws* (Foundation Press, 6th ed. 2010) § 5.1.A.

[15] Weintraub, § 5.1.C.

[16] Id.

[17] Erin A. O'Hara and Larry Ribstein, *The Law Market* (OUP 2009) Ch. 8.

CASE

Supreme Court, Appellate Division, New York, 27 April 2010 *In the Matter of Daoud Farraj*[18]

In May 2003 the petitioner, Rabaa M. Hanash, and Daoud Farraj, a/k/a David I. Farraj (hereinafter the decedent), participated in a formal marriage ceremony in accordance with Islamic law, at the home of the petitioner's brother in Clifton, New Jersey. Prior to the marriage ceremony, the decedent was a resident of New York and the petitioner lived at her brother's residence in New Jersey. An Imam (Islamic clergyman) came from New York to New Jersey to solemnize the marriage. However, a marriage license was not obtained. Immediately after the marriage ceremony, the petitioner and the decedent returned to Brooklyn, where they had a wedding celebration. The decedent and the petitioner lived together in New York until the decedent's death in July 2007.

The decedent died intestate and Letters of Administration were issued to the appellant, the decedent's son from a prior marriage. Subsequently, the petitioner filed a petition to compel an accounting of the decedent's estate. The appellant moved to dismiss the petition pursuant to CPLR 3211(a)(3) on the ground that the petitioner lacked standing as a surviving spouse, since her marriage to the decedent was invalid under New Jersey Law.

Under the law of the State of New Jersey, the failure to obtain a marriage license renders a purported marriage absolutely void (*see* N.J. Stat. Ann. § 37:1–10). In New York, while the Domestic Relations Law deems it necessary for all persons intending to be married to obtain a marriage license (*see* Domestic Relations Law § 13), a marriage is not void for the failure to obtain a marriage license if the marriage is solemnized (*see* Domestic Relations Law § 25). A marriage is solemnized where the parties 'solemnly declare in the presence of a clergyman or magistrate and the attending witness or witnesses that they take each other as husband and wife' (Domestic Relations Law § 12). Therefore, if New Jersey law is applied to determine the validity of the marriage between the petitioner and the decedent, the marriage is void. If New York law is applied, the marriage is valid. The Surrogate's Court applied New York law and denied the appellant's motion. We affirm.

The general rule is that the legality of a marriage 'is to be determined by the law of the place where it is celebrated' (*Matter of May*, 305 N.Y. 486, 490, 114 N.E.2d 4). The Restatement (Second) of Conflict of Laws § 283, however, provides a more flexible approach, whereby '[t]he validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage'. We look to the Restatement (Second) of Conflict of Laws § 283 for guidance in determining which law should govern the validity of the marriage at issue here.

The petitioner and the decedent had a justified expectation that they were married, since they participated in a formal marriage ceremony in accordance with Islamic law (*see* Restatement [Second] of Conflict of Laws § 6). The only reason the petitioner and the decedent had their marriage ceremony in New Jersey was because, under Islamic law, the marriage ceremony was to be conducted in the residence of the bride's eldest male relative, which was the petitioner's brother. In addition, the intended and actual

[18] 72 A.D.3d 1082, 900 N.Y.S.2d 340.

matrimonial domicile was New York, and the petitioner and the decedent held themselves out as a married couple in New York. Therefore, New York has a significant interest in the marriage between the petitioner and the decedent. While New Jersey has an interest in enforcing its marriage requirements, this interest is not particularly strong here, since the petitioner and the decedent left New Jersey immediately after the marriage ceremony, and lived in New York for the entirety of their marriage.

Therefore, the Surrogate's Court properly determined that New York had the 'most significant relationship to the spouses and the marriage' and that New York law should apply to determine the validity of the marriage. Under New York law, the marriage between the petitioner and the decedent was valid, even without a marriage license, since it was solemnized (*see* Domestic Relations Law §§ 12, 25). Accordingly, the appellant's motion to dismiss the proceeding was properly denied.

NOTES AND QUESTIONS

1 What is the reason for concluding that New York is strongly interested in the marriage? In effect, will this approach lead to the application of the law of the place of celebration?
2 The court also insists that the parties' expectations should be respected. But what are these expectations when they marry abroad? A comment to § 283 states:

'Parties enter into marriage with forethought. To the extent that they think about the matter, they would usually expect that the validity of their marriage would be determined by the local law of the state where it was contracted. In situations where the parties did not give advance thought to the question of which should be the state of the applicable law, or where their intentions in this regard cannot be ascertained, it may at least be said that they expected the marriage to be valid.'

