

Voilà! Taking the Judge Out of Divorce

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Divorce and court go together like a horse and carriage, but that may be changing. Recently, France allowed couples to contract into a divorce without any judicial involvement. This Article examines the implications for American courts recognizing divorces from France and whether the United States will join the non-judicial divorce movement.

INTRODUCTION

People may harbor a divorce fantasy that goes something like this: a stern judge peers over his eyeglasses, glares down at the no-good other spouse, and raises a wobbly finger to shake. The judge leans forward, slamming down the gavel and yelling at the opposing spouse in open court.

Unfortunately, this kind of cathartic moment is unlikely to happen. While closing statements in murder cases and Erin Brokovich style lawsuits are the stuff of legend, divorces resemble an orderly property division. They are often a calm and methodical unwinding of a couple's partnership. Many times, they involve a conference table with fluorescent lights and lawyers writing up agreements for the court's approval.¹

Despite the increasing autonomy of the parties in divorce, one aspect of the divorce fantasy is correct: judicial oversight, which has a long

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1. "Most divorcing parties themselves settle the financial issues incident to dissolution. They present their agreement to the court for approval." D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 679 (6th ed. 2016). This is partly due to the large increase of mediation in family law cases in recent years. Mary E. O'Connell & J. Herbie DiFonzo, *The Family Law Education Reform Project Final Report*, 44 FAM. CT. REV. 524, 527-28 (2006) ("In addition, the vast majority of family law cases are ultimately settled, either by the parties themselves, through negotiation involving lawyers (whether traditional attorneys or the newer 'collaborative lawyers') or by mediation.").

history in the United States. Indeed, a fundamental premise in American law is that divorce constitutes a civil judicial process.²

Judicial involvement in American divorces started with the early Pilgrim and Puritan settlers, who charged the local magistrates with overseeing marriage and divorce.³ The power to issue divorce decrees remains with the judiciary today to ensure the enforcement of both parties' rights and equity in the dissolution process.⁴

Given the transactional nature of modern divorces, however, state legislatures have started to reevaluate the judicial role. In 2015 and 2017, Minnesota legislators proposed an administrative divorce option that circumvented the courts, but it never became law.⁵ Some states do allow for a summary dissolution in which the divorce hearing can be waived, but it is still overseen by a court.⁶

American courts have recognized contract divorces executed abroad.⁷ For recognition of a foreign divorce, the original decree must comport with the general U.S. requirements for notice, opportunity to be heard, personal jurisdiction, and lack of fraud.⁸ Additionally, the decree must not be objectionable on public policy grounds.⁹

Foreign contract divorces may now include those from France, which recently allowed divorce by agreement of the parties without any judicial oversight. This further pushes family law toward increased contractualization and liberalization of divorce on the global scale,¹⁰ with France continuing to offer innovations in this area.¹¹

2. Alan Reed, *Transnational Non-Judicial Divorces: A Comparative Analysis of Recognition Under English and U.S. Jurisprudence*, 18 LOY. L.A. INT'L & COMP. L. REV. 311, 311 (1996).

3. Judith Areen, *Uncovering the Reformation Roots of American Marriage and Divorce Law*, 26 YALE J.L. & FEMINISM 29, 63 (2014); see also *infra* Part I.

4. See, e.g., Vijay Bal, *Retention of Jurisdiction Over Alimony Issues*, 20 J. CONTEMP. LEGAL ISSUES 257, 264 (2011) ("By retaining post-divorce jurisdiction over alimony, the court is able to ensure equity in shifting circumstances."); James Herbie Difonzo, *Customized Marriage*, 75 IND. L.J. 875, 898 (2000) (noting that divorce courts weigh equitable considerations in divorce cases).

5. H.R. 302, 90th Leg., 2017-2018 (Minn. 2017); S. 1726, 90th Leg., 2017-2018 (Minn. 2017); H.R. 1348, 89th Leg., 2015-2016 (Minn. 2015); S. 1361, 89th Leg., 2015-2016 (Minn. 2015).

6. See, e.g., CAL. FAM. CODE § 2400 (West 2018).

7. See *infra* Part II.

8. See *infra* Part II.B.

9. *Id.*

10. "Scholars describing the current contractualization of family law . . . cite the availability of no-fault divorce, the enforceability of prenuptial agreements about property distribution, and the enforceability of agreements between nonmarital partners." Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 835-36 (2004). "But the status-to-contract story overstates the changes that have occurred in family law over time. It obscures the substantial evidence that supports a counter-narrative that could be told about family law, but is not: the story of the persistence of status rules denying individuals choice about the structure of their relationships." *Id.* at 836.

