

A VERMONT CIVIL UNION AND A CHILD IN VIRGINIA: FULL FAITH AND CREDIT?

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INTRODUCTION

This essay examines the conflict between Lisa and Janet Miller-Jenkins over a child, Isabella Miller-Jenkins. Isabella was conceived and born by Lisa, by means of artificial insemination, during the time that Lisa and Janet were lovers. Additionally, Lisa and Janet were partners in a Vermont civil union, although domiciled in Virginia. Lisa has dramatically changed her mind about her relationship with Janet and about her sexual orientation, and now desires to raise Isabella alone. Janet seeks continuing contact with Isabella as a legal parent.¹ The case has already produced conflicting judgments from courts in Virginia and Vermont, and culture-war journalists, as well as lawyers, are beginning to circle.

While much of the Miller-Jenkins case focuses on the application of the Parental Kidnapping Prevention Act (“PKPA”)² and Virginia’s Uniform Child Custody Jurisdiction and Enforcement Act,³ the Full Faith and Credit Clause⁴ stands in the background. If Janet succeeds in establishing her own parental or quasi-parental rights via a Vermont court, over the objections of Virginia-based Lisa, this will be a great step forward for same-sex marriage advocates who argue that such marriages recognized in one state must be recognized in all states. It will also serve as a strong justification for same-sex marriage opponents who argue that federal marriage protection is necessary.

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1. For the facts of the case, see *infra* Part I.
2. 28 U.S.C. § 1738A (2000).
3. VA. CODE ANN. §§ 20-146.1 to -146.38 (Michie 2004).
4. U.S. CONST. art. IV, § 1.

This article will argue that the Full Faith and Credit Clause does not prevail over more familiar child custody standards, such as the “best interests of the child” standard. Part I of this essay will set forth the relevant history of Lisa and Janet’s litigation so far. Part II will briefly look at common-law and statutory bases for Virginia’s jurisdiction over Lisa’s parentage claim. Part III will examine Supreme Court precedent regarding the Full Faith and Credit Clause as applied to divorce and child custody cases, concluding that this precedent is favorable to a state’s enforcement of its own public policy.⁵ Part IV will argue that federal statutory law enacted many years after the Supreme Court’s last pronouncement on this issue only strengthens this conclusion.

I. THE STORY (SO FAR) OF LISA, JANET, AND ISABELLA

In December of 2000, Lisa Jenkins and Janet Miller, domiciliaries of Virginia, and intimate partners for several years, traveled to Vermont to enter into a civil union.⁶ They now both go by the last name of Miller-Jenkins.

On April 16, 2002, during the time Lisa and Janet’s civil union was in effect, Lisa gave birth to a child, Isabella, conceived by means of artificial insemination.⁷ Four months later Lisa, Janet, and Isabella moved to Vermont.⁸ Just over a year later, in September of 2003, Lisa returned to Virginia with Isabella.⁹ Evidently Lisa had decided to leave both Janet and the lesbian lifestyle, and she filed in Vermont for dissolution of the civil union.¹⁰

Lisa’s decision to file for dissolution of the civil union sparks the issue of what legal rights Janet has in regards to Isabella, since Janet has no biological link to her. Arguably, Janet has functioned as a co-mother during her relationship with Lisa, and perhaps this brings her

5. For a comprehensive survey of the drafting and interpretive history of the Full Faith and Credit Clause, including a critique of dominant interpretations, and concluding that the clause does not require the out-of-state recognition of same-sex marriages that are legal where entered into, see Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255 (1998).

6. *Opposing Courts Decide Parentage of Child Born Via AI During Civil Union*, 31 FAM. L. REP. (BNA) 1051 (Nov. 30, 2004).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

within the limits of what the American Law Institute would recognize as a “de facto parent.”¹¹ Janet certainly felt that it did so. In reply to Lisa’s request for dissolution, Janet’s counterclaim sought “legal and physical rights and responsibilities” over Isabella.¹²

Initially, Lisa was burdened by an attorney who seems to have insisted on principle that Lisa waive the issue of whether Janet has parental rights over Isabella. I say “on principle” because when Lisa protested the attorney’s unauthorized in-court waiver of that issue, the attorney withdrew from the case.¹³ On May 28, 2004, with Lisa still lacking counsel, the Vermont Family Court held a hearing on a “Temporary Order re: Parental Rights and Responsibilities.”¹⁴ This resulted, on June 17, in a Temporary Order giving Janet “parent-child contact,” without ruling on Janet’s parental status or her lack thereof.¹⁵ Under the terms of this order, Lisa, living in Virginia and flat broke, had to take baby Isabella to Vermont to spend the third week of each month with Janet.

