
NORTH CAROLINA SAME-SEX WEDLOCK: THE
INTERSECTION OF *UNITED STATES V. WINDSOR* WITH
NORTH CAROLINA'S STATUTORY AND CONSTITUTIONAL
PROHIBITIONS ON SAME-SEX MARRIAGE

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I. INTRODUCTION

Beth and Justine, both then residents of Massachusetts, were married in Boston in 2009, where same-sex marriages were legal and valid. A few months after their marriage, the couple relocated to North Carolina. After four years of marriage, the couple split. Beth contacted a North Carolina attorney to file for divorce, but was informed that because North Carolina does not recognize same-sex marriages, in the eyes of the state, the marriage does not exist.¹ Because the marriage does not legally exist in North Carolina, it is unclear whether North Carolina courts can grant same-sex couples a divorce.²

Beth inquired as to whether she could file for divorce in Massachusetts, where the marriage took place. The attorney informed her that every state, including Massachusetts, requires that at least one party reside within the state for a certain statutory period, usually six months or more, immediately preceding the filing.³ Unless Beth or

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¹ N.C. GEN. STAT. § 51-1.2 (2013).

² See Shannon Minter, *Wedlocked No More! Maryland Victory Sheds Light On An Emerging Issue for Married Same-Sex Couples Across the Country*, NAT'L CENTER FOR LESBIAN RTS. (Nov. 15, 2012), <http://www.nclrights.org/wedlocked-no-more-maryland-victory-sheds-light-on-an-emerging-issue-for-married-same-sex-couples-across-the-country/> (discussing generally the issue of same-sex divorce in states that do not recognize same-sex marriage).

³ *Williams v. North Carolina*, 325 U.S. 226, 229-30 (1945) (“[J]udicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicile [and] . . . [t]he domicile of one spouse within a State gives power to that State to dissolve a marriage wheresoever contracted.”).

Justine relocates to a state that recognizes same-sex marriage, they cannot be divorced, and the couple is left in legal limbo.⁴

This article critically examines whether North Carolina can grant divorces to married same-sex couples residing within its borders, notwithstanding its statutory and constitutional provisions prohibiting same-sex marriage.

II. DOCTRINAL HISTORY

In 1996, in response to the federal Defense of Marriage Act⁵ (DOMA), the North Carolina General Assembly passed its own “mini-DOMA,” which states that “[m]arriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina.”⁶ Although the statute was never judicially challenged, in May 2012, North Carolina voters approved a constitutional amendment (hereinafter “Amendment One”) that states:

Marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State. This section does not prohibit a private party from entering into contracts with another private party; nor does this section prohibit courts from adjudicating the rights of private parties pursuant to such contracts.⁷

On June 27, 2013, the U.S. Supreme Court handed down opinions in two cases addressing same-sex marriage: *Hollingsworth v. Perry* and

⁴ See Minter, *supra* note 2 (discussing recent legal developments in jurisdictions that allow same-sex marriage whereby same-sex couples who wed in those jurisdictions may be eligible to file for divorce in the jurisdiction in which they were wed without having to satisfy any residency requirements).

⁵ 28 U.S.C. § 1738C (2006) provides:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

⁶ N.C. GEN. STAT. § 51-1.2 (2013).

⁷ N.C. CONST. art. XIV, § 6. The second sentence of the provision was added to the bill at the last minute, in response to concerns that the amendment would prohibit businesses from providing certain employee benefits to same-sex couples. *How the Proposed Amendment Got On The Ballot, the Added Sentence and Other Issues*, NC AMENDMENT ONE TRUTH (Mar. 1, 2012), <http://ncamendmentonetruth.wordpress.com/2012/03/01/how-the-proposed-amendment-got-on-the-ballot-the-added-sentence-and-other-issues>. See John Frank, *Ballot's Omitted Clause On Same-Sex Marriage Ban Raises Objections*, NEWS & OBSERVER (Sept. 22, 2011), <http://archive.is/5p94q>.