11. Another French family law innovation is the Pacte Civil de Solidarité (PACS), which is a legally recognized partnership somewhere in between a cohabitation and marriage. See, e.g., Ji Hyun

This Article examines the possibility of non-judicial divorce in the United States based on the French model. Part I begins by examining the recognition of divorce by agreement of the parties in France. Part II analyzes the judicial role in American divorces, and whether it bars either domestic non-judicial divorce or recognition of foreign non-judicial divorce. Part III undertakes a comparative analysis, concluding that the United States may be amenable to non-judicial divorces that occur not only abroad but, eventually, within its own borders.

I. NON-JUDICIAL DIVORCE IN FRANCE

Currently, there are several types of divorce available in France: (1) divorce by mutual consent, (2) divorce on the basis that both spouses accept that the marriage has broken down, (3) divorce following irrevocable damage to the conjugal bond, and (4) contested or hostile divorce.¹² This Part focuses on divorce by mutual consent, which recently has led to non-judicial, contractual divorce in France.

Divorce numbers throughout the world have grown in the last forty years, along with the increased freedom for families in society. To broaden divorce access, the legal reform of 1975 introduced divorce by mutual consent in France.¹³ The numbers show the popularity of divorce by mutual consent: in 2015, there were 123,668 divorces in France, and half of these were divorces by mutual consent.¹⁴

Divorce by mutual consent has evolved since 1975. In particular, the last few years have seen the decline of the family judge's role in France. In 1975, spouses met with the family judge twice and divorce judgments were pronounced after a three month period, during which the spouses had time to reflect. Likewise, a minimum of six months of marriage was necessary before a spouse could claim a divorce. In 2004, the French

Kim, Scott A. Oliver & Margaret Ryznar, *The Rise of PACS: A New Type of Commitment from the City of Love*, 56 WASHBURN L.J. 69, 85 (2017).

12. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 229 (Fr.). *Notaires de France* explains the four types of divorces. Divorce by mutual consent is divided into contractual divorce and judicial divorce when minor children request to be heard by a judge and when a spouse is subject to a protective measure. Notaries of France, *Getting Divorce in France: Different Types of Divorce*, NOTAIRES.FR (Apr. 19, 2017), <https://www.notaires.fr/en/differents-types-divorce> [<https://perma.cc/9WMD-YL9X>] [hereinafter *Different Types of Divorce*]. See *infra* Part I.

13. Loi 75-617 du 11 juillet 1975 portant réforme du divorce [Law 75-617 of July 11, 1975 on the Reform of Divorce], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], JULY 12, 1975.

14. INSTITUT NATIONAL DE LE STATITIQUE ET DES ÉTUDES ÉCONOIQUES [FRENCH NATIONAL INSTITUTE OF STATISTICS AND ECONOMIC STUDIES (INSEE)], MARIAGES - PACS - DIVORCES 28 (2017), <https://www.insee.fr/fr/statistiques/2569324?sommaire=2587886> [<https://perma.cc/BW4D-C732>].

legislator removed the second judge interview and the minimum six months before seeking divorce.¹⁵

This trend toward non-judicial processes is more generally reflected in the French family law, which is increasingly characterized by the contractualization of family relations and party autonomy. There are many examples of this, such as the introduction of *mandat de protection future*,¹⁶ the posthumous mandate¹⁷ or the decline of the forced heirship with the introduction of the anticipated renunciation of a forced share in succession law.¹⁸

Just like the modern family, society has changed and is today characterized by the rapidity of economic and personal meetings and exchanges. The evolution of family relations, and thus the evolution of couples' separation, is an example. People marry, divorce, and marry again.¹⁹

In this context, on November 16th, 2016, a bill to modernize justice into the twenty-first century introduced non-judicial divorce by mutual consent in France.²⁰ The 2016 divorce law reform took place on January 1st, 2017, a few days after the French parliament voted for it. The speed of execution illustrated the strong desire to reform the divorce process from a long judicial process to a quick contractual process.

The 2016 divorce reform introduced French Civil Code Art. 229-1.²¹ It provides that “[w]hen the spouses agree on the marriage breakdown and its effects, they record, each assisted by a lawyer, their agreement into an agreement in the form of an act under private signature countersigned by their lawyers and established under the conditions provided for in Article

15. Loi 2004-439 du 26 mai 2004 relative au divorce [Law 2004-439 of May 26, 2004 Relating to the Divorce], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 27, 2004.

16. *Mandat de protection future* allows an individual to manage a future legal incapacity by undertaking advanced directives in a contract. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 477 (Fr.).

17. “The posthumous mandate is a legal act by which a person appoints another person (*mandataire*) to be responsible for managing all or part of his assets after his death, on behalf and in the interest of his heirs.” Angélique Devaux, DeAnna Beckner & Margaret Ryznar, *The Trust Has More Than A Common Law Creature*, 41 OHIO N.U. L. REV. 91, 117 (2014).

18. French Civil Code, Article 929 provides: “Any presumptive forced heir may renounce his right to exercise an action in reduction in a succession not yet opened. This renunciation must be made for the benefit of one or more specified persons. The renunciation only binds the person who renounces from the day it is accepted by the person from [whom] he has the potential to inherit.” CODE CIVIL [C. CIV.] [CIVIL CODE] art. 929 (Fr.).