The case took a turn toward the issue of interstate recognition when, on July 1, 2004, Lisa filed an action in Virginia, asking the Circuit Court of Frederick County to determine that she is the sole parent of Isabella.¹⁶ Furthermore, she asked the court to award her “custodial rights to raise her daughter in accordance with the law,”¹⁷ which presumably means no monthly trips to Vermont to spend a week with a now-estranged former lover. Shortly thereafter, on July

11. THE AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(C) (2002) (emphasis removed); see also David M. Wagner, *Balancing “Parents Are” and “Parents Do” in the Supreme Court’s Constitutionalized Family Law: Some Implications for the ALI Proposals on De Facto Parenthood*, 2001 BYU L. REV. 1175.

12. *Opposing Courts Decide Parentage of Child Born Via AI During Civil Union*, *supra* note 6, at 1051.

13. See Memorandum of Law in Opposition to Motion to Dismiss Appeal for Lack of Jurisdiction at 7, *Miller-Jenkins v. Miller-Jenkins*, No. 2004-443 (Vt. 2004) (on file with the Ave Maria Law Review) [hereinafter Memorandum of Law] (stating that Lisa’s attorney “moved to withdraw as counsel” after Lisa “insisted that [her attorney] inform the court that [Lisa] did not consent to the waiver”).

14. *Id.*

15. *Id.* at 3-4.

16. *Opposing Courts Decide Parentage of Child Born Via AI During Civil Union*, *supra* note 6, at 1051.

17. Petitioner’s Memorandum of Points & Authorities Regarding Jurisdiction, *Miller-Jenkins v. Miller-Jenkins*, No. CH04-280 (Va. Cir. Ct. 2004), <http://www.publicadvocateusa.org/news/article.php?article=141> (on file with the Ave Maria Law Review) [hereinafter Petitioner’s Memorandum].

19, the Vermont court issued an order threatening Lisa with an immediate hearing to change custody if she did not begin complying with the June 17 order.¹⁸ In response, Janet filed a motion in Vermont to hold Lisa in contempt, which was granted by the Vermont court on September 2.¹⁹

However, before the Vermont contempt order was issued, the Virginia court set a hearing to determine whether it had jurisdiction to hear the case, and cancelled Lisa's Vermont-imposed obligation to take Isabella up north every month.²⁰ At the same time, the Virginia court also granted Janet visitation rights—in Virginia.²¹

On September 28, the Virginia Circuit Court found that Lisa is the sole parent of Isabella and awarded her sole custody, and with it, the right to decide when and where Janet will visit with Isabella.²² The court reasoned that the only other claimant to parental rights over Isabella is Janet. Her claim is based on Vermont's civil union statute, and recognition of this statute in Virginia is barred by the strong public policy embodied in Virginia Code section 20-45.3.²³ Janet did not enter an appearance in the Virginia action, presumably not wishing to waive personal jurisdiction, but is appealing the decision to the Virginia Court of Appeals.²⁴

On November 17, 2004, a Vermont family court granted parental rights to both Lisa and Janet.²⁵ The Vermont court based this conclusion on two premises: (1) if one of them were male, and

18. Memorandum of Law, *supra* note 13, at 8.

19. *Id.* at 8-9.

20. *Id.* at 9.

21. *Id.*

22. Calvin R. Trice, *Va. Woman Gets Sole Custody: Ex-Lesbian Partner Wants Visitation Rights Under Vermont Law*, RICHMOND TIMES DISPATCH, Sept. 29, 2004, at B4.

23. *Opposing Courts Decide Parentage of Child Born Via AI During Civil Union*, *supra* note 6, at 1051-52. The Virginia Code states:

A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.

VA. CODE ANN. § 20-45.3 (Michie 2004).

