January 1987

Conflicts of Law in Divorce Litigation: A Looking-Glass World?

Mary M. Wills

Follow this and additional works at: http://scholarship.law.campbell.edu/clr
Part of the Conflict of Laws Commons

Recommended Citation

This Comment is brought to you for free and open access by Scholarly Repository @ Campbell University School of Law. It has been accepted for inclusion in Campbell Law Review by an authorized administrator of Scholarly Repository @ Campbell University School of Law.
COMMENT

CONFLICTS OF LAW IN DIVORCE LITIGATION: A LOOKING-GLASS WORLD?

I. INTRODUCTION .......................................................... 145
II. HISTORY .................................................. 146
   A. Interest Analysis: The Modern Theory ................. 148
   B. Choice of Law in Family Law Problems .......... 149
   C. Marriage: Conflicts Rules .......................... 149
   D. Divorce: Conflicts Rules ............................ 150
   E. Military Personnel Statutes ....................... 153
III. ANALYSIS .................................................. 155
   A. Failures of the Present System in Divorce Litigation ......................... 155
   B. Effects on Incidents of Divorce ..................... 159
   C. The Constitutional Objection ...................... 160
IV. PROPOSAL OF INTEREST ANALYSIS: AN ALTERNATIVE ...... 162
V. CONCLUSION .................................................. 165

I. INTRODUCTION

A court called upon to resolve a dispute with multi-state aspects must choose a law to apply to the problem. This task is often difficult, complicated by the need to select a process to use in choosing the appropriate law. Thus, it is not surprising that the search for a system for choice of law has occupied and continues to occupy a great deal of judicial and academic time and effort.

Family law, in particular, presents some rather unique problems in the field of conflicts of law. In an attempt to resolve some of these difficulties, this comment will inquire into the relevant policies underlying family law, and divorce law in particular, and analyze the viability of the use of the choice of law doctrine of
interest analysis\(^1\) in the divorce arena. It will address the current state of United States conflicts law in family law cases and the possible ramifications of the application of interest analysis to certain family law concepts. Finally, it will propose the adoption of some form of interest analysis for choice of law in divorce actions, including actions incidental to divorce, based on the proposition that use of the interest analysis theory will better serve and promote the policies underlying the laws of divorce and its incidents.

In response to a cry for reform intensified over several decades, recent years have witnessed a dramatic change in conflicts of law theory. This cry for reform has been answered, particularly with regard to tort and contract cases, by two significant developments: (1) a shift away from the mechanical application of rigid laws used to resolve choice of law problems, and (2) an enlargement of the jurisdiction available to courts over nonresident defendants.\(^2\) While the second conflicts development coincided with developments in various aspects of divorce litigation, choice of law theory concerning divorce actions proved unusually resilient to reform and remained virtually unchanged.\(^3\)

II. History

An analysis of the effects of the application of an interest analysis technique in divorce litigation first requires a brief history of the evolution of choice of law theory in the United States. The traditional system for choice of law in the United States was the system embodied in the *Restatement (First) of Conflict of Laws*.\(^4\) The rules of the *First Restatement* are jurisdiction-selecting rules.\(^5\) They choose between competing states, not between competing rules. The court does not consider the scope, content, or policy of the substantive rule of law until after the state is chosen. The *First

---

1. Professor Brainerd Currie proposed this theory during the 1950s. Currie, a professor at Duke University, explained his theory in a series of articles collected in B. CURRIE, ESSAYS.


4. *Restatement (First) of Conflict of Laws* (1934) (hereinafter *First Restatement*).

Restatement rules are not concerned with which substantive rule is better, or which rule validates the parties' intentions, or which rule is motivated by a policy which can be advanced by its application in this case; rather, the rules are concerned only with identifying a particular event and the jurisdiction (state) in which that event occurred.6

The First Restatement provided choice of law rules that were easily applied and were once accepted without hesitation. The rules, rigidly applied, provided a high degree of predictability and uniformity to decisions but were inflexible and failed to consider policies relevant to choice of law problems.7 The merely fortuitous results achieved through the courts’ applying these rules and the absence of any significant relationship between the results and the policies involved spurred a cry for reform.8

Reform came in the Second Restatement,9 published in 1971, almost forty years after the publication of the First Restatement. The Second Restatement’s approach10 to choice of law questions is relatively simple. First, a court must follow a statutory choice of law rule. If no statutorily directed choice exists, the Restatement provides specific jurisdiction-selecting rules to resolve some issues. However, for most issues, the Restatement requires application of the law of the state with “the most significant relationship” to that issue.11 To determine which state has “the most significant relationship,” section 6 lists a number of general considerations.12