19. See, e.g., Deborah Zalesne, *The Contractual Family: The Role of the Market in Shaping Family Formations and Rights*, 36 CARDOZO L. REV. 1027, 1035 (2015) (noting high divorce and remarriage rates).

20. Loi 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle [Law 2016-1547 of November 18, 2016 of Modernization of Justice of the 21st Century], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Nov. 19, 2016.

21. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 229-1 (Fr.).

1374.”²² Divorce by mutual consent is therefore a contract by which spouses agree on the principle and consequences of their divorce. The spouses are not heard by a judge and are assisted only by their lawyers.

Contractual freedom does not mean that couples are completely on their own to divorce. Rather, the non-judicial divorce process has been highly regulated by the French legislature in order to keep a certain solemnity in the marriage dissolution. Marriage dissolution could have been more flexible by copying the Pacte Civil de Solidarité (PACS) contract dissolution procedure, in which only an acknowledgment of receipt is required to end the partnership contract.²³ Instead, the French legislator decided to require bilateral willingness to separate for a divorce by mutual consent—only spouses who agree on the terms of their divorce may proceed with a non-judicial divorce.

Contested divorces and other types of divorces still proceed through the judicial process.²⁴ In some situations, divorce by mutual consent remains judicial, such as when the couple’s minor children request to be heard by a judge, or when a spouse does not have sufficient mental capacity. In this situation, the re-introduction of the judge aims to protect vulnerable parties.²⁵

Non-judicial divorce has revolutionized the French legal landscape. Not only has it become an option for mutual consent divorce, but it is now common.

A. The Logistics of French Non-Judicial Divorce

Given the uniqueness of non-judicial divorce, this Part describes it in detail. Relevant issues range from contract law to the protection of children.

1. Contract Characteristics

Non-judicial divorce by mutual consent is a contract that must comply with French contract law requirements. According to the French Civil Code, a valid contract requires the (1) consent of the parties, (2) capacity to agree, and (3) lawful and certain consent.²⁶ However, a person

22. *Id.*

23. “There are several ways for a couple to dissolve a PACS: (1) if either party gets married; (2) upon the death of one party; (3) by mutual consent; or (4) if one party unilaterally decides to terminate the relationship.” Kim, Oliver & Ryznar, *supra* note 11, at 85.

24. *Different Types of Divorce*, *supra* note 12.

25. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 229-1 (Fr.); see also *Different Types of Divorce*, *supra* note 12.

26. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1128 (Fr.).

lacking mental capacity²⁷ is not deprived of the divorce right, but may divorce through a judicial process where the judge for family matters supplements the person's individual capacity.

The content of the divorce contract must comply with French public policy. According to the new French Civil Code Article 1162 issued as part of the 2016 contract reform: "A contract cannot derogate from public policy either by its stipulations or by its purpose, whether or not this was known by all the parties."²⁸ Parental authority and maintenance obligations are considered to be a matter of public policy²⁹ and therefore cannot be renounced by contract.

In sum, French courts have an extensive interpretation of contract provisions. The validity of the divorce contract may be challenged for lack of consent or mental capacity, or as a violation of French public policy.

2. Lawyers as the New Judges

The divorce contract must be drafted with the help of two independent lawyers (*avocats*),³⁰ one for each spouse. The presence of two lawyers increases the cost of the divorce compared to the past, when only one lawyer was necessary. Nonetheless, two lawyers are now mandatory to guarantee the fairness of the contract, to respect each party's interest, and to avoid conflicts of interest as in the Anglo-American model of legal representation.³¹

27. Such as a person under a guardianship or curatorship. Exclusion of persons placed under protective supervision. Article 229-2(2) of the Civil Code excludes from this procedure spouses of whom at least one is placed under a legal protection provided for in Articles 425 et seq. of the same Code, namely the protection of justice, guardianship, trusteeship, or legal representation measures (protection mandate and family empowerment). When a spouse is placed under a protection regime, recourse to divorce by mutual judicial consent is also prohibited (Article 249-4 of the Civil Code).

Le nouveau divorce par consentement mutuel par acte d'avocat prévu à l'article 229-1 du code civil, SANDRINE BERESSI: ADVOCATE (Mar. 6, 2017), <http://www.beressi-avocat.fr/le-nouveau-divorce-par-consentement-mutuel-par-acte-davocat-prevu-a-larticle-229-1-du-code-civil/> [<https://perma.cc/K8FZ-Y6YH>].

28. Ordonnance 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations [Order 2016-131 of February 10, 2016 on the Reform of the Law of the Contracts, the General Regime and the Proof of the Obligations], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Feb. 11, 2016.

29. For example, it has been ruled that the Moroccan law that does not provide a maintenance obligation for spouses is contrary to the French International Public Policy. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., July 16, 1992, Bull. civ. I, No 315, p. 207.