24. Trice, *supra* note 22.

25. See *Miller-Jenkins v. Miller-Jenkins*, No. 454-11-03 (Vt. Fam. Ct. Nov. 17, 2004) (Ruling on Plaintiff's Motion to Withdraw Waiver to Challenge Presumption of Parentage), available at <http://pub.bna.com/fl/mjvtopnfront.pdf> (on file with the Ave Maria Law Review); Jonathan Finer, *Court Says Both in Gay Union Are Parents*, WASH. POST, Nov. 22, 2004, at A3.

married to the other, then a child born to them would have both of them as her parents; and (2) under Vermont law, civil unions must offer the same rights and benefits as marriages.²⁶

To understand Lisa's argument, it is important to understand her contention about the Vermont proceedings from which she asks the Virginia court to release her. Lisa maintains that there *is no* Vermont custody or parentage judgment, and hence no danger of a conflict or of comity issues or full faith and credit issues arising out of a conflicting custody decision in Virginia.²⁷ Vermont granted a dissolution of the civil union, which only it could do as the situs of the res that is the civil union. In fact, no other state could dissolve the union because no other state recognizes such a status.²⁸ As an incident of that dissolution, the Vermont trial court also entered a temporary "parental rights and responsibilities" order.²⁹ But it is not at all clear that this was a judgment concerning the parentage of Isabella.³⁰

Janet's view is that the temporary "parental rights and responsibilities" order is a recognition by the Vermont court that she, Janet, is a parent to Isabella under Vermont's version of the traditional "child of the marriage" presumption.³¹ However, Lisa maintains that the Vermont order lacks certain standard features of a parentage order. As she has told the Virginia court,

no Vermont order ever awarded custody, any child support, provided for health insurance, or in any way obligated the Respondent [Janet] to provide for the health and welfare of Isabella. Although these elements are not "required" for custody, they are

26. *Miller-Jenkins*, No. 454-11-03, slip op. at 6-8 (citing VT. STAT. ANN. tit. 15, § 1204(a)). In so holding, however, the Vermont court was in a sense flying blind, since Vermont has neither statutory nor case law on the parental status *vel non* in cases of "assisted conception." Appealing this November 17 ruling, Lisa is arguing, *inter alia*, separation of powers, maintaining that it was for the legislature to make law in this novel area: "[Janet] cannot lay claim to more than the Legislature has afforded her: [Janet] is not a parent under Title 15 of the Vermont statutes." Memorandum of Law, *supra* note 13, at 12 n.3.

27. Petitioner's Memorandum, *supra* note 17.

28. See, e.g., *Rosengarten v. Downes*, 802 A.2d 170 (Conn. App. Ct. 2002) (declining to dissolve a Vermont civil union because such a thing is unknown in Connecticut law).

29. Memorandum of Law, *supra* note 13, at 2.

30. Petitioner's Memorandum, *supra* note 17 ("It is undisputed that Vermont has never entered an order ruling that Respondent is the parent of Isabella or that she is a 'person acting as a parent,' custodial or otherwise.").

31. In Vermont this is codified at VT. STAT. ANN. tit. 15, § 308 (2002).

certainly customary, and their absence in the Vermont order is highly relevant.³²

II. BASES OF VIRGINIA JURISDICTION FOR LISA

A threshold question, of course, is how a Virginia court can take jurisdiction of a custody and/or parentage issue that is already *sub lite* in Vermont, especially in light of the federal Parental Kidnapping Prevention Act,³³ which aims to stop the divorced parent who, dissatisfied with the forum state's custody judgment, whisks the child off to another state and obtains a custody judgment more to his or her liking.³⁴

Virginia's claim is strong under traditional bases such as territorial jurisdiction.³⁵ Lisa and Janet lived together there before their two sojourns in Vermont—first a brief visit to obtain a civil union, and then a longer one that ended with the breakdown of their relationship. At present, Lisa and Isabella are both domiciled in Virginia.³⁶ It was in Virginia that Lisa was artificially inseminated, and there that Isabella was born. Additionally, certain standard conflict-of-law concepts may help Lisa. It is arguable that, as domicile to both Lisa and Isabella, and as the place where Isabella was conceived and born, Virginia “has the most significant relationship to the occurrence and the parties.”³⁷ There is also Virginia's recently enacted statute prohibiting same-sex marriages, civil unions, and the

32. Petitioner's Memorandum, *supra* note 17.

33. 28 U.S.C. § 1738A (2000).