United States v. Windsor.⁸ The *Hollingsworth* holding has no bearing on the issue at hand, but the *Windsor* decision has a much broader application. *Windsor* holds that Section 3 of DOMA,⁹ which sets forth the federal definition of marriage as “only a legal union between one man and one woman as husband and wife,” is unconstitutional.¹⁰ However, the *Windsor* Court limited its holding to Section 3; Section 2 of DOMA¹¹ remains valid, such that the individual states remain free to refuse to allow or recognize same-sex marriages.¹² As applied to states that have statutory or constitutional prohibitions against same-sex marriage, such as North Carolina, the *Windsor* decision has little legal impact, and the *status quo* continues.

III. NORTH CAROLINA COURTS SHOULD GRANT DIVORCES TO SAME-SEX COUPLES

In order to fully grasp the argument in favor of same-sex divorce, courts must first be made to appreciate the effects of literal “wedlock.” First, the fact that a same sex-marriage is invalid in North Carolina does not mean that the marriage is invalid everywhere.¹³ If one party moves or even travels to a recognizing state, the couple is married, with all of the rights and obligations of any other marriage.¹⁴ Second, wedlocked couples face a number of pragmatic challenges in separating their property and debt, establishing support, resolving child custody issues, and the like. Such couples are deprived of the psychological closure of a final divorce, and neither party is able to remarry.¹⁵ In *Boddie v. Connecticut*, the United States Supreme Court recognized the importance of access to divorce in our society and

⁸ 570 U.S. ___, 133 S. Ct. 2652 (2013); 570 U.S. ___, 133 S. Ct. 2675 (2013).

⁹ 1 U.S.C. § 7 (2012), held unconstitutional by *Windsor*, 133 S. Ct. at 2675, which provided:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

¹⁰ *Windsor*, 133 S. Ct. at 2696.

¹¹ 28 U.S.C. § 1738C (2006).

¹² *Windsor*, 133 S. Ct. at 2695-96.

¹³ See Edward Stein, *The Topography of Legal Recognition of Same-Sex Relationships*, 50 FAM. CT. REV. 181, 189-92 (2012).

¹⁴ Mary P. Byrn & Morgan L. Holcomb, *Same-Sex Divorce in a DOMA State*, 50 FAM. CT. REV. 214, 215 (2012).

¹⁵ *Id.*

made clear that the categorical denial of access to divorce is constitutionally suspect.¹⁶

IV. CAN NORTH CAROLINA COURTS RECOGNIZE SAME-SEX MARRIAGES FOR THE PURPOSE OF GRANTING DIVORCE?

Will same-sex couples like Beth and Justine be forced to languish in failed marriages simply because they reside in a state that does not honor the marriage? North Carolina appellate courts have not yet addressed the application of either the state's statutory "mini-DOMA" or constitutional amendment with respect to same-sex couples seeking divorce.¹⁷ But, given today's mobile society and the ever-increasing number of states allowing same-sex marriage, it is just a matter of time before the issue of whether North Carolina courts can grant a divorce to same sex-couples legally married in another state comes squarely before the North Carolina courts. This article explores two alternatives under which North Carolina could grant divorces to married same-sex couples without rescinding its current statutory and constitutional prohibitions on same-sex marriage.

¹⁶ 401 U.S. 371, 376 (1971) ("Without a prior judicial imprimatur, individuals may freely enter into and rescind commercial contracts, for example, but we are unaware of any jurisdiction where private citizens may covenant for or dissolve marriages without state approval. Even where all substantive requirements are concededly met, we know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without invoking the State's judicial machinery."). For a more complete discussion, see Byrn & Holcomb, *supra* note 14, at 214-15.

¹⁷ Prior to the enactment of Amendment One, at least one North Carolina district court dissolved a Vermont same-sex civil union, concluding that:

3. The parties are in need of a dissolution of their Vermont civil union, and are entitled to same under Vermont law, except that neither party meets the residency requirements of Vermont such that a dissolution may be granted to the parties by the State of Vermont;
4. This Court has jurisdiction in equity to determine the parties' legal rights and status;
5. Vermont law applies to this matter;
6. The parties have met the requirements under Vermont law for dissolution of their civil union; and
7. There is a sufficient basis upon which to dissolve the parties' civil union.