30. "Lawyers (*avocats*) are officers of the court and members of an independent, self-employed-profession. . . In their daily business lawyers advise and represent clients." *Legal Profession and Justice Networks*, EUR. JUST., (July 6, 2018, 1:57 PM), https://e-justice.europa.eu/content_legal_professions-29-fr-en.do?member=1 [<https://perma.cc/B2RU-NYRT>].

31. MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 2016) ("(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent

The lawyers must be registered at a bar association of their choice. There is no requirement for them to be a French *avocat* registered at the French Bar Association, but they must have full professional capacity under their foreign bar association.³²

The divorce contract may be drafted in a language other than French. However, the contract must be translated into French to be registered in the form of a notarial authentic deed.³³ An official translator may also be hired when a spouse does not speak French to ensure full comprehension and consent.

3. Protection of Children

Although divorce only relates to the spousal relationship, children are often at the heart of a separation. Thus, minor children are treated with special attention in the new divorce procedure.

Parents have a duty to inform their children of the divorce if they are capable of discernment, and they must be informed of the opportunity to be heard by a judge.³⁴ The judge's hearing is not mandatory, but it is an option at the children's own request. The divorce remains judicial if the children exercise this right.³⁵

The law goes even further and requires minor children to sign a divorce information form consent,³⁶ which is then attached to the divorce contract. Not providing such a form and neglecting the duty of information leads to the nullity of the contract. According to the French Government's circular,³⁷ which provides details about the practice of the new divorce,

conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client").

32. French Civil Code, Article 229-3 prescribes that the agreement must state the registered bar of the Avocat. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 229-3 (Fr.).

33. As a general rule, the Latin notarial document is deemed to be authentic and executory and constitutes proof of the facts asserted therein. It can only be invalidated by judicial order In France, the notarial document and the facts included therein, are automatically admissible in evidence and only upon judicial declaration of invalidity does the document lose its executory nature.

Pedro A. Malavet, *The Foreign Notarial Legal Services Monopoly: Why Should We Care?*, 31 J. MARSHALL L. REV. 945, 955 (1998).

34. MINISTÈRE DE LA JUSTICE, BULLETIN OFFICIAL, CIRCULAIRE DU 26 JANVIER 2017 DE PRESENTATION DES DISPOSITIONS EN MATIERE DE DIVORCE PAR CONSENTEMENT MUTUEL ET DE SUCCESSION ISSUES DE LA LOI NUMERO 2016-1547 DU 18 NOVEMBRE 2016 DE MODERNISATION DE LA JUSTICE DU XXIEME SIECLE ET DU DECRET NUMERO 2016-1907 DU 28 DECEMBRE 2016 RELATIF AU DIVORCE PREVU A L'ARTICLE 229-1 DU CODE CIVIL ET A DIVERSES DISPOSITIONS EN MATIERE SUCCESSORALE 15 (June 30, 2017) (discernement must be made by parents) [hereinafter BULLETIN OFFICIAL DU MINISTÈRE DE LA JUSTICE], <http://circulaires.legifrance.gouv.fr/index.php?action=afficherCirculaire&hit=1&retourAccueil=1&r=42386> [https://perma.cc/XBS8-ATZR].

35. See *supra* Part I.A.3.

36. CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] art. 1144 (Fr.).

37. BULLETIN OFFICIAL DU MINISTÈRE DE LA JUSTICE, *supra* note 34.

the divorce information form has a dual objective: first, to provide children all the practical information to ensure the effective exercise of their rights, and second, to allow *avocats* and *notaires* to verify the application of the French civil code provision.³⁸ In France, a *notaire* is a legal specialist appointed by the Minister of Justice with a public authority mission to draw up authenticated contracts on behalf of clients and to give a personal guarantee regarding the content and date of the instrument, thus simplifying the proof.³⁹

Scholars and lawyers have criticized this duty of information and the creation of the divorce information form.⁴⁰ First, the child may feel pressure to do as the parents wish.⁴¹ Second, a child's discernment capacity is subjective and it is unclear how to judge it. Some authors argue that the child must be eight or nine years old,⁴² while others agree on thirteen.⁴³ However, there is no objective answer because discernment capacity is evaluated individually. Therefore, the evaluation is based on particular facts, such as the child's age, maturity, and level of understanding of the divorce. Only parents are responsible to evaluate *in concreto* their children's age of discernment.

4. A Formal Process

Once an agreement has been reached between the spouses, the *avocat* sends a draft of it to the spouses by registered letter with an

38. *Id.*

39. *The Role of the Notaire*, NOTAIRES DE FRANCE (June 25, 2014) [hereinafter *Definition of a Notaire*], <https://www.notaires.fr/en/role-notaire> [<https://perma.cc/L4YS-4TRX>] (providing a detailed definition of a *notaire*'s role).