In 2014, the New York Supreme Court distinguished *Farraj* as follows:

The reasons for the parties here having had their wedding in Mexico stand in stark contrast to the reasons Mr. Farraj and Ms. Hanash traveled to New Jersey. Without a doubt, plaintiff and defendant were under no obligation, religious or otherwise, to travel to Mexico for their wedding ceremony. The only impetus for having the wedding in Mexico was the sentimental value of the beach town of Tulum, where defendant had proposed to plaintiff on vacation a year earlier, along with their desire to have a wedding at a Mexican beach resort in February. They chose the site of their wedding completely of their own volition, and once there did not make any attempt to follow the local laws. In a very real sense, the parties availed themselves of the facilities, services and hospitality of Mexico to hold a destination wedding and then completely disregarded the rules and customs of the host country.

(. . .) no finding can be made here that the parties either jointly or justifiably had an expectation that they were legally married as result of the Mexican ceremony. The record clearly establishes that defendant unequivocally knew both before and after the wedding that it did not constitute a valid marriage. The record also strongly indicates that plaintiff knew, or at least should have known, this as well; after all, the very same wedding guide from the Dreams Tulum Resort that plaintiff admits she used to select the food to be served at the reception stated in no uncertain terms that the type of wedding ceremony the parties planned would only be symbolic and would not give rise to a legal marriage. Plainly, if plaintiff did not know about the legal infirmities of the purported marriage, it was because she chose not to know.

(. . .) it is clear that neither defendant nor plaintiff expected, or could have expected, that their marriage was valid in Mexico. Nothing in their papers supports a reasonable inference that they contemporaneously or subsequently expected their marriage to be valid in New York. The Restatement's formulation, which, again, is merely persuasive authority and goes against longstanding Court of Appeals precedent, appears to have been adopted to protect people like

> the couple in *Farraj*: people who fully and reasonably believed together as a couple that they were marrying officially and had every reason to justifiably expect that their marriage was valid. Inasmuch as the parties in this case cannot be found to have had the same reasonable beliefs and justifiable expectations concerning their marriage, there is no basis to apply either the holding in *Farraj* or Restatement § 283 to circumvent the general rule of comity. Accordingly, the validity of their marriage must be determined by applicable Mexican law (. . .).[19]

What is the law in New York after these two cases?

FURTHER REFERENCES

D. Coester-Waltjen, 'Marriage', in *Encyclopedia of Private International Law* (Edward Elgar 2017).

[19] *Ponorovskaya v. Stecklow*, 987 N.Y.S.2d 543 (N.Y. Supr. 2014).

2 Divorce

1 Jurisdiction

Under the laws of most countries, divorce must be granted judicially. In some Asian jurisdictions such as Japan, however, divorce is typically obtained from administrative authorities upon request of the parties.

1.1 United States

CASE

Superior Court of Connecticut, Judicial District of New London, 13 September 2012
Chamberlin v. Chamberlin[20]

Generally, in Connecticut, 'personal jurisdiction over the other party [to a marriage dissolution] is not necessary for actions involving the marriage itself . . . [the] domicile of at least one [party] for the twelve month period preceding the actual issuance of a dissolution decree is necessary.' *Pavlick v. Pavlick*, Superior Court, judicial district of New London, Docket No. 523485 (February 4, 1993, Mihalakos, J.); see General Statutes § 46b–44(c); *Keefe v. Keefe*, Superior Court, judicial district of Hartford, Docket No. FA 00 0723938 (May 31, 2000, Gruendel, J.) ('[b]ecause any state where the parties to a marriage may be domiciled has an interest in their marital status, a state has the power to exercise judicial jurisdiction to dissolve the marriage even if only one of the spouses resides in that state'). Although the court has the power to exercise jurisdiction over the defendant to dissolve the marriage, it does not, automatically follow that the court has the power to exercise jurisdiction over the defendant 'to entertain or make orders for alimony, child support, custody, or property.' *Keefe v. Keefe*, *supra*. '[Personal jurisdiction] over a nonresident requires statutory authorization.' *Cato v. Cato*, 27 Conn.App. 142, 144 (1992). The 'statutory basis for [personal] jurisdiction is mandatory, and . . . the concept of due process cannot take the place of statutory compliance.' *Id.*

[20] 54 Conn. L. Rptr. 623.

CASE

Superior Court of Connecticut, Judicial District of New Haven, July 28, 1989
Babouder v. Abdennur[21]

Fuller, Judge.

This action for dissolution of marriage commenced when the defendant was served with a copy of the complaint on May 10, 1989. The defendant has filed a motion to dismiss the complaint on five grounds: (1) personal service upon the defendant was accomplished by trick, fraud or artifice; (2) the plaintiff is not a resident of Connecticut now or when this action was commenced, and therefore has no standing to bring or to maintain this action under General Statutes § 46b-44; (3) there is pending in the Family Court, Patriarchy of Catholics, in Beirut, Lebanon, a prior claim commenced by the plaintiff claiming similar relief; (4) the plaintiff failed to file a custody statement as required by General Statutes § 46b-99; (5) the plaintiff allegedly violated the clean hands doctrine by her unauthorized removal of the parties' minor child from Lebanon in violation of a court order, by the method she used to serve the complaint on the defendant, and by her misrepresentation as to her residence. (. . .)