7. See, e.g., Seidelson, supra note 2; Carteaux, supra note 3; Richman & Reynolds, supra note 6; J. Martin, Conflict of Laws: Cases and Materials (1984).
8. See sources listed supra note 7. See also R. Weintraub, Commentary on the Conflict of Laws (1971).
11. Richman & Reynolds, supra note 6, at 158.
12. Restatement (Second) of Conflict of Laws § 6 (1971):
a. the needs of the interstate and international systems,
b. the relevant policies of the forum,
c. the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
d. the protection of justified expectations,
e. the basic policies underlying the particular field of law,
These factors provide the flexibility and consideration of states' interests which the First Restatement lacked. The Second Restatement "integrates policy and interest considerations into a 'contacts' approach and provides that the law of the state with the 'most significant relationship' to the parties and the transaction or occurrence should be applied."13 However, the flexibility evident in tort,14 contracts,15 and marriage16 cases is conspicuously absent from divorce cases under the scheme of the Second Restatement. In divorce cases, the Second Restatement adheres to the traditional domicile rule.17

A. Interest Analysis: The Modern Theory

Interest analysis is a method of analyzing choice of law problems without presuming choice of law provisions. Instead, it entails judicial scrutiny of the interests of the states involved in a particular controversy. Currie argued that, in choice of law decision-making, courts should consider the governmental interests of each jurisdiction in having its law applied.18 That procedure helps insure that a court will not apply a particular law to a problem "unless doing so would achieve a policy goal sought by the sovereign which promulgated the law."19 The goal of interest analysis is to apply the law that would promote the concerns of the state having the greatest interest in applying its law to the case.

Many jurisdictions have adopted interest analysis to resolve choice of law problems. Many courts and commentators have praised interest analysis because it allows flexibility, rationality, fairness, and consideration of relevant policies involved. A court using interest analysis enjoys the freedom to inquire whether the

f. certainty, predictability and uniformity of result, and the law to be applied,
g. ease in the determination and application of the state law.

14. Restatement (Second) § 145.
15. Id. at § 188.
16. Id. at § 283.
17. Id. at § 285.
18. Richman & Reynolds, supra note 6, at 161.
19. For explanations of Currie's method, the best summaries are those he prepared in 1964 for insertion in two casebooks. See Cramton, Currie, & Kay, Conflict of Laws 216-17 (1984); see also Reese & Rosenberg, Cases and Materials on Conflict of Laws 468-72 (3d ed. 1983).
value of applying a local statute and of implementing local policy outweighs other choice of law considerations. Conversely, some courts and scholars have criticized interest analysis for being unpredictable, easily manipulated, and unduly favorable toward forum law.

B. Choice of Law in Family Law Problems

Family law presents unique problems in the field of conflicts. Although family legal problems sometimes are treated in the same fashion as any other personal legal problem encountered in tort or contract law, the law also treats the relationship among family members as creating a status. The law recognizes that the state has a substantial interest in the existence and possible dissolution of this status. The peculiar nature of the family’s legal status creates special conflicts problems. The need for continuing adjustment of the family’s legal arrangements and the fact that the parties involved have often traveled into other states create further problems. The interests of several states in the supervision and adjustment of continuing arrangements among family members makes problems in domestic relations particularly complicated. Thus, while the recent change in choice of law thinking generally has resulted in a resort to open-ended standards rather than black letter rules, the portions of the Second Restatement that deal with family law almost totally lack the virtues that make interest analysis and other similar theories so attractive to conflicts scholars. The rules concerning divorce, in particular, are more laden with First Restatement atavisms than the torts and contracts chapters.

C. Marriage: Conflicts Rules

The Second Restatement did make some advances in the fam-

22. RICHMAN & REYNOLDS, supra note 6, at 313.
23. RESTATEMENT (SECOND) §§ 69-79 (jurisdiction over status); §§ 283-90 (status).
24. RESTATEMENT (SECOND) §§ 70-74 (jurisdiction); § 285 (choice of law).
ily law area but limited those advances to its rules concerning marriage. According to the First Restatement, a marriage that failed to meet the requirements of the state of celebration was invalid everywhere. However, marriage is an area where reliance is no longer properly placed on broad, hard-and-fast rules in choice of law. The choice of law rules of the Second Restatement concerning marriage require application of the law of the state having the "most significant relationship" with the particular issue to be determined.

The general rule is that a marriage which is valid under the law of the state of celebration is valid everywhere. This rule's rationale is protection of the parties' expectations.

However, the Second Restatement provides further that the general rule does not apply if the marriage in question would be invalid under the laws of the state of requisite interest, even if it would be valid in the state of celebration. If the rule were not subject to this exception, it would disregard the factor of state interest because a state of celebration with no other contact with the parties will have no substantial interest in the marriage, apart perhaps from the question of whether the parties observed the necessary formalities. The rules of the Second Restatement make two major advances over those of the First Restatement. First, they abandon the monolithic approach to "status," and second, they abandon the automatic application of the law of celebration.