40. "This new divorce without judge seems to us slipping on a dangerous slope: the interests of the minor children could be violated and their right to be heard seems a very illusory defense." Sophie Pretot, *L'enfant dans le nouveau divorce par consentement mutuel: danger et incohérence du droit positif*, REVUE JURIDIQUE PERSONNES ET FAMILLE (2017) (Fr.) (translated by the author of this Article). "The legislature could have reserved the non-judicial divorce by mutual consent to the hypotheses where the spouses have no minor children. . . . to face these criticisms, another solution could have been implemented: in the presence of minor children, the systematic submission to homologation of clauses concerning children." CHRISTOPHE LESBATS, LE DROIT NOTARIAL DU DIVORCE, PRATIQUE NOTARIALE 22 (LexisNexis 2017) (Fr.) (translated by the author of this Article).

41. See, e.g., Barbara Jo Fidler & Nicholas Bala, *Children Resisting Postseparation Contact with a Parent: Concepts, Controversies, and Conundrums*, 48 FAM. CT. REV. 10, 35 (2010) (noting that care may be needed to prevent children from feeling such pressure in their parents' divorce); Philip M. Stahl, *Critical Issues in Relocation Cases: A Custody Evaluator's Response to Parkinson and Cashmore (2015) and Thompson (2015)*, 54 FAM. CT. REV. 632, 633 (2016) (noting "anecdotal evidence in child custody evaluations [that] confirms that the pressure of parents often influences children's wishes").

42. Claude Lienhard, *Le nouveau divorce par consentement mutuel, une révolution culturelle*, 6 DALLOZ 307 (2017) (Fr.).

43. Thibault Douville & Laurence Mauger-Vielpeau, *La loi de modernisation de la justice du XXIème siècle: aspects de droit des personnes et de la famille*, 13 LA GAZETTE DU PALAIS 14 (2016) (Fr.).

acknowledgement. After a fifteen-day cooling-off period, the contract can be signed by the spouses and both of the *avocats*.⁴⁴

Non-judicial divorce in France is achieved through a private agreement signed by the spouses and countersigned by their respective attorneys. The agreement is called *acte d'avocat* and enjoys a strong probative value because it provides proof of the writing and signature of the parties, equally as regard to themselves and their heirs or successors.⁴⁵ The contract may be modified, but a new fifteen-day cooling-off period starts before the contract is signed again.⁴⁶ The signed contract is then sent to a *notaire*, who has a period of fifteen days to register the document.⁴⁷

The role of the *notaire* is unique because there is no duty to check the fairness of the contract. Even if the contract shows an imbalance between the spouses, the *notaire* cannot refuse the registration of the contract. The role of the *notaire* is limited to the formalism aspects of the contract's registration. The *notaire* checks the accuracy of the divorce agreement's content, especially regarding the cooling-off period, the civil status of the parties, the effects of the divorce (such as the amount of the compensatory payment), and the share of the spouses' assets.⁴⁸

The probative value assigned to the notarial instrument implies the guarantee of the accuracy of the agreement's content and includes a guaranteed date. The authentic instrument is enforceable in itself, which means that it enjoys the same legal force as a court order. Under French law, the contractual divorce produces the same legal effects as a French judicial divorce.

The dissolution of the marriage occurs between the spouses on the day that the *notaire* registers the divorce agreement, and between the spouses and third parties on the day that the transcription is undertaken on the public civil register.⁴⁹ However, as the spouses are not heard by a *notaire* and a *notaire* is not a judge, the divorce is not pronounced by a jurisdiction.⁵⁰

B. International Aspects of French Non-Judicial Divorce

Cross-border issues may arise at different steps of the divorce, such as when the couple is binational, when a spouse has a domicile in a foreign country, and when the spouses own properties in different states. However, in the international context, French non-judicial divorce is complex

44. See also *Different Types of Divorce*, *supra* note 12.

45. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1374 (Fr.).

46. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 229-4 (Fr.).

47. CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] art. 1146, 3 (Fr.).

48. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 229-1, 2 (Fr.).

49. BULLETIN OFFICIEL DU MINISTÈRE DE LA JUSTICE, *supra* note 34, at 21.

50. See *infra* Part I.B.

because it is not an international norm. Except in a few countries,⁵¹ divorce is mainly judicial; therefore, there are issues with recognizing French non-judicial divorces internationally.

In the international context, non-judicial divorce is not applicable to parental responsibility,⁵² maintenance obligations,⁵³ and matrimonial property regimes⁵⁴ because the international regulations binding France apply to French jurisdictions only.⁵⁵ However, a *notaire* or an *avocat* is not a jurisdiction, but a legal professional. Therefore, it is difficult to recognize or enter into a French non-judicial divorce outside of France.