The defendant claims that personal jurisdiction was obtained over him by trick, fraud and artifice by the plaintiff and her attorney because of the method used to obtain service of process. The defendant's affidavit, which the court accepts for the factual basis of this claim, particularly since it was not contradicted by the plaintiff's testimony or affidavit, is as follows: The defendant, after determining that his wife was living with a man in New Haven, came to the United States from the United Arab Emirates. After the defendant contacted the plaintiff by telephone, the plaintiff told him that if he wanted to see their daughter, he would have to arrange it through the plaintiff's attorney, Elizabeth Curry. When the attorney was contacted, the defendant was told that he had to come to the attorney's office that afternoon at 5:30 to make arrangements. When the defendant arrived, the attorney had the sheriff serve him with this action and other legal papers. In Connecticut, as in other states, the court will not exercise jurisdiction in a civil case which is based upon service of process on a defendant who has been decoyed, enticed or induced to come within the court's jurisdiction by any false representation, deceitful contrivance or wrongful device for which the plaintiff is responsible. *Siro v. American Express Co.*, 99 Conn. 95, 98 (1923); *Hill v. Goodrich*, 32 Conn. 588 (1865). This also applies to conduct by a plaintiff's agents and attorneys. *Hill v. Goodrich*, at 590. This rule does not apply, however, when the defendant enters the state on his own, even if the plaintiff and his agents then engage in trickery to make service of process. (. . .). In the present case, the defendant came to Connecticut voluntarily, and the attempt to serve him did not occur until after he had arrived. The action will not, under these circumstances, be dismissed for abuse of process. (. . .)

The final claim is that the plaintiff does not have standing to bring this action since she is not a resident of this state, but a citizen and domiciliary of Lebanon, where she was born, married and resided before entering the United States on September 4, 1988. At the hearing on this motion there was testimony from the plaintiff and Sheila Brent, an attorney specializing in immigration law, as to the plaintiff's immigration status. The

[21] 41 Conn.Supp. 258.

complaint alleges that the plaintiff had been a resident of this state for nine months when the action was started on May 10, 1989. Where a motion to dismiss is accompanied by supporting affidavits containing undisputed facts, those facts may be accepted on jurisdictional issues, and the court does not have to presume the validity of the allegations of the complaint. *Barde v. Board of Trustees*, 207 Conn. at 62. Where there is testimony on a motion to dismiss, it can be given more weight than statements in affidavits. *Rosenblit v. Danaher*, 206 Conn. 125, 136 (1988).

The plaintiff applied for and obtained a B-1 Business Visa from the United States consulate in Lebanon, which allowed her to come to the United States. To obtain this type of visa she was required to swear that she was a resident of Lebanon and intended to return there when the visa expired. Upon arriving in the United States, and in order to enter, she was issued an I-94 form which governs the length of the authorized stay under the visa and is issued for six months. One six month extension is allowed for a B-1 Business Visa, and one has been granted to the plaintiff until September 3, 1989. Since this is a temporary visa, for immigration law purposes a person cannot establish residence here while in a B-1 status, because it is issued on the basis that the applicant is a resident of another country and will return there when the visa expires; it does not establish any legal status in this country. The plaintiff has no relatives here and has not applied for a change in her status or type of visa, and remains a nonimmigrant visitor to this country. Even a change in status, if applied for, cannot establish residence retroactively. The defendant claims that the plaintiff's temporary status here also cannot give her residency status for purposes of satisfying the statutory requirements for a dissolution action under the laws of this state. The plaintiff claims that she intends to remain in Connecticut, eventually hopes to marry the man with whom she is residing in New Haven, and that the intent to remain, if possible, gives her standing to bring this action.