Carrison v. McWilliams, 10 CVD 12453 (N.C. Dist. Ct. May 25, 2011) (order dissolving Vermont civil union).

1. *North Carolina Case Law Compels Recognition of Same-Sex Marriages*

To date, North Carolina courts have followed the general rule of *lex loci celebrationis* (law of the place of celebration)¹⁸ and have recognized as valid any marriage that was valid where celebrated, so long as the marriage was not offensive to the public policy of the state.¹⁹ Such recognition is consistent with the well-established principle of comity, under which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect.²⁰ Accordingly, North Carolina courts have recognized common law marriages formed pursuant to the laws of another state as valid,²¹ even though the law of North Carolina does not permit common law marriage.²²

Under the reasoning set forth above, it would seem that North Carolina should recognize a same-sex marriage that was valid where the marriage took place. However, common law marriage does not specifically offend any North Carolina statute, constitutional provision or other established public policy of the state.²³ “A marriage formed . . . where nothing is required but the consent of the parties, we allow to be valid here, although it would be invalid if formed here; because it is a mere matter of form and we courteously recognize it. It

¹⁸ See Elisabeth Oppenheimer, *No Exit: The Problem of Same-Sex Divorce*, 90 N.C. L. REV. 73 (2011) (discussing the prominence of *lex loci celebrationis* in history and tradition); see also *Tanglewood Land Co. v. Wood*, 252 S.E.2d 546, 550 (N.C. Ct. App. 1979) (citations omitted) (applying *lex loci celebrationis* in the general contracts context in North Carolina); see generally *Hastings v. Douglas*, 249 F. 378, 380 (N.D. W. Va. 1918) (citations omitted) (applying *lex loci* in the marriage context).

¹⁹ Oppenheimer, *supra* note 18, at 92; see also *Overton v. Overton*, 132 S.E.2d 349, 352 (N.C. 1963) (“It is presumed that a marriage entered into in another State is valid under the laws of that State in the absence of contrary evidence . . .”).

²⁰ BLACK’S LAW DICTIONARY 267 (8th ed. 2008).

²¹ See Oppenheimer, *supra* note 18, at 91 (discussing *lex loci celebrationis* and its implications regarding the validity of a marriage in jurisdictions other than the jurisdiction where the marriage was solemnized); see also *Parker v. Parker*, 265 S.E.2d 237, 239-40 (N.C. Ct. App. 1980).

²² See N.C. GEN. STAT. § 51-1 (2013); see also *State v. Samuel*, 19 N.C. 177, 180 (1836) (“We do not agree that persons *sui juris* are legally married merely in virtue of their own consent, however explicitly expressed, in terms of immediate agreement, unless it be so expressed in presence of those persons who are designated by law to be witnesses thereto.”).

²³ See *State v. Ross*, 76 N.C. 242, 244-47 (1877) (holding that a marriage between a white wife and a black husband validly entered into in South Carolina, though deemed “immoral and opposed to public policy” by virtue of state legislation in North Carolina, was nevertheless valid in North Carolina).

inflicts no harm upon our people.”²⁴ On the other hand, recognition of same-sex marriages would seem to clearly violate N.C. Gen. Stat. § 51-1.2 and Amendment One.²⁵ That difference, on its face, might lead one to conclude that same sex marriages cannot be recognized in North Carolina, despite the general rule. However, a close reading of North Carolina case law addressing the validity of other prohibited marriages calls such conclusion into question.²⁶

In *State v. Ross*, the North Carolina Supreme Court addressed the question of whether a marriage entered into in South Carolina between a black man and a white woman who were domiciled in South Carolina at the time of marriage, valid by the law of a South Carolina, must be regarded as valid in North Carolina when the parties afterward migrate here.²⁷ At the time, interracial marriage was prohibited in North Carolina²⁸ but was not prohibited in South Carolina. The married interracial couple had relocated from South Carolina to North Carolina, where they were indicted for fornication and adultery from living and cohabiting together without being lawfully married.²⁹ The couple defended the charges on the grounds that they were lawfully married.