In France, couples may undertake a non-judicial divorce if French law is applicable to the divorce. The law applicable to a divorce in France is subject to European Regulation No. 1259/2010 of 20 December 2010 Implementing Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separation (Rome III), which dictates which law should be used in cross-border divorces in the European Union.⁵⁶

Rome III provides that the default applicable law to divorce is the habitual residence of the couple at the time the court is seized, or failing that, the law of the nationality of both spouses, or where the court is seized.⁵⁷ Like Rome III, European law gives couples the possibility to choose the applicable law to their divorce based on nationality and habitual residence.⁵⁸

As a consequence, the starting point of a non-judicial divorce *a la française* is to ensure that the applicable law to the divorce in question is French law. An election clause included in the divorce contract secures the application of French law, but it is not guaranteed.

51. For example, judicial divorce is available in Japan, Thailand, Mexico, Russia, and China, as well as some religious cultures. *See infra* Part II.B.

52. Council Regulation 2201/2003 of Nov. 27, 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation (EC) No 1347/2000, 2003 O.J. (L338) 1 (EC).

53. Council Regulation 4/2009 of Dec. 18, 2008 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations, 2008 O.J. (L7) 1 (EC).

54. Council Regulation 2016/1103 of June 24, 2016 Implementing Enhanced Cooperation in the Area of Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions in Matters of Matrimonial Property Regimes, 2016 O.J. (L183) 1 (EC).

55. *See infra* Part I.

56. Council Regulation 1259/2010 of 20 Dec. 2010 Implementing Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separation, 2010 O.J. (L 343) 10 (EU) (referred to as the Rome III Regulation).

57. *Id.*

58. European Parliament Press Release 20101202IPR04728, Cross-Border Divorces: Couples to Be Able to Choose Which Law Applies (Dec. 2, 2010), <http://www.europarl.europa.eu/news/en/press-room/20101202IPR04728/cross-border-divorces-couples-to-be-able-to-choose-which-law-applies>.

Issues arise if Rome III is considered applicable to non-judicial divorces in France, which depends on the interpretation of the notion of jurisdiction and whether the *notaire*—the one who records the divorce—is considered a jurisdiction. A *notaire* is not a judge, but is appointed by the Minister of Justice to give authenticity to deeds through a signature,⁵⁹ serving as an interface between the state and the private parties.⁶⁰

Soha Sahyouni v. Raja Mamisch begins to answer the question of whether Rome III applies to a private divorce based on a declaration of the spouses, instead of a decision by a court or other public authority.⁶¹ Mr. Mamisch applied for recognition of a divorce in Germany that resulted from his unilateral decision to declare the dissolution of his marriage by pronouncing the divorce formula before the religious *Shari'a* court in Latakia (Syria). The Court of Justice of the European Union stated that “a divorce resulting from a unilateral declaration made by one of the spouses before a religious court, such as that at issue in the main proceedings, does not come within the substantive scope of that regulation.”⁶²

According to *Soha Sahyouni v. Raja Mamisch*, it seems clear that unilateral decisions do not come within the scope of Rome III.⁶³ However, the decision does not directly refer to private contracts and does not include bilateral decisions. A French private divorce is a bilateral decision because there is mutual consent to divorce expressed through a contract.⁶⁴ Consequently, a liberal interpretation of this recent decision would allow French contractual divorce to be covered by the 2010 European Union regulation. Nonetheless, this legal interpretation is not certain without further case law.

The press release of the Court of Justice advised that:

[A] number of Member States have, since the adoption of the Rome III Regulation, introduced into their legal systems the possibility for divorces to be pronounced without the involvement of a State authority. However, the inclusion of private divorces within the scope

59. See *Definition of a Notaire*, *supra* note 39.

60. For further background on the role of the *notaire*, see Margaret Ryznar & Angélique Devaux, *Au Revoir, Will Contests: Comparative Lessons for Preventing Will Contests*, 14 NEV. L.J. 1, 14 (2013).

61. Case C-372/16, *Soha Sahyouni v. Raja Mamisch*, 2017 EUR-Lex CELEX LEXIS 988 (Dec. 20, 2017), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016CJ0372&from=EN> [<https://perma.cc/QV3D-ME24>].

62. *Id.*

63. *Id.*

64. See *supra* Part I.

of that regulation would require arrangements coming under the competence of the EU legislature alone.⁶⁵

The legal issue is thus still open.

A group of French scholars and legal professionals also filed a complaint with the European Commission that the French non-judicial divorce did not comply with Bruxelles II bis because any couple will be able to get a non-judicial divorce in France, even without a connection to the country.⁶⁶ Nonetheless, French authorities can introduce the non-judicial divorce even without authority granted by Bruxelles II bis.⁶⁷

Since its introduction, non-judicial divorce has become an important option for divorce in the French legal landscape. It is a revolutionary concept, yet unknown to much of the world, including the United States.