34. Referring to the Parental Kidnapping Prevention Act, one court stated: “By this statute Congress has provided for the effect to be given to the judicial proceedings in the state originally exercising jurisdiction, and thus has defined what full faith and credit requires in such instances.” *Quenzer v. Quenzer*, 653 P.2d 295, 299 (Wyo. 1982). Needless to say, Lisa and Janet differ over which state is “the state originally exercising jurisdiction” over Isabella's parentage.

35. *See Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) (“[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil *status* and capacities of its inhabitants . . .”).

36. *See Miller-Jenkins v. Miller-Jenkins*, No. CH04-280 (Va. Cir. Ct. Oct. 15, 2004), available at <http://pub.bna.com/fl/04280.htm> (on file with the Ave Maria Law Review) (Final Order of Parentage granting Lisa complete legal rights as Isabella's sole parent). Domicile gives a state a basis for jurisdiction in a divorce suit. *See Bell v. Bell*, 181 U.S. 175, 177-78 (1901).

37. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (1971) (explaining the law that applies to an issue in tort).

recognition of either.³⁸ While this statute will play its most important role in the “public policy”³⁹ scene of this drama, it also strengthens the argument that application of Virginia law to this case will cause less impairment to a state goal under a “comparative impairment” analysis.⁴⁰

III. THE FULL FAITH AND CREDIT CLAUSE

It is possible that this case is ultimately governed either by the Parental Kidnapping Prevention Act or by Virginia’s version of the Uniform Child Custody Judgment Enforcement Act.⁴¹ As the case approaches the Virginia Court of Appeals, both parties accept that these statutes apply, and both argue that they win under them.⁴² But in the background, and also briefed by the parties, is the issue of the Constitution’s Full Faith and Credit Clause.⁴³

The Supreme Court has steadily affirmed that full faith and credit is not a broad rule obliging a state to set aside its own laws in favor of those of other states. The Court has said so at least since 1909, when it explained in *Fall v. Eastin*:⁴⁴ “This provision does not extend the jurisdiction of the courts of one State to property situated in another, but only makes the judgment rendered conclusive on the merits of the

38. See VA. CODE ANN. § 20-45.3 (Michie 2004).

39. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(b),(e) (1971) (listing as “factors relevant to the choice of the applicable rule of law,” “relevant policies of the forum” and “basic policies underlying the particular field of law”). *But see also id.* § 6(2)(c) (listing as a factor the “relevant policies of other interested states and the relative interests of those states in the determination of the particular issue”).

40. See, e.g., *Engel v. CBS Inc.*, 981 F.2d 1076, 1081 (9th Cir. 1992) (“Under the comparative impairment approach, the court examines ‘which state’s interest would be more impaired if its policy were subordinated to the policy of the other state.’”) (citation omitted); *Barringer v. State*, 727 P.2d 1222, 1227 (Idaho 1986) (concluding that “Idaho as the forum state has the most significant interest in having its law applied under a ‘comparative impairment’ . . . analysis”).

41. 28 U.S.C. § 1738A (2000); VA. CODE ANN. § 20-146.1 to -146.38 (Michie 2004).

42. See Brief of Appellee, *Miller-Jenkins v. Miller-Jenkins*, No. 2192-04-4 (Va. Ct. App. Jan. 3, 2005), available at http://www.lc.org/attachments/Miller_Brief_VACtApp.pdf (on file with the Ave Maria Law Review); Press Release, ACLU of Virginia, Appeals Brief Filed in Interstate Lesbian Custody Case (Dec. 8, 2004) (on file with the Ave Maria Law Review).

43. *Id.*

44. 215 U.S. 1 (1909) (holding that Nebraska courts are not bound by the Full Faith and Credit Clause to execute a Washington state equitable judgment giving plaintiff title to land in Nebraska).

claim or subject-matter of the suit.”⁴⁵ The Court reaffirmed this teaching most recently in 2003 in a unanimous opinion in *Franchise Tax Board v. Hyatt*.⁴⁶ Justice O’Connor, writing for a unanimous Court, stated: “Whereas the full faith and credit command ‘is exacting’ with respect to ‘[a] final judgment . . . rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment,’ it is less demanding with respect to choice of laws.”⁴⁷

In this same discussion, the Court reached back to its 1939 decision in *Pacific Employers Insurance Co. v. Industrial Accident Commission*,⁴⁸ where it held, concerning the Full Faith and Credit Clause:

While the purpose of that provision was to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states, the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.⁴⁹

In the area of family law, the Court has been willing to take this “attributes of sovereignty” idea quite far. Consider, for instance, the famous *Williams*⁵⁰ litigation, involving a North Carolina couple, each married to someone else, who fled together to Nevada, fulfilled that state’s tongue-in-cheek residency requirement, obtained ex parte

45. *Id.* at 12 (Holmes, J., concurring). Justice Holmes, concurring, explained the rather opaque language phrase just quoted: “As between the parties to it that [Washington] decree established in Washington a personal obligation of the husband to convey to his former wife.” *Id.* at 14 (Holmes, J., concurring). This obligation was not enforceable in Nebraska, unless, Holmes adds, the husband had been before the court in Nebraska; were such the case, Holmes would find that the Washington ruling was binding in Nebraska under the Full Faith and Credit Clause. *Id.* at 14-15 (Holmes, J., concurring). But this was not the holding of the Court. *Cf. Baker v. General Motors Corp.*, 522 U.S. 222, 241 (1998) (Scalia, J., concurring) (“[E]nforcement measures do not travel with sister-state judgments as preclusive effects do.”).

46. 538 U.S. 488 (2003).

47. *Id.* at 494 (quoting *Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998)).

48. 306 U.S. 493, 501 (1939).

49. *Id.*

50. *Williams v. North Carolina (Williams I)*, 317 U.S. 287 (1942), *Williams v. North Carolina (Williams II)*, 325 U.S. 226 (1945).

divorces from their spouses back home, married each other, then returned to North Carolina—only to be prosecuted for bigamy.⁵¹ The case went before the Supreme Court twice. In *Williams I*, the Court, per Justice Douglas, held that North Carolina was barred by the Full Faith and Credit Clause from rejecting a Nevada divorce merely because its own law would not have granted that divorce.⁵² But in *Williams II*, the Court, per Justice Frankfurter, focused on an issue not addressed in *Williams I*: whether North Carolina had power to review Nevada's assertion of jurisdiction over the parties, as a condition of respecting their Nevada divorce and marriage decrees.⁵³

Thus, using the procedural issue of jurisdiction, or more precisely, a jurisdictional fact of domicile,⁵⁴ the *Williams II* Court largely undid the substantive holding of *Williams I*. The Court in *Williams II* announced:

The State of domiciliary origin should not be bound by an unfounded, even if not collusive, recital in the record of a court of another State. As to the truth or existence of a fact, like that of domicil, upon which depends the power to exert judicial authority, a State not a party to the exertion of such judicial authority in another State but seriously affected by it has a right, when asserting its own unquestioned authority, to ascertain the truth or existence of that crucial fact.⁵⁵

However, caution is in order. The burden of proof is on the party assailing the secondary forum's jurisdiction: "The burden of undermining the verity which the Nevada decrees import rests heavily upon the assailant. But simply because the Nevada court found that it had power to award a divorce decree cannot, we have seen, foreclose reexamination by another State."⁵⁶

Is Virginia, with all of its contacts with the facts of the Miller-Jenkins case, and its strong public policy of not recognizing same-sex unions or their incidents, "seriously affected," within the meaning of *Williams II*, by Vermont's contrary parental holdings? For that

51. 317 U.S. at 289-90.

52. *Id.* at 294.

53. 325 U.S. at 229-30.

54. *Id.* at 230.

55. *Id.*

56. *Id.* at 233-34.

matter, is Vermont, the uncontested forum of at least two important facts here, the civil union itself and the dissolution thereof, “seriously affected” by Virginia’s contrary rulings?

Additionally, attention must be paid to the Supreme Court’s decision in *Kovacs v. Brewer*.⁵⁷ In that case, a mother divorced in New York tried to regain custody of her child who was living with her ex-husband’s father in North Carolina.⁵⁸ She was awarded custody by a court in New York, but the grandfather in North Carolina “refused to surrender the child,”⁵⁹ much like Lisa refusing the required monthly trip to Vermont (although, to be precise, Lisa takes the view that she had not yet violated that order at the time the Vermont court first found her in contempt).

In response, the mother, Aida Kovacs, turned to a North Carolina trial court to enforce her New York custody ruling.⁶⁰ After further fact-finding, the North Carolina trial court determined that it was not bound by the New York ruling, and the North Carolina Supreme Court affirmed.⁶¹ Janet has not taken this step, but conceivably could. As we have noted, however, Lisa contests whether the Vermont “parental rights and responsibilities” order was, in fact, a custody ruling.