With regard to the issue of the validity of marriage, courts enjoy some freedom of choice in selecting the law to apply because they cannot make wisely a decision without regard to the particular issue involved. The degree of a state's interest in having its law applied and the strength of the policy favoring the validation of marriages vary with the issue.

D. Divorce: Conflicts Rules

While the prevailing choice of law rules concerning marriage illustrate the flexibility and rationality evident in most of the Second Restatement, the same cannot be said for the rules concerning

26. RESTATEMENT (FIRST) § 122.
27. RESTATEMENT (SECOND) § 283(1).
28. Id. at § 283(2).
29. Reese, supra note 20, at 960.
30. RESTATEMENT (SECOND) at § 283 comment i.
31. Id. at § 283 comment j.
32. Reese, supra note 20, at 960-63.
divorce. In divorce litigation, the emphasis is on jurisdiction. Foreign law is never even considered, much less applied. A line of United States Supreme Court decisions indicates that the basic jurisdictional requirement for divorce is domicile. The domicile of one party is sufficient jurisdictional basis to entitle a decree to full faith and credit in every other state, so long as there is constructive notice reasonably calculated to provide actual notice to the absent party. However, another state with jurisdiction may inquire into the issues of domicile and jurisdiction decided by the state rendering the decree, and may deny full faith and credit upon a finding of lack of jurisdiction.

The decisions in the Williams cases resulted from a fact situation all too common in today’s society. The defendants, Mr. Williams and Mrs. Hendrix, were both married to their respective spouses in North Carolina, where they each lived with their former spouses for over twenty years. In 1940, each left his/her spouse, went to Las Vegas, and filed divorce actions. The defendants, their spouses, did not enter an appearance; nor were they served with process in Nevada. Mr. Williams and Mrs. Hendrix maintained a residence together at a motor inn in Nevada for six weeks in order to establish domicile in that state and obtained decrees of divorce from a Nevada court applying Nevada law. The Nevada court included in its findings a statement as to each party that “plaintiff has been and now is a bona fide and continuous resident of Nevada.” The couple subsequently married and returned to North Carolina to live, where a jury convicted them of bigamous cohabitation. North Carolina was able to convict them of bigamous cohabitation because the Nevada court did not have personal jurisdiction; therefore, the divorce was not valid.

In its decisions in Williams and other divorce cases, the Supreme Court ignored choice of law considerations and focused totally on the issue of jurisdiction. Accordingly, the Second Re-

35. See Williams (I), 317 U.S. 287.
36. See Williams (II), 325 U.S. 226.
37. Williams (I), 317 U.S. 287; and Williams (II), 325 U.S. 226.
38. Id.
39. One could read some opinions of the Supreme Court as holding that a divorce decree will not be entitled to full faith and credit unless at least one of the
statement adopted the same approach. The Restatement renders accurately the constitutionally mandated rules for ex parte and bilateral divorces.41

The formal arrangement of the Second Restatement's provisions relating to family law illustrates its traditionalist mold.42 While a significant disparity is apparent in the Second Restatement's treatment of jurisdiction and of choice of law in the family law area generally, the disparity is pronounced in its divorce rules. The Second Restatement provides one section only on choice of law but five sections on jurisdiction.43 Ten pages of comments and notes illustrate the latter, whereas little more than one solitary page illustrates and documents the former.

The general rule regarding jurisdiction is that a state has jurisdiction to grant a divorce when one spouse is domiciled in that state.45 The choice of law rule makes the internal law of the domiciliary state in which the action is brought applicable to determine the right to divorce. The proposed rationale for this rule is that the person's domiciliary state has the dominant interest in that person's marital status. "The local law of the forum determines the right to a divorce, not because it is the place where the action is brought but because of the peculiar interest which a state has in the marriage status of its domiciliaries."47

The Supreme Court has yet to directly confront this rule. However, the Second Restatement does state that the spouse's domicile in the state is not the only jurisdictional basis on which a court may grant a divorce.48 If a court does establish jurisdiction to grant a divorce on some basis other than domicile, the court must

spouses was domiciled in the divorce state. In these cases, however, domicile was the asserted basis of jurisdiction. Many authorities believe that, when this question is squarely presented, the Supreme Court will hold that other jurisdictional bases also suffice to entitle the decree to full faith and credit.