The pertinent statute is § 46b-44, which provides in part: '(a) A complaint for dissolution of a marriage or for legal separation may be filed at any time after either party has established residence in this state. (b) Temporary relief pursuant to the complaint may be granted in accordance with sections 46b-56 and 46b-83 at any time after either party has established residence in this state. (c) Decree dissolving a marriage or granting a legal separation may be entered if: (1) One of the parties to the marriage has been a resident of this state for at least twelve months next preceding the date of the filing of the complaint or next preceding the date of the decree . . .' While the court has personal jurisdiction over the defendant because of the personal service of the complaint on him, the court can enter a dissolution of the marriage without personal jurisdiction over the defendant; *Fernandez v. Fernandez*, 208 Conn. 329, 334 (1988); if the plaintiff meets the residency requirement in the statute. A dissolution can be filed and the court has subject matter jurisdiction if the plaintiff is a resident of the state at the time the action was started. *Cugini v. Cugini*, 13 Conn.App. 632, 635 (1988). Residency of one party without a showing of domicil is sufficient to give the court jurisdiction for the purposes of filing a complaint or for the granting of alimony and support pendente lite. *LaBow v. LaBow*, 171 Conn. at 439. A party can have more than one residence, and residence with intent to remain in Connecticut is the foundation for jurisdiction. *Cugini*, at 636. A dissolution decree cannot be granted until twelve months after the plaintiff has established residence in this state. General Statutes § 46b-44(c)(1); *LaBow v. LaBow*, at 438. Jurisdiction for filing the action and jurisdiction to grant a dissolution have different requirements. The court finds that the plaintiff intended to reside here permanently when she filed this action even if she may not be able to accomplish that objective without a future change

in her status under the immigration laws.

The key question is whether the plaintiff can be a resident for purposes of § 46b-44 when she intends to reside here permanently when the action is filed but is not a resident and is in a nonimmigrant status, under a temporary visa, for immigration law purposes. In *Torlonia v. Torlonia*, 108 Conn. 292, 142 A. 843 (1928), the plaintiff was born in the United States but was apparently a citizen of Italy who came to the United States under a nonimmigrant visitor's visa. Despite her entry into this country on a temporary basis, she was not precluded from establishing her domicil in this state for purposes of maintaining a divorce action. A similar result has been reached in other states where the plaintiff is in this country only on a temporary visa. The fact that the plaintiff entered the country with intent at that time to return to the foreign country did not prevent the plaintiff from acquiring residence status to bring a dissolution action in *Williams v. Williams*, 328 F.Supp. 1380 (D. St. Croix 1971); or prevent 'dual intent,' namely intent to remain if that could be accomplished, or intent to leave if required by law, which conferred standing to file the action. *Bustamante v. Bustamante*, *supra*. In *Alves v. Alves*, 262 A.2d 111 (D.C.1970), where the plaintiff had the present intent to reside in the District of Columbia, the court held that the absence of a visa giving the legal right to remain in the United States did not prevent jurisdiction for a divorce action. In *Santangelo v. Santangelo*, 137 Conn. 404, 408 (1951), the fact that the plaintiff was a nonresident of the state did not prevent a collateral attack on a prior divorce decree rendered in another state obtained by the defendant, and the court stated that an alien was in the same position as a nonresident. The plaintiff in the present case sufficiently meets the residency requirement in § 46b-44(a). This court, therefore, has subject matter jurisdiction.

The motion to dismiss is denied.

NOTES AND QUESTIONS

1 The vast majority of American states share the same jurisdictional rule: domicile, or residence, of one of the parties in the forum suffices to give jurisdiction to its courts to rule on divorce. The judgments of the Supreme Court in *Williams* are considered to be authority for that proposition,[22] although they were concerned with the recognition of a foreign divorce decree. The Court explained:

'Domicil implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance. The domicil of one spouse within a State gives power to that State, we have held, to dissolve a marriage wheresoever contracted. (. . .) Divorce, like marriage, is of concern not merely to the immediate parties. It affects personal rights of the deepest significance. It also touches basic interests of society. Since divorce like marriage, creates a new status, every consideration of policy makes it desirable that the effect should be the same wherever the question arises.'[23]

2 In many jurisdictions, granting jurisdiction to the courts of the domicile of the plaintiff (*forum actoris*) is considered as unfair to the defendant. One would have expected U.S. courts to find that such jurisdiction violates the Due Process clause for lack of nexus between the court and the defendant (Casebook, Chapter 3). But, as the previous quote exemplifies, the foundation of the jurisdiction of the court of the domicile has been understood in public law terms. Some federal courts have held that relying on other criteria such as a six weeks' residence would actually violate the Due Process clause.[24] Would the Connecticut statute (§ 46b-44) resist a constitutional challenge?

[22] *Williams v. North Carolina I* 317 U.S. 287 (1942); *Williams v. North Carolina (II)*, 325 U.S. 226 (1945).

[23] *Williams II*, at 229–30.

[24] See eg *Alton v. Alton*, 207 F.2d 667 (3 Cir. 1953).

3 As shall be shortly explained, American courts apply the law of the forum to divorce actions. The jurisdictional rule is thus indirectly the choice of law rule in American divorce actions. Can plaintiffs freely choose the law governing their action? Which steps do they have to take in order to secure the jurisdiction of their preferred court?