In the United States Supreme Court, Ms. Kovacs argued *inter alia* that the Full Faith and Credit Clause required North Carolina to honor the New York custody ruling.⁶² The Court did not agree.⁶³ It noted that the New York ruling was not *res judicata* even in New York, as it could be modified by changed circumstances.⁶⁴ Since it was not clear whether the North Carolina court had in fact found changed circumstances, the Court remanded for a finding on that issue,⁶⁵ but along the way, it held that:

Whatever effect the Full Faith and Credit Clause may have with respect to custody decrees, it is clear . . . “that the State of the forum

57. 356 U.S. 604 (1958).

58. *Id.* at 604-05.

59. *Id.* at 605.

60. *Id.*

61. *Kovacs v. Brewer*, 97 S.E.2d 96 (N.C. 1957), *vacated by* 356 U.S. 604 (1958).

62. *Kovacs v. Brewer*, 356 U.S. 604, 607 (1958).

63. *Id.* at 608.

64. *Id.*

65. *Id.*

has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered."⁶⁶

In the Miller-Jenkins case, the question of changed circumstances has not yet been specifically addressed; but then, neither is there undisputedly an out-of-state custody ruling. At all events, the doctrine of the *Kovacs* decision supports Lisa's position. The Supreme Court upheld the North Carolina court in its decision to apply a "welfare of the child"⁶⁷ test even in the face of a New York order that ran contrary to the North Carolina court's estimate of the child's welfare. In remanding for a finding on the issue of changed circumstances, the Court added that if the North Carolina courts "properly find that changed conditions make it to the child's best interest for the grandfather to have custody, decision of the constitutional questions [i.e., concerning full faith and credit] now before us would be unnecessary."⁶⁸ One could not ask for a clearer statement that, in issues of child custody, the legal gravitational field of the Full Faith and Credit Clause is weaker than that of traditional child-welfare standards such as "best interests of the child," as these standards are determined by the courts of the child's domicile.

IV. FULL FAITH AND CREDIT IN RELATION TO LATER STATUTES

Cases like *Williams II* and *Kovacs* show us the Full Faith and Credit Clause operating free of later statutory law that implements and modifies it.⁶⁹ PKPA, for instance, lays down some binding assumptions relating to full faith and credit, which would be outcome-changing if applied to older cases. For example, the *Kovacs* Court observed that "the New York decree was not binding because the divorce court had no jurisdiction to modify its original custody award after the child had become a resident and domiciliary of North Carolina."⁷⁰ It is hard to see such a judgment standing after PKPA, because PKPA aims, in part, to neutralize the mere change of a child's

66. *Id.* at 607 (quoting *Halvey v. Halvey*, 330 U.S. 610, 615 (1947)).

67. *Id.* at 606.

68. *Id.* at 608.

69. For a discussion of the Full Faith and Credit Clause as granting broad authority to Congress for its implementation, see Whitten, *supra* note 5.

70. *Kovacs*, 356 U.S. at 606.

domicile as a factor causing loss of jurisdiction by the court that made the original custody ruling.⁷¹

However, if PKPA modifies operation of the Full Faith and Credit Clause, then the Defense of Marriage Act (“DOMA”)⁷² modifies PKPA, explicitly expanding the authority of states to refuse recognition to same-sex marriages, their imitations (such as Vermont civil unions), and their incidents. The authority of a forum state, such as Virginia in the Miller-Jenkins case, to implement its public policy on matters of marriage and child custody, an authority already given wide scope through the power to reexamine jurisdictional facts (as in *Williams II*) or to hold the “best interests of the child” test to be determinative (as in *Kovacs*), is almost certainly wider, not narrower, as a result of the combined operation of PKPA and DOMA.

71. See 28 U.S.C. § 1738A(b)(4), (c)(1)-(2)(A) (2000). The *Kovacs* holding that full faith and credit may yield to a “best interests of the child” test arguably survives PKPA, due to exceptions built into PKPA itself. This is all the more the case after the enactment of the Defense of Marriage Act, at least where children conceived in the context of same-sex relationships are concerned.

72. 28 U.S.C. § 1738C (2000).