40. Restatement (Second) § 71.
41. Id. at § 73.
42. Family law matters are dealt with under the heading of Status, which appears twice, once as an eleven-section topic in the chapter on jurisdiction and once more as a separate choice of law chapter of its own, which consists of eight sections.
43. Restatement (Second) at § 285.
44. Id. at §§ 70-74.
45. Id. at § 71.
46. Id. at § 285.
47. Id. at § 285 comment a.
48. Id. at § 72 comment b.
consider whether a state in which neither spouse is domiciled has as great an interest in the marital status of the spouse as it would have if at least one of the spouses was domiciled in its territory. Similarly, the interest of such a state in the marital status may not be as great as the interest of some other state. According to the Restatement, "it is uncertain whether it would be appropriate for the courts of a state where neither spouse is domiciled but which does have jurisdiction to grant a divorce to apply their local law in determining whether a divorce should be granted." 49

Thus, while the Second Restatement indicates that choice of law might become an issue if the bases for divorce jurisdiction were expanded or changed, so long as domicile remains the only constitutionally established basis for jurisdiction choice of law is likely to remain a nonexistent issue in divorce litigation. This mere hint 50 that expansion of the bases for divorce jurisdiction, accompanied by the emergence of choice of law as a viable issue, might be acceptable is the sum total of the change in conflicts thinking on divorce from the First Restatement to the Second Restatement. However, as one commentator noted, "perhaps the foundation has been laid for some future minute digression from the automatic application of the lex fori [forum state] in divorce cases." 51

While the Second Restatement did make slight progress over the First Restatement in this area, it still did not provide the flexibility and rationality sorely needed to furnish a workable concept for the resolution of conflicts problems in the divorce arena. Although the slight cosmetic change in conflicts theory resulted in minor innovations regarding jurisdiction for divorce, choice of law looms even larger as a non-issue. The courts' application of military personnel statutes best illustrates the problems of the present system.

E. Military Personnel Statutes

In response to the plight of military personnel in establishing domicile to obtain a divorce, 52 many states 53 enacted statutes with

49. Id. at § 285 comment d.
50. Id. at § 72 (stating that domicile is not the only jurisdictional basis for divorce) and § 285 (stating that, in a situation under § 72, it is uncertain whether the forum court could apply its own law).
52. See Garfield, The Transitory Divorce Action: Jurisdiction in the No-Fault Era, 58 Tex. L. Rev. 501 (1980). Because a person in military service is sent
provisions applicable only to military personnel that provide for jurisdiction when at least one party is either domiciled in the state or stationed in the state as a member of the armed services for a required period of time. The purpose of these statutes is to make either domicile or military presence in the state a sufficient basis for divorce jurisdiction. However, even in a particular case where a court bases its jurisdiction solely on military presence, the courts still apply the law of the forum state without question. While it may be logical to allow a state to assert jurisdiction in such a situation, often there is no basis at all for allowing that state to apply its own law to the divorce action of two parties with no real connection to the state.

For example, in a North Carolina case, the plaintiff was domiciled in Maryland and married his wife there. They lived in Maryland until he enlisted in the Army. The Army subsequently assigned him to various posts and, after he served at Ft. Bragg, North Carolina, for a year, he petitioned for a divorce in North Carolina from his wife, who had never been in North Carolina. The North Carolina court asserted jurisdiction pursuant to North Carolina's serviceman statute and granted the divorce, applying North Carolina law.

Clearly, jurisdiction in this and other similar instances does not imply "a nexus between person and place of such permanence from place to place at the will of his superiors, he lacks the freedom of choice to form the intent necessary to establish a new domicile. Traditionally, his domicile would remain the place from which he enlisted, even though he has been away from that place for years, and even though he does not intend to return. The only way he could secure a divorce that would be assured recognition in other states was to file for divorce in the state of his technical domicile. If his technical domicile was in a distant state, that could be impossible, or at least prohibitively expensive and burdensome. Id.


as to control the creation of legal relations and responsibilities of the utmost significance.”

Simple common sense dictates that, even though a state may claim jurisdiction over a serviceman for purposes of divorce jurisdiction, that state usually will have insufficient contacts to justify application of its own law to dissolve the marriage in question. The courts recognize this conclusion in every area of the law except for divorce litigation.

However, the present rules create problems of jurisdiction that are by no means confined to the military. The military serviceman statutes engender difficulties that are but one visible aspect of the larger problem.

III. Analysis

A. Failures of the Present System in Divorce Litigation

Changes in social and legal attitudes toward marriage and divorce cast new doubt on the continuing validity of domicile as the principal basis for divorce jurisdiction. One reason for this development is that the traditional legal conceptualization of divorce and traditional conflict of laws doctrine operate in both domestic and conflicts cases not only to frustrate established policies but also to discourage courts from even considering the substantive policies involved in a case. This fact has been noted by many legal scholars.

In the words of Currie, “the law of divorce inhabits a looking-glass world in which the usual conflicts principles are distorted beyond recognition.”