4. The doctrine of *forum non conveniens* can be applied in divorce cases. In *Saunders v. Saunders* (445 P.3d 991 (Wyo 2019)), the Supreme Court of Wyoming declined jurisdiction in a case where, even though the husband fulfilled the requirement of sixty days of residence in Wyoming, North Carolina appeared to be the most appropriate forum to hear the divorce case: the spouses lived in North Carolina for thirty years and the husband's real estate business, pending lawsuits and the evidence required to determine his wife's share were located there.

1.2 European Union

EU Regulation No 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (Brussels IIter)

CHAPTER II JURISDICTION IN MATRIMONIAL MATTERS AND IN MATTERS OF PARENTAL RESPONSIBILITY

SECTION 1 Divorce, legal separation and marriage annulment

Article 3 **General jurisdiction**

In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State:

(a) in whose territory:

(i) the spouses are habitually resident,

(ii) the spouses were last habitually resident, insofar as one of them still resides there,

(iii) the respondent is habitually resident,

(iv) in the event of a joint application, either of the spouses is habitually resident,

(v) the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or

(vi) the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is a national of the Member State in question; or

(b) of the nationality of both spouses.

Article 6 **Residual jurisdiction**

1. Subject to paragraph 2, where no court of a Member State has jurisdiction pursuant to Article 3, 4 or 5, jurisdiction shall be determined, in each Member State, by the laws of that State.

2. A spouse who is habitually resident in the territory of a Member State; or a national of a Member State, may be sued in another Member State only in accordance with Articles 3, 4 and 5.

3. As against a respondent who is not habitually resident in and is not a national of a Member State, any national of a Member State who is habitually resident within the territory of another Member State may, like the nationals of that State, avail himself of the rules of jurisdiction applicable in that State.

NOTES AND QUESTIONS

1 Contrary to the Rome III Regulation for choice of law (*infra*, 2.2), the Brussels IIter Regulation is applicable in all Member States of the European Union, with the exception of Denmark. There is no mirror convention applicable to Switzerland, Norway and Iceland.

2 The jurisdictional rules of the Brussels IIter Regulation are exclusive of the application of national rules of jurisdiction of the Member States where the defendant has his habitual residence within the European Union or is a national of a Member State (Art. 6(2)). Where the defendant resides habitually outside of the European Union and is a national of a third State, national rules of jurisdiction apply (Art. 7), including available exorbitant heads of jurisdiction.

3 Article 3 grants jurisdiction to seven courts without establishing any hierarchy among them. A strict *lis pendens* rule applies.[25] Will this result in a rush to the courts that each spouse will perceive as more favourable to his/her interests, whether for legal and psychological reasons? Suppose spouses of different nationalities separate and go back to their respective country of origin. They then consider initiating divorce proceedings and would like to secure the jurisdiction of their home court by suing first there. Does Art. 3 allow it?

4. In *Hadadi v. Mesko* (Case C 168/08), the CJEU has ruled that the court of the Member State addressed cannot regard spouses who each hold the nationality both of that State and of the Member State of origin as nationals only of the Member State addressed. What does this imply regarding jurisdiction?

5. The Court of Justice has also ruled that in divorce proceedings, where the defendant is not habitually resident nor a national of a Member State, the courts of a Member State cannot base their jurisdiction to hear the case on their national law if the courts of another Member State have jurisdiction under this Regulation (CJEU 29 November 2007 *Lopez v. LIzazo* C 68/07).

1.3 China

Under Art. 22 of the Chinese Civil Procedure Act of 1991, Chinese courts will entertain divorce proceedings if the defendant is domiciled or resides within the jurisdiction of the court.

However, in an Opinion on Some Issues relating to the Application of the Civil Procedure Act issued on 14 July 1992, the Chinese Supreme Court decided that Chinese courts should also retain jurisdiction in cases involving overseas Chinese:

- where the marriage was celebrated in China, or
- where both spouses live abroad, but the foreign court declined jurisdiction on the ground that the dispute should be decided by the court of the common nationality of the spouses, or
- where a spouse living in China wishes to initiate proceedings against a spouse living abroad.[26]

1.4 Japan

There is no express provision in Japanese legislation on jurisdiction in divorce matters, but the Japanese parliament was considering a bill on international jurisdiction in personal matters in 2016. The Japanese Supreme Court has rarely ruled on the issue,[27] because judicial divorce is rarely granted by Japanese courts, and spouses typically divorce by filing a joint declaration with a family registration official.

There is no rule of jurisdiction limiting the power of registration officials to accept a joint filing for divorce: one of the spouses must simply be 'present' in Japan. However, while the official might accept to issue a 'certificate attesting the official acceptance of a filing for divorce' absent any other connection with Japan, he will only do so if the applicable law pursuant to the Japanese choice of law rule allows divorce by agreement. Article 27 of the Application of Laws Act (*infra*, 2.2) allows him to apply Japanese law if one spouse is both a national of and resident in Japan.