In its analysis, the North Carolina Supreme Court recognized that

[t]he State of North Carolina, with the general concurrence of its citizens of both races, has declared its conviction that marriages between them are immoral and opposed to public policy as tending to degrade them both. It has, therefore, declared such marriages void. It is needless to say that the members of this Court share that opinion. For that reason it becomes us to be careful not to be unduly influenced by it in ascertaining, not what the law of North Carolina is upon such marriages contracted within her limits—that is found in the Act of Assembly and is

²⁴ *Id.* at 248 (Reade, J., dissenting).

²⁵ See N.C. GEN. STAT. § 51-1.2; N.C. CONST. art. XIV, § 6.

²⁶ See Oppenheimer, *supra* note 18, at 85-88 (discussing the ability of courts, regardless of whether there are mini-DOMAs in effect in the state, to dissolve same-sex unions pursuant to their general equity jurisdiction); see also *Parker*, 265 S.E.2d 237 (holding that the plaintiff may be entitled to alimony subsequent to the dissolution of her South Carolina common law marriage, even though North Carolina does not recognize common law marriage).

²⁷ *Ross*, 76 N.C. at 244-45.

²⁸ At the time of *Ross*, the North Carolina State Constitution provided that “[a]ll marriages between a white person and a negro . . . are hereby forever prohibited.” N.C. CONST. of 1883, art. XIV, § 8. A state statute provided that such marriages were “forever prohibited, and shall be void.” N.C. GEN. STAT. § 14-182 (repealed 1973).

²⁹ *Ross*, 76 N.C. at 242-43.

beyond doubt—but what the law of North Carolina is upon the question presented, and for that we must look beyond the statutes of the State.³⁰

The court went on to recognize the general rule that a “marriage between citizens in a foreign State contracted in that State and valid by its laws is valid everywhere where the parties might migrate, although not contracted with the rites required by the law of the country into which they come and between persons disqualified by such law from intermarrying;” and further noted, as an exception to the general rule, that such marriages “will not be recognized in other States in which such marriages are deemed immoral and are prohibited.”³¹ Thus, the *Ross* court confirmed that, despite the general rule of recognition, North Carolina courts will not recognize marriages that violate a fundamental public policy of the state.³² But, further acknowledging that public policy differs from state to state, the *Ross* court specified that such public policy exceptions to the general recognition rule are limited to incestuous and bigamous marriages,³³ in that “all Christian countries agree that [incest and polygamy] is unlawful, consequently such marriages will be held null everywhere, because they were null in the place of the contract.”³⁴ Notwithstanding the North Carolina statutes and constitutional provisions banning interracial marriage, the North Carolina Supreme Court held that the South Carolina interracial marriage was entitled to recognition, stating that while

[t]he State of North Carolina, with the general concurrence of its citizens of both races, has declared its conviction that marriages between them are immoral and opposed to public policy . . . the decided weight of English and American authority requires us to hold that the relation thus lawful in its inception continues to be lawful here.³⁵

In support of its holding, the *Ross* court went on to state:

However revolting to us and to all persons, who, by reason of living in States where the two races are nearly equal in numbers, have an experience of the consequences of matrimonial connections between them, such a marriage may appear, such cannot be said to be the common sentiment of the civilized and Christian world. . . .

³⁰ *Id.* at 244.

³¹ *Id.* at 245.

³² *See* *Howard v. Howard*, 158 S.E. 101, 104 (N.C. 1931) (“Application of the principle that foreign laws will not be given effect when contrary to the settled public policy of the forum is often made in a certain class of cases, such, for example, as prohibited marriages, wagers, lotteries, racing, contracts for gaming or the sale of liquor, and others.”).

³³ *Ross*, 76 N.C. at 245-46.

³⁴ *Id.* at 246.

³⁵ *Id.* at 244-45.