One reason for the failure of the traditional rules is that fundamental changes in the law of marriage and divorce have eroded the permanence of the nexus formerly supplied by domicile. The jurisdictional requirement of domicile was meant to protect the interest of the state in controlling the domestic relations of its citizens. However, this statement of justification presupposes a stable and intimate attachment of both spouses to a single

55. Williams (II), 325 U.S. at 229.
56. See generally Baade, supra note 25; Carteaux, supra note 3 (concerning family law in general); Currie, supra note 33; Seidelson, supra note 2; Richman & Reynolds, supra note 6; W. Weyrauch & S. Katz, American Family Law in Transition (1983).
58. Garfield, supra note 52, at 503.
community; a community which in fact and alone has a genuine interest in a particular marriage relationship. This picture is no longer characteristic of society or of the conduct of estranged spouses. With the adoption of no-fault divorce laws, the states surrendered much of their control over marriage and divorce to the parties and their lawyers. 60

In their activities and their careers men are increasingly mobile. Community attachments tend to be less intimate and less lasting than heretofore. And when the unsettling factor of domestic estrangement is added there is considerable likelihood that the spouses will go their separate ways in different communities. One need not approve these patterns of behavior to recognize what they cast upon the essentiality of a legal rule which must be justified by premising a single community which alone and intimately is concerned with each unsuccessful marriage. 61

Therefore, the concern with domicile for jurisdictional purposes has lost much of its persuasive power.

Another reason for the failure of the present rules is that they foster uncertainty. The problem is that the forum court's determination of the plaintiff's domicile within that state is subject to redetermination by other courts. Without personal jurisdiction over or entry of appearance by the defendant, the forum court's decree is subject to collateral attack. 62 Therefore, a divorce decree never is assured of receiving full faith and credit if a nonresident defendant ignores the proceedings, and it leaves the plaintiff uncertain if the divorce is valid.

The consequence of this defect in the system is that migratory ex parte divorces are not conclusive. Parties who marry again in reliance on their divorce may become bigamists, and the children of such marriages may become illegitimate and unable to inherit from their parents. 63 There also exists the possibility of dual litigation that can result in similar or identical issues being resolved in a contradictory manner, thereby causing further conflict, litigation, and expense. 64

A third, and arguably the most significant, problem with the

60. Id.
62. Williams (II), 325 U.S. at 229.
rules governing divorce is that they frustrate the interests of the states and of the parties involved. While the conflicts rules governing marriage require that a court consider the policies of all relevant jurisdictions and the interests that these jurisdictions have in the application of their laws to a particular case,\textsuperscript{66} the same is not true of divorce. The traditional divorce and conflicts rules strip the domicile states of the respective spouses of the legal capacity to determine conclusively the marital status and incidental economic consequences of their own domiciliaries. The result is the complete frustration of the legitimate interest of each state in its domiciliaries.\textsuperscript{66} A related result is the frustration of the expectations of the parties. It is not fair nor is it consistent with our legal system that "one whose rights are in question should be summoned by mail, publication, or otherwise to a remote jurisdiction chosen by the other party and there be obliged to submit their marital rights to adjudication under a state policy at odds with that of the state under which the marriage was contracted and the matrimonial domicile was established."\textsuperscript{67}

The current status of the law is that a married person's change of domicile will subject the stay-at-home spouse's right to retain his marital status to the divorce law of the new domicile, a state with which he has had absolutely no contact. However, the courts have refused even to address the choice of law problems inherent in such a situation.

A problem related to the frustration of state interests is that of synthetic domicile. The prevalence of situations analogous to Williams prompted much judicial comment on the subject.\textsuperscript{68} The prevailing laws encourage the establishment of a synthetic domicile in a sister state "for the facile termination of a marriage . . . as a subterfuge to circumvent [the true domiciliary state's] interest in its marriages."\textsuperscript{69} Because of this, citizens can avoid the legislative judgment of their home state on the question of divorce and submit their marital rights and obligations to the contrary policies and judgments of a foreign jurisdiction with which they have little or

\textsuperscript{66} Seidelson, supra note 2, at 328-29.
\textsuperscript{67} Williams (I), 317 U.S. at 317 (Jackson, J., dissenting).
\textsuperscript{68} It also prompted a good deal of hostility towards Nevada.
Even worse, litigants and lawyers freely engage in conduct that, in Justice Frankfurter's words, "in any other type of litigation would be regarded as perjury, but which is not so regarded where divorce is involved because ladies and gentlemen indulge in it."71

While all of the problems discussed so far are legitimate concerns with respect to the interaction of the divorce and conflicts laws now in effect, perhaps the best comments on the undesirable consequences of those laws emerged as a result of the Williams decisions. Justice Murphy argued that the holding in Williams introduced an undesirable rigidity in the application of the full faith and credit clause, and that rigidity often results in a "perfunctory application of the literal language of the Full Faith and Credit Clause, with the result that measures which North Carolina has adopted to safeguard the welfare of her citizens in this area of legitimate governmental concern are undermined."72