[25] Art. 19. The rule is similar to the rule found in the Brussels Ibis Regulation: see Casebook, p. 185.

[26] See Weidong Zhu, 'The New Conflicts Rules for Family and Inheritance Matters in China' (2012–2013) 14 Yearbook Pr. Int. L. 369.

[27] Yasuhiro Okuda, 'Divorce, Protection of Minors, and Child Abduction in Japan's Private International Law', in Jürgen Basedow, Harald Baum and Yuko Nishitani (eds), *Japanese and European Private International Law in Comparative Perspective* (Mohr Siebeck 2008) 305.

2 Choice of law

2.1 Law of the forum

In the common law tradition, courts have traditionally applied the law of the forum in divorce cases.

CASE

UK Supreme Court, 20 October 2010 *Radmacher v. Granatino*[28]

103. In England, when the court exercises its jurisdiction to make an order for financial relief under the Matrimonial Causes Act 1973, it will normally apply English law, irrespective of the domicile of the parties, or any foreign connection: *Dicey, Morris & Collins*, *The Conflict of Laws*, 14th ed (2006), vol 2, rule 91(7), and e.g. *C v. C (Ancillary Relief: Nuptial Settlement)* [2005] Fam 250, para 31.

104. The United Kingdom has made a policy decision not to participate in the results of the work done by the European Community and the Hague Conference on Private International Law to apply uniform rules of private international law in relation to maintenance obligations. Although the United Kingdom Government has opted in to Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, the rules relating to applicable law will not apply in the United Kingdom. That is because the effect of article 15 of the Council Regulation is that the law applicable to maintenance obligations is to be determined in accordance with the 2007 Hague Protocol on the law applicable to maintenance obligations, but only in the member states bound by the Hague Protocol.

105. The United Kingdom will not be bound by the Hague Protocol, because it agreed to participate in the Council Regulation only on the basis that it would not be obliged to join in accession to the Hague Protocol by the EU. The United Kingdom Government's position was that there was very little application of foreign law in family matters within the United Kingdom, and in maintenance cases in particular the expense of proving the content of that law would be disproportionate to the low value of the vast majority of maintenance claims.

NOTES AND QUESTIONS

1 This case was concerned with an application for financial relief made by a husband against his wife in the context of divorce proceedings. While English courts have rarely ruled on the issue of the applicable law to other aspects of divorce, nullity of marriage or legal separation, the proposition that English courts normally apply English law in divorce proceedings is widely accepted. It was long expressed in s. 46(2) of the Matrimonial Causes Act 1973. This provision was repealed, but it is understood that the law has remained the same.[29]

2 The rule has long been the same in the United States, where courts have almost always applied forum's law to determine grounds for divorce.[30]

3 As the U.K. Supreme Court underscores, a major advantage of forum's law is that it needs not be proven. The resolution of the dispute is thus less costly. However, the argument could be made for all disputes, and would

[28] [2010] UKSC 42.

[29] Dicey, Morris and Collins, § 18--029.

[30] Richman and Reynolds, § 120.

militate for the application of forum's law in all cases.[31]

4 Forty years ago, English[32] and American[33] scholars made the more interesting argument that the rationale for the application of the law of the forum would be that divorce law is mandatory in character, and that the forum should thus necessarily apply its own law. While divorce might have been allowed in a few defined cases in the past, it is more broadly available in many countries today. Is the argument that divorce law should be internationally mandatory convincing in jurisdictions where divorce by consent is widely available?

5 Choice of law rules may only be applied by courts which retain jurisdiction. They should thus be read in conjunction with jurisdictional rules. If common law courts only retained jurisdiction on the basis of the domicile of the parties, the application of the law of forum would be uncontroversial, as it would in truth amount to the application of the personal law of the parties, that is, the law of their domicile.[34] Is it the case, however?

6 The application of the law of the forum creates an incentive for forum shopping. One way to address the issue is to limit the cases in which the court would retain jurisdiction. How broad is the jurisdiction of American courts in divorce proceedings (*supra*, 1.1)? Does it significantly limit the possibilities of out-of-state residents to shop around for their preferred law?

In other cases, it is defined by s. 5(2)(b) of the *Domicile and Matrimonial Proceedings Act* 1973:

> **Section 5**. *Jurisdiction of High Court and county courts*
> (2) The [High court or divorce county court] shall have jurisdiction to entertain proceedings for divorce and judicial separation if (and only if):
>
> (a) The court has jurisdiction under the Council Regulation; or
> (b) No court of a Contracting State has jurisdiction under the Council Regulation and either of the parties to the marriage is domiciled in England and Wales on the date when the proceedings are begun.