It is impossible to identify this case with that of an incestuous or polygamous marriage admitted to be such *jure gentium*. The law of nations is a part of the law of North Carolina. We are under obligations of comity to our sister States. We are compelled to say that this marriage being valid in the State where the parties were *bona fide* domiciled at the time of the contract, must be regarded as subsisting after their immigration here.³⁶

The *Ross* court also wisely noted:

The inconveniences which may arise from this view of the law are less than those which result from a different one. The children of such a marriage, if born in South Carolina, could migrate here and would be considered legitimate. The only evil which could be avoided by a contrary conclusion is that the people of this State might be spared the bad example of an unnatural and immoral but lawful cohabitation. The inconveniences on the other side are numerous

Upon this question above all others it is desirable (altering somewhat the language of Cicero with which Story concludes his great work) that there should not be one law in Maine and another in Texas, but that the same law shall prevail at least throughout the United States.³⁷

The importance of *State v. Ross* to the question of whether North Carolina courts should recognize same-sex marriages cannot be overstated, in that it establishes as binding precedent that North Carolina shall recognize all marriages valid in the state where celebrated, despite its own statutes and constitutional provisions prohibiting such marriages, unless it is essentially universally accepted by all other states and nations that such marriages are repugnant and prohibited.³⁸ Applying *Ross* to the issue of same-sex marriages, it certainly cannot be said that all countries or even all states agree that same-sex marriage is immoral and prohibited.³⁹ Thus, *Ross* compels North Carolina courts to recognize as valid same-sex marriages legally entered into in a state that allows such marriages.

But despite the *Ross* court's unequivocal holding, some argue that the current statutory and constitutional language specifically referring

³⁶ *Id.* at 246-47.

³⁷ *Id.* at 247.

³⁸ *State v. Cutshall*, 15 S.E. 261, 262 (N.C. 1892) ("Such marriages may be declared unlawful, not simply because they are contrary to the law of the state in which the question arises, but for the reason that they fall under the condemnation of all civilized nations, like marriages between persons very nearly related or those that are polygamous.").

³⁹ At the time of this writing, same-sex marriage is legal in fourteen states and several countries. See Sean Sullivan, *The 14 States Where Gay Marriage Is Legal, in One Map*, THE FIX (Oct. 22, 2012, 11:45 AM), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/10/22/the-14-states-where-gay-marriage-is-legal-in-one-map/>.

to marriages “performed outside of North Carolina”⁴⁰ and prohibiting “recognition”⁴¹ of same-sex marriages compels a different result.⁴² Notably, the plain language of the statute and constitutional provision at issue in *Ross* simply declared interracial marriages “invalid” and “void” in North Carolina, while the present North Carolina statutory provision concerning same-sex marriages specifically provides that same-sex marriages formed in other states cannot be recognized, and North Carolina’s constitutional amendment prohibits recognition of marriage between any people other than one man and one woman.⁴³ The ultimate question before the North Carolina appellate courts will be whether the specific language of these current provisions changes the *Ross* rule requiring recognition. In the event that North Carolina appellate courts determine that the current statutory and constitutional provision preclude application of the *Ross* recognition rule to same-sex marriage, courts should consider recognizing such marriages for the limited purpose of divorce.

2. *Incidents Analysis: North Carolina Courts Should at Least Recognize Same-Sex Marriages for Purposes of Divorce.*

“Incidents analysis,” determining a marriage’s validity for a particular purpose, is advocated by legal scholars as a tool for judges in non-recognizing states addressing the issue of same-sex divorce.⁴⁴ The premise of incidents analysis is that marriage consists of a series of “incidents,” or bundles of rights, and courts should decide whether a marriage is valid for the purpose of the specific incident being litigated.⁴⁵

In *Christiansen v. Christiansen*, the Wyoming Supreme Court applied incidents analysis to the issue of recognition of same-sex marriage for the purpose of divorce.⁴⁶ Wyoming law defined marriage as “a civil contract between a male and a female person.”⁴⁷ Holding that the same-sex marriage should be recognized for purposes of divorce, the Wyoming court reasoned that

⁴⁰ N.C. GEN. STAT. § 51-1.2 (1996).