Justice Jackson argued that the Williams decision nullified the power of each state to protect its own citizens against dissolution of their marriages by the courts of other states that have an easier system of divorce. He added that "[it] is not an exaggeration to say that this decision repeals the divorce laws of all the states and substitutes the law of Nevada as to all marriages one of the parties to which can afford a short trip there."73

In analyzing Williams twenty-five years after its resolution, Currie labeled the action of the Nevada court as "offensive meddling."74 He used the term to describe the application of forum law to divorce cases that have no other connection with the forum than the fact that the plaintiff filed the action there.75 The Williams decision was justified, according to the Second Restatement, because six weeks residence within the borders of Nevada gave Nevada a reasonable interest in the marital status of the defendants.76 In reality, however, Nevada had no conceivable interest in applying its own law to dissolve the two marriages. Thus, a decree of a lenient state, one with little or no interest in a particular mar-

72. See Williams (I), 317 U.S. 287, 310 (Murphy, J., dissenting).
73. Id. at 312 (Jackson, J., dissenting).
74. Currie, supra note 33, at 45.
75. Id.
76. Restatement (Second) § 71.
riage, thwarts an interested state's policy of strict control over the institution of marriage.  

Only in the divorce arena is it true that any nominally interested state may assert jurisdiction to affect the rights of absent parties. According to Justice Jackson, "settled family relationships may be destroyed by a procedure that we would not recognize if the suit were one to collect a grocery bill."  

B. Effects on Incidents of Divorce  

In analyzing the laws of divorce and the practical and legal consequences of those laws, it is necessary to discuss briefly the laws concerning legal incidents of divorce. In beginning this discussion, it is important to note that an ex parte divorce decree is the only ex parte, in personam judgment whose validity the courts uniformly recognize. This is true because of the doctrine of "divisible divorce." According to this doctrine, an ex parte proceeding upon substituted service of process is sufficient to confer jurisdiction to grant a divorce to a domiciliary plaintiff; but, unless the defendant enters a personal appearance, substituted service will not sustain an in personam judgment awarding alimony, support, or custody. The fact that an ex parte divorce decree has changed the marital status does not mean that it has affected every other legal incidence of marriage. The rationale behind the rule is that the forum's interest does not extend to adjudicating the property interests of absent nondomiciliary spouses.

For example, a couple may be validly divorced in an ex parte proceeding in a Nevada court, but, if the wife is not personally served and does not appear, she may retain the wife's right to support. The Nevada court could not bind a New York wife to its alimony decree because of the recognition of New York's legitimate interest in the economic integrity of its domiciliaries.

77. See Currie, supra note 33.  
78. Currie, supra note 33, at 28.  
79. Williams (I), 317 U.S. at 316 (Jackson, J., dissenting).  
80. Stimson, supra note 63, at 295.  
82. See Estin v. Estin, 334 U.S. 541 (1948).  
85. See Vanderbilt, 354 U.S. 416.
The fact that a court may have appropriate jurisdiction over the marital status yet be without jurisdiction over the incidents of that status can create serious problems. In a typical case, a spouse claims a right such as child support, alimony, or a property settlement, all of which are predicated on the right of divorce. Applying the present rules, the courts of a state cannot determine those property interests unless that state has personal jurisdiction over both parties. The rationale is that a state with no power over the persons whose relationships are the source of the rights and obligations in controversy has no power over those rights and obligations. However, the courts of the same state do have power over those same persons whose relationships are the source of their marital status.

This view requiring a court to have personal jurisdiction over a defendant before it may decide his or her support rights or obligations, but not before it can dissolve his or her marriage, is adverse to logic, unfair to the parties, and burdensome on the judicial system. It implies that a state has a significantly greater interest in adjudicating a resident plaintiff's marital status than his or her support rights or obligations. It also implies that the defendant has a significantly greater interest in litigating his or her support rights or obligations than his or her marital status. Not only is this view unrealistic, but its application exacts a heavy burden on both the litigants and the judicial system.