Is jurisdiction wide enough to promote London as the world's divorce capital?

Chinese choice of law rules also provided for the application of the law of the forum. In 2010, an exception was made for consensual divorce, but the traditional rule remains with respect to non-consensual divorce.

> *Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (2010)*
>
> **Article 26** In respect of consented divorce, the parties may by agreement choose to apply the law of a party's habitual residence or nationality. Absent any choice by the parties, the law of their common habitual residence shall be applied; absent common habitual residence, the law of their common nationality shall be applied; absent common nationality, the law of the place where the agency responsible for completing the divorce formalities is located shall be applied.
>
> **Article 27** Divorce decided by a court is governed by the law of the forum.

[31] Peter M. North, 'Development of Rules of Private International Law in the Field of Family Law' (1980) 166 Collected Courses of the Hague Academy of International Law 82.

[32] North, cit., p. 83.

[33] David Cavers, 'Contemporary Conflicts Law in American Perspective' (1970) 131 Collected Courses of the Hague Academy of International Law 245.

[34] North, n. 12, p. 83.

2.2 Law of common nationality

In the civil law tradition, personal status in general and the substantive validity of marriage in particular have traditionally been governed by the law of nationality. The effects of marriage were logically subjected to the law of the common nationality of the spouses, and divorce was analysed as an effect of marriage.

Japanese Act on the General Rules of Application of Laws (1989)

Article 25 *Effect of Marriage*
The effect of a marriage shall be governed by the spouses' national law when it is the same, or where that is not the case, by the law of the spouses' habitual residence when that is the same, or where neither of these is the case, by the law of the place with which the spouses are most closely connected.
Article 27 *Divorce*
Article 25 shall apply mutatis mutandis to divorce. However, divorce shall be governed by Japanese law where one of the spouses is a Japanese national with habitual residence in Japan.

Tunisian Code of Private International Law (1998)

Article 49
Divorce and separation are governed by the law of the common nationality of the spouses in force when the proceedings are initiated. Failing a common nationality, the applicable law is the law of the last common domicile of the parties or, failing that, the law of the forum. Provisional measures granted during the proceedings are governed by Tunisian law.

NOTES

1 Article 49 of the Tunisian Code reflects the choice of law rule laid down by the French Supreme Court in 1953 and codified in Luxembourg in 1990. In both countries, however, the Rome III Regulation (*infra*, 2.3) has superseded these rules.
2 The obvious issue raised by common nationality is that the spouses can hold different nationalities. A default choice of law rule is thus necessary. Civil law jurisdictions have typically relied on common domicile or residence, or to a more flexible criterion such as the country to which the spouses are the most closely connected.

2.3 Law of common habitual residence

Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III Regulation)

Article 8 *Applicable law in the absence of a choice by the parties*
In the absence of a choice pursuant to Article 5, divorce and legal separation shall be subject to the law of the State:
(a) where the spouses are habitually resident at the time the court is seized; or, failing that
(b) where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court was seized, in so far as one of the spouses still resides in that State at the time the court is seized; or, failing that
(c) of which both spouses are nationals at the time the court is seized; or, failing that
(d) where the court is seized.

NOTES

1 The Rome III Regulation only applies in 14 Member States, which include Germany, Spain, Italy, France and Luxembourg. Others, including the United Kingdom, apply their national choice of law rules. In the participating Member States, the Regulation entirely supersedes the previous legal regime, as their courts must apply the regulation in all disputes, irrespective of the applicable law and their connection with Europe.

2 Article 8 provides primarily for the application of the last common habitual residence of the spouses. It is only if divorce proceedings are initiated more than a year after the spouses separated that another law will apply, or if both spouses have left the place of their last common habitual residence. This law will be the law of the common nationality of the spouses, or, failing that, the law of the forum. This last possibility must be read in conjunction with the jurisdictional rules of the Brussels IIter Regulation: jurisdiction will lie with the court of either the residence of the defendant, or, under certain conditions, the residence of the plaintiff (*supra*, 1.2).

3 In the majority of the participating Member States, the law of the common nationality of the spouses governed divorce. The priority given by Art. 8 to the common habitual residence over common nationality is thus an important innovation. The European lawmaker considered that Europe being an immigration destination, the application of the law of the place of residence would strengthen internal cohesion and ease the administration of justice. More generally, relying on nationality is increasingly perceived as incompatible with the European project of building a common area of justice.