⁴¹ N.C. CONST. art. XIV, § 6 (1970).

⁴² See Byrn & Holcomb, *supra* note 14.

⁴³ N.C. GEN. STAT. § 51-1.2; N.C. CONST. art. XIV, § 6.

⁴⁴ See Oppenheimer, *supra* note 18, at 95.

⁴⁵ *Id.* at 96.

⁴⁶ See *Christiansen v. Christiansen*, 253 P.3d 153, 156 (Wyo. 2011).

⁴⁷ *Id.* at 154.

recognizing a valid foreign same-sex marriage for the limited purpose of entertaining a divorce proceeding does not lessen the law or policy in Wyoming against allowing the creation of same-sex marriages. A divorce proceeding does not involve recognition of a marriage as an ongoing relationship. . . . Specifically, Paula and Victoria are not seeking to live in Wyoming as a married couple. They are not seeking to enforce any right incident to the status of being married. In fact, it is quite the opposite. . . . Respecting the law of Canada, . . . for the limited purpose of accepting the existence of a condition precedent to granting a divorce, is not tantamount to state recognition of an ongoing same-sex marriage. Thus, the policy of this state against the creation of same-sex marriages is not violated.⁴⁸

Likewise, North Carolina courts should apply incidents analysis and determine that same-sex marriages are valid in North Carolina *only* for the purpose of divorce for many reasons. The state is not required to give effect to same-sex marriage in order to grant the couple a divorce.⁴⁹ The effect of granting divorce is quite the opposite. Further, the state's statutory and constitutional prohibitions are not intended to prohibit same-sex divorce.⁵⁰ The purpose of such provisions is to prohibit same-sex couples from enjoying the benefits that flow from an ongoing marriage, such as tax benefits, medical, disability, and education benefits, decision-making authority, and inheritance rights *going forward*.⁵¹ Such prohibitions should not preclude same-sex couples lawfully married in another state from divorcing in their state of residence, in that access to judicial divorce confers no benefit other than the full and final dissolution of the marriage — a result that cannot be obtained by any other means. Holding same sex-couples hostage in their failed marriages, while simultaneously denying them any benefits of marriage, seems almost Kafka-esque.⁵² It seems like some cruel punishment for entering into a marriage prohibited by the state, rather than in furtherance of any legitimate state interest in discouraging same-sex relationships. Further, North Carolina no-fault divorce law reflects the policy that the state should end in law marriages that have

⁴⁸ *Id.* at 156-57.

⁴⁹ *Id.* at 157.

⁵⁰ *See* Byrn & Holcomb, *supra* note 14, at 216 (“DoMAs were not created to prevent same-sex couples from getting divorced. State divorce policy, unlike marriage policy, focuses not on the benefits of marriage, but on the disentanglement of a couple’s affairs. As such, although state DoMA restrictions on who can marry are consistent with the state’s alleged interests in marriage, suggesting that DoMAs also restrict who can divorce is in direct contravention of the state’s interests when it comes to divorce.”).

⁵¹ *See id.* at 217.

⁵² *See* FRANZ KAFKA, IN THE PENAL COLONY 26 (Ian Johnston trans., 1914).

2014]

North Carolina Same-Sex Wedlock

385

ended in fact.⁵³ The state has no valid interest in perpetuating a failed same-sex marriage, any more than it has in perpetuating failed traditional marriages, and its laws should reflect this policy by providing a way to legally end failed same-sex marriages.

V. CONCLUSION

Disallowing lawfully married same-sex couples residing in North Carolina to divorce serves no purpose. Whether by application of the recognition rule espoused in *State v. Ross*, or by application of incidents analysis, North Carolina courts should allow unhappily married same-sex couples like Beth and Justine to end their failed marriages through judicial divorce.

⁵³ 2 SUZANNE REYNOLDS, *LEE'S NORTH CAROLINA FAMILY LAW* § 7.8, 41 (5th ed. 1999).