C. The Constitutional Objection

The rationale supporting the present system is that "adherence to the domiciliary requirement is necessary if our states are really to have control over the domestic relations of their citizens." But this view overlooks the interest of the home of the defendant spouse, of the place of marriage, and of the last marital domicile, all of which must be very important under this rationalization offered to justify the domiciliary rule. A review of United States Supreme Court decisions on choice of law indicates that a state court's choice of law is unconstitutional when the state whose law is applied has no legitimate interest in its application. The landmark case of Home Insurance Co. v. Dick furnishes support
for the thesis that, when a state with no interest in a matter applies its law to the exclusion of the law of an interested foreign state, that state denies due process to the defendant. The court in that case held that the technical domicile of the plaintiff in the forum state could not support the assertion of an interest sufficient to justify application of that state's law. 89

Why then, have these constitutional limitations on choice of law been ignored in the context of divorce litigation? Judicial discussion of the issue is practically nonexistent. The only judicial reflection on constitutional limits on choice of law in the divorce arena 90 appears in the dissent of Alton v. Alton: 91

In this case, if it should appear that Mr. and Mrs. Alton were both domiciled in Connecticut at the time of suit in the Virgin Islands and that their estrangement had resulted from conduct in the matrimonial home state, it may well be that under correct application of conflict of laws doctrine, and even under the due process clause, it is incumbent upon the Virgin Islands, lacking connection with the subject matter, to apply the divorce law of some state that has such connection, here Connecticut. 92

In light of the fact that constitutional limitations on choice of law have been applied to restrain a forum court from applying its law in a situation where the forum state has no real connection with the case, a similar restraint should prevail in divorce cases. In an action as personal as divorce, the due process rights of a party should weigh heavily in a decision on the choice of applicable law. In most ex parte and in many bilateral divorces, the application of the law of the forum state, if analyzed in almost any other context, would amount to an arbitrary and capricious application of laws that have no fair or decent connection with the issue in question and would be held to amount to a denial of due process of law.

Therefore, in addition to the many logical and practical considerations indicating the benefit of the introduction of choice of law into divorce litigation, constitutional considerations suggest

89. Id. at 406-07.
90. To the knowledge of this author.
91. Alton, 207 F.2d 667 (A couple domiciled in Connecticut denied a divorce in the Virgin Islands. Jurisdiction was based on the two-day residence of the wife and the physical presence of the husband.).
92. Id. at 685 (Hastie, J., dissenting) (emphasis added).
very strongly that it is required.

IV. PROPOSAL OF INTEREST ANALYSIS: AN ALTERNATIVE

The conventional theory has been that, so long as one of the spouses to a marriage has a domiciliary relationship to the forum, the forum has sufficient connection with the marriage to justify not only the exercise of its judicial power to decide the controversy but also the application of its own substantive law of divorce as well.93 It is quite possible that some of the difficulties that have arisen in this field are the result of a "failure to keep in view that these are distinct problems, although the existence of a domiciliary relationship is thought to solve both."94 Once a court has jurisdiction to decide the case, then the court must decide as a separate question upon what basis, if any, it can properly apply the local substantive law of divorce to determine whether the plaintiff is entitled to the relief sought.

Once choice of law becomes a factor in divorce litigation, the law of the state having the dominant interest in that issue should apply to resolve that issue in any particular case. Because the choice of which dispositive law to apply often affects or even determines how issues will be decided, the forum should choose the law of the jurisdiction with an interest in the issue of divorce, alimony, support or other issues incidental to divorce sufficient to justify the use of its law in resolving that issue.95 Any action for divorce should focus on two preliminary questions. One, to what extent may a court assert jurisdiction to hear the action? Two, to what body of law should it refer in determining the merits of the case?96

Courts should treat divorce actions the same as any other action and apply the forum’s choice of law rules. It is doubtful, however, that courts can achieve socially desirable results if they apply the same choice of law rule in all cases where a divorce is at issue.97 The decisive question should focus on the meaning of "divorce" for purposes of the particular law under which rights are claimed. That is why some form of interest analysis would be desirable as a choice of law theory in divorce actions.

The relevant policies supporting and the protections provided

93. Id. at 684.
94. Id. at 685.
95. Seidelson, supra note 2, at 320.
96. Id. at 315.
97. Reese, supra note 20, at 952.
by divorce law should and would be the pivotable considerations in an interest analysis. As such, they take on an importance in choice of law decisions commensurate with their significance in divorce law itself. As opposed to other choice of law theories, interest analysis attempts to effectuate the substantive policies involved and to determine the dominant policy in case of a conflict. The ultimate object would be the optimum realization of a dominant and independently fixed substantive policy.

In making a choice of law determination, a court should consider such interests as the probable expectations of the parties, the state where the parties last lived in a matrimonial relationship, the state of matrimonial domicile, the residence of each party, and the place of the conduct that allegedly provided the grounds for divorce. In any event, technical domicile should be irrelevant to any rational search for the state whose law the parties are entitled to have applied to their dispute.