2.4 Choice of applicable law by the parties

Rome III Regulation (2010)

Preamble

(15) Increasing the mobility of citizens calls for more flexibility and greater legal certainty. In order to achieve that objective, this Regulation should enhance the parties' autonomy in the areas of divorce and legal separation by giving them a limited possibility to choose the law applicable to their divorce or legal separation.
(16) Spouses should be able to choose the law of a country with which they have a special connection or the law of the forum as the law applicable to divorce and legal separation. The law chosen by the spouses must be consonant with the fundamental rights recognised by the Treaties and the Charter of Fundamental Rights of the European Union.
(17) Before designating the applicable law, it is important for spouses to have access to up-to-date information concerning the essential aspects of national and Union law and of the procedures governing divorce and legal separation. To guarantee such access to appropriate, good-quality information, the Commission regularly updates it in the Internet-based public information system set up by Council Decision 2001/470/EC.
(18) The informed choice of both spouses is a basic principle of this Regulation. Each spouse should know exactly what are the legal and social implications of the choice of applicable law. The possibility of choosing the applicable law by common agreement should be without prejudice to the rights of, and equal opportunities for, the two spouses. Hence judges in the participating Member States should be aware of the importance of an informed choice on the part of the two spouses concerning the legal implications of the choice-of-law agreement concluded.

Chapter II – Uniform Rules on the Law Applicable to Divorce and Legal Separation

Article 5 *Choice of applicable law by the parties*
1. The spouses may agree to designate the law applicable to divorce and legal separation provided that it is one of the following laws:
(a) the law of the State where the spouses are habitually resident at the time the agreement is concluded; or
(b) the law of the State where the spouses were last habitually resident, in so far as one of them still resides there at the time the agreement is concluded; or
(c) the law of the State of nationality of either spouse at the time the agreement is concluded; or
(d) the law of the *forum*.

2. Without prejudice to paragraph 3, an agreement designating the applicable law may be concluded and modified at any time, but at the latest at the time the court is seized.
3. If the law of the *forum* so provides, the spouses may also designate the law applicable before the court during the course of the proceeding. In that event, such designation shall be recorded in court in accordance with the law of the *forum*.

Article 6 *Consent and material validity*
1. The existence and validity of an agreement on choice of law or of any term thereof, shall be determined by the law which would govern it under this Regulation if the agreement or term were valid.
2. Nevertheless, a spouse, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence at the time the court is seized if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.

Article 7 *Formal validity*
1. The agreement referred to in Article 5(1) and (2), shall be expressed in writing, dated and signed by both spouses. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.
2. However, if the law of the participating Member State in which the two spouses have their habitual residence at the time the agreement is concluded lays down additional formal requirements for this type of agreement, those requirements shall apply.
3. If the spouses are habitually resident in different participating Member States at the time the agreement is concluded and the laws of those States provide for different formal requirements, the agreement shall be formally valid if it satisfies the requirements of either of those laws.
4. If only one of the spouses is habitually resident in a participating Member State at the time the agreement is concluded and that State lays down additional formal requirements for this type of agreement, those requirements shall apply.

NOTES AND QUESTIONS

1 Contrary to the rule found in contractual matters, Art. 5 does not grant unlimited freedom of choice. It allows the parties to choose between a number of laws which are all reasonably connected to the dispute. Recall that the law of the forum will indirectly be determined by the Brussels IIter Regulation.

2 Recital 18 of the Preamble explains that the informed choice of both spouses is a basic principle of the Regulation. The choice could indeed have dramatic consequences. How does the Regulation ensure that the choice be indeed informed? Pursuant to Art. 7, the spouses may enter into an agreement on the applicable law on their own. Will the website announced by Recital 17 suffice for that purpose? If a national law requires the involvement of a lawyer (for instance a notary), does this requirement apply?

3 When should it be possible to designate the law applicable to divorce? Article 5 allows for a choice of law at the time of marriage, but also shortly before the initiation of the proceedings. While the spouses should be able to agree easily at the earliest stage of their relationship, their choice might produce consequences decades later. The chosen law might have changed dramatically. Agreements might be harder to reach shortly before separation, but spouses contemplating a consensual divorce may be able to agree on a law and a jurisdiction where such divorce can be obtained at the lowest cost. Recall that Art. 3 of the Brussels IIter Regulation grants jurisdiction to seven courts where the parties could freely decide to initiate jointly the proceedings.

Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (2010)

Article 26 In respect of consensual divorce, the parties may by agreement choose to apply the law of a party's habitual residence or nationality. Absent any choice by the parties, (. . .)

Article 27 Divorce decided by a court is governed by the law of the forum.

NOTES

1 As Art. 5 of the EU Regulation, Art. 26 grants a limited freedom of choice to choose the law governing divorce.

The rule allows overseas Chinese married in China to displace the application of the law of their residence and to choose the application of Chinese law.

2 Unlike the EU Regulation, Art. 26 limits the scope of such freedom to consensual divorce.

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