II. DIVORCE IN THE UNITED STATES

Judicial involvement in American divorces is as old as the United States. Over the centuries, the courts have played a significant role in divorce and the development of family law.⁶⁸

While family law is in the domain of the states, some generalizations are possible.⁶⁹ When considering divorce law in the United States, both

65. Court of Justice of the European Union Press Release No 137/17, *The Rome III Regulation Does Not Determine the Law Applicable to Private Divorces* (Dec. 20, 2017), <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-12/cp170137en.pdf> [<https://perma.cc/2N89-FMXW>].

66. The professors included Cyril Nourissat, Delphine Eskenazi, Alice Meier-Bourdeau, Alexandre Boiché et Grégory Thuan, avocats. *See* *Plainte Aupres De La Commission Europeenne pour Non-Respect Du Droit De L'Union Europeenne: Violation Par La France Du Droit De L'Union Europeenne Suite A La Reforme Du Divorce Entree En Vigueur Le 1 Janvier 2017* [Complaint to the European Commission for Non-Compliance with European Union Law: France's Violation of European Union Law Following the Divorce Reform Effective January 1st, 2017] (2017) (Fr.), <http://forum-famille.dalloz.fr/files/2017/04/Plainte-aupr%C3%A8s-de-la-Commission-19.04.2017.pdf> [<https://perma.cc/TF6J-M9XR>]; *see also* Jan Von Hein, *Complaint Against France for a Violation of Several Obligations Arising from the Rome III and Brussels Ibis Regulations*, CONFLICTOFLAWS (Apr. 27, 2017), <http://conflictoflaws.net/2017/complaint-against-france-for-a-violation-of-several-obligations-arising-from-the-rome-iii-and-brussels-iibis-regulations/> [<https://perma.cc/ERJ9-MTNK>].

67. Alexandre Boiché, *Divorce conventionnel: La loi n'est pas compatible avec les textes européens*, 17 GAZETTE DU PALAIS 10, 10 (2017) (Fr.); *see also* CHARLOTTE BUTRUILLE-CARDEW, *FAMILY LAW IN FRANCE: OVERVIEW* (2017), [https://uk.practicallaw.thomsonreuters.com/6-615-3545?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/6-615-3545?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1) (“If the jurisdiction of the French courts is not established in accordance with the provisions set out in the Brussels II Regulation, Article 1070 of the French Code of Civil Procedure (FCCP) provides for alternative provisions.”).

68. *See, e.g.,* *Wendt v. Wendt*, 757 A.2d 1225 (Conn. App. Ct. 2000).

69. Libby S. Adler, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197, 197–99 (1999) (arguing that there is no foundation for the view that family law belongs in the state domain); Kristin A. Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 CARDOZO L. REV. 1761, 1764 (2005) (noting that family law is currently in the domain of the states, but that the federal government was not historically limited in this way).

domestic policy and recognition of foreign divorces must be considered. A clear disparity emerges between these approaches, which has implications for American divorce law and its future.

A. Judicial Divorce in the United States

While marriage in England was under the control of the Anglican Church, the Pilgrims believed that marriage was a civil, not religious, matter.⁷⁰ A magistrate, not a religious figure, performed the first colonial marriage in New England on May 12, 1621.⁷¹ The Puritans in the Massachusetts Bay Colony held similar beliefs on the separation of marriage from the church.⁷²

While all thirteen colonies treated marriage as a civil matter, most colonies outside New England followed the ecclesiastical law of the Church of England and did not allow divorce.⁷³ For example, Virginia did not allow divorce until after the American Revolution.⁷⁴ Once Virginia began to permit divorce in 1803, it was only allowed by legislative act, not by judicial process.⁷⁵ Over time, the increase in requests for divorce made it too onerous for the legislature to address.⁷⁶ Thus, the authority to grant a divorce in Virginia was transferred to the courts in 1853.⁷⁷

Modern divorces in the United States remain under the control of the judiciary.⁷⁸ Justifications include the government's interest in preserving equity and protecting the parties.⁷⁹ There is also concern that, without proper judicial oversight, one party can be coerced into giving up rights that could have been retained with the assistance of a lawyer.⁸⁰ Inequities in property and asset division could also potentially be exacerbated by a lack of the discovery process.⁸¹ In addition, the state has an interest in promoting and preserving marriage as a building block for society.⁸² There

70. Areen, *supra* note 3, at 63.

71. *Id.*

72. *Id.* at 66.

73. *Id.* at 74. (The Puritans in the Massachusetts Bay Colony did allow divorce, with the first divorce in the Massachusetts Bay Colony granted in 1643.).

74. *Id.* at 76.

75. *Id.* at 82.

76. *Id.* at 83.

77. *Id.*

78. *See supra* intro.

79. *See supra* intro.

80. Penelope Eileen Bryan, *The Coercion of Women in Divorce Settlement Negotiations*, 74 DENV. U. L. REV. 931, 937–38 (1997).