Application of these principles of interest analysis would result in the discovery of many false conflicts, as is illustrated by application of the method to the Williams case. The dominant legislative concern in fashioning grounds for divorce is to determine in what circumstances a true domiciliary of that state should be entitled to be relieved of his or her matrimonial status. Each state legislature has attempted to describe those situations in which divorce would be appropriate for its domiciliaries. Therefore, it is realistic to assert that Nevada’s policy underlying its lenient divorce laws is relief from intolerable or dead marriages for Nevada citizens. It is equally realistic to assert that North Carolina’s policy underlying its strict divorce laws is to further the stability of marriages of North Carolina citizens. Therefore, if Mr. Williams and Mrs. Hendrix were truly domiciled in North Carolina (as they clearly were), Nevada had no conceivable interest in applying its own law to dissolve their marriages, regardless of whether Nevada required six weeks or six months or a year to establish residence. The unavoidable conclusion is that, even if the Nevada court had legitimately asserted jurisdiction based on domicile, the application of Nevada law so as to dissolve these marriages would have

98. Carteaux, supra note 3, at 425.
100. Seidelson, supra note 2, at 331.
101. North Carolina required a showing of adultery or physical abuse, while Nevada only required a showing of incompatibility.
advanced no Nevada interest and would have thwarted North Carolina's legitimate interest.\textsuperscript{102}

Although the Williams decision focused exclusively on jurisdiction, it carried with it the implication that, if the abandoning spouses \textit{had} established legitimate domicile in Nevada so as to provide a constitutionally sufficient basis for jurisdiction, then Nevada could have applied its own law to dissolve these marriages. In situations such as the one in the Williams case, a flexible choice of law theory that considers personal and state interests would prevent a state with such a slight or nonexistent connection to a particular marriage from applying its law to dissolve that marriage. While the extremely mobile nature of today's society may make it expedient to allow a state with no real connection to a marriage to assert its jurisdiction over that marriage, it does not logically follow that that state should apply its own law when another state clearly has a more real and substantial connection to that marriage.

True conflicts are more likely to arise in connection with the issues of custody, support, alimony, and property. In terms of the expectations of the parties, a solid argument favors applying the law of the state where the parties lived in the marital relationship. However, the state of the dependent, or custodial, spouse's present residence would have a genuine interest in seeing that the spouse and children were adequately supported. In any case, the respective domiciles of both the husband and the wife, and the marital domicile itself, all have legitimate interests because each has the potential of affecting the economic integrity of each litigant. While the problem of multiple issues and multiple choices of law might arise, the problem is no more troublesome in the context of divorce litigation than it already is in tort or contract litigation. In addition, it is highly probable that the same choice of law conclusion would apply as to all issues of incidents to a particular marriage.

It is beyond the scope of this comment to attempt to formulate detailed rules for the resolution of this kind of conflict. The guiding principle, however, is resolution, not by any facile assumptions about the interests of the state of domicile in the incidents of a marriage but by the same analysis the forum would use in nondivorce cases.

\textsuperscript{102} See Currie, supra note 33.
Divorce, like marriage, is of great concern to the immediate parties involved. It also touches basic interests of society. Since divorce, as does marriage, affects personal and societal rights of the deepest significance, every consideration of policy should be taken into account in a determination to create, perpetuate, or dissolve the relationship. The relevant policies underlying the divorce laws of each jurisdiction should take on an importance in choice of law decisions commensurate with their significance in divorce law itself. Only then will the system as a whole allow flexibility, rationality, and justice in the particular case to prevail in a system that is currently characterized by application of rigid, irrational, and often unfair rules.

The present system exaggerates the theoretical interest of the technical domicile of a plaintiff at the time of suit for divorce at the expense of personal and community interests on the defendant’s side. The same considerations that guide decisions in other areas of the law should guide the decisions that have to be made in divorce cases. In this regard, the application of an interest analysis theory would serve four desirable purposes: (1) assurance of the appropriate recognition of the legitimate state interests involved; (2) assurance of compliance with the legislative intent of each jurisdiction in fashioning grounds for divorce; (3) assurance of the relevance of the policies and purposes that conflicting laws seek to vindicate; and (4) discouragement of plaintiffs from seeking “divorce-haven” forums, thereby possibly reducing the incidence of ex parte proceedings and of divisible divorces.

Old habits of thought die hard, especially in an area that touches everyone as intimately as divorce. Courts long accustomed to assuming that only the state of domicile has sufficient interest in a marriage to assert jurisdiction over its dissolution will most likely translate that belief into an assumption that only the state of domicile has sufficient interest in a marriage to apply its law to dissolution. However, the benefits to be gained clearly outweigh any inconvenience of implementation. Although in some instances it may be difficult to determine with certainty what policy underlies a given rule or statute predicing rights or duties on “divorce,” such difficulty is no justification for declining to make the attempt.

The application of interest analysis to divorce actions would improve substantially the existing state of the law regarding divorce litigation. Policies give rise to laws, and laws further the in-
terests of states. Therefore, relevant policies and interests should be the starting and finishing points in a choice of law analysis.

Mary M. Wills