81. Lynda B. Munro et al., *Administrative Divorce Trends and Implications*, 50 FAM. L.Q. 427, 442 (2016).

82. *See, e.g.*, Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 351 (2006).

is a concern that, without judicial oversight, divorce will be more easily obtained, and thus salvageable marriages will be dissolved.⁸³ Finally, there may be constitutional issues with non-judicial divorce.⁸⁴

Commentators have suggested that proper safeguards can alleviate a number of these concerns.⁸⁵ Accordingly, there have been individual state non-judicial movements. Members of the Minnesota legislature recently considered allowing non-judicial divorce,⁸⁶ which would have been termed cooperative private divorce.⁸⁷ The proposed bill would allow the Bureau of Mediation Services to oversee the divorce process and circumvent the court system, resulting in an administrative divorce.⁸⁸ In response, the Minnesota State Bar Association “oppose[d] any ‘cooperative private divorce’ or similar legislation that would remove judicial oversight of family law matters.”⁸⁹ Ultimately, the legislation failed.

While no U.S. state currently offers a non-judicial divorce, some states do allow for divorce by agreement in which a court hearing is not required.⁹⁰ This process has different names, including summary dissolution.⁹¹

A summary dissolution proceeding is faster and simpler than the typical divorce because the ultimate goal is to proceed to judgment summarily and avoid formal court hearings.⁹² In a summary dissolution, the parties reach an agreement on their own without a trial.⁹³ While this dissolution process still requires judicial involvement, it does allow the

83. Munro, *supra* note 81, at 444.

84. *See, e.g.,* Holmberg v. Holmberg, 588 N.W.2d 720 (Minn. 1999) (holding that a statutory administrative child support process violated the State Constitution’s separation of powers provision).

85. Munro, *supra* note 81, at 445–46.

86. H.R. 302, 90th Leg., 2017–2018 (Minn. 2017); S. 1726, 90th Leg., 2017–2018 (Minn. 2017); H.R. 1348, 89th Leg., 2015–2016 (Minn. 2015); S. 1361, 89th Leg., 2015–2016 (Minn. 2015). The 2015 and 2017 House versions were referred to the Civil Law and Data Practices Policy Committee. In 2015, the Senate bill was referred to the Judiciary Committee and in 2017 it was referred to the Judiciary and Public Safety Finance and Policy Committee.

87. *Id.*

88. *Id.*

89. *New Legislative Positions Adopted by Assembly*, BENCH & B. MINN., Jan. 2016, at 11, 11.

90. CAL. FAM. CODE §§ 2400–2406 (West 2018); COLO. REV. STAT. ANN. § 14-10-120.3 (West 2018); IND. CODE ANN. § 31-15-2-13 (West 2018); MINN. STAT. ANN. § 518.195 (West 2018); MONT. CODE ANN. § 40-4-130 (West 2018); NEB. REV. STAT. ANN. § 42-361 (West 2018); NEV. REV. STAT. ANN. § 125.181 (West 2018); OR. REV. STAT. ANN. § 107.485 (West 2018); WASH. REV. CODE ANN. § 26.09.030 (West 2018); 2017 Conn. Legis. Serv. 17–47 (West); 2017 Ill. Legis. Serv. 100–422 (West); *see also* Munro et al., *supra* note 81, at 434.

91. Munro et al., *supra* note 81, at 428 (noting that, depending on the state, names include “summary dissolution, streamlined dissolution, simplified dissolution—or no title at all”).

92. *Id.* at 432.

93. *Id.*

parties to tailor their own agreements, similar to an administrative or contract divorce in other countries such as France.

State summary dissolution statutes often limit who may use the process. The most common restrictions include a waiting period between the time of filing until the dissolution is finalized, the absence of minor children, a monetary limit on assets, and agreement by both parties to waive the right to an appeal.⁹⁴ Limits on the length of marriage and a requirement for waiver of spousal support are sometimes additional requirements.⁹⁵

Even outside of summary dissolutions, divorcing couples have the opportunity to settle the details of their own divorce before seeking judicial approval.⁹⁶ Often, they do so with the help of mediation.

Mediation is a process for resolving disputes that allows parties, with the help of a mediator, to come to an agreement on contested issues.⁹⁷ Mediators help parties settle their lawsuits before receiving a judgment from the court.⁹⁸ The mediator must remain neutral and not be biased toward either party.⁹⁹ The parties cannot be forced into an agreement.¹⁰⁰ Mediation opens communication between the divorcing spouses and allows parties to explore all settlement options in order to resolve disputes.¹⁰¹ This saves public resources and facilitates buy-in by the parties, making them more likely to fulfill their obligations.¹⁰² Mediation also gives parties more control over the outcome of their case, often allows the case to be resolved sooner, and can save on the overall expenses involved in the case.¹⁰³

Mediation can be used in almost any type of dispute, including family law cases. Mediation in family law requires the parties to work on an agreement regarding many issues, such as the division of their assets and debts, maintenance, and child-related matters.

Divorce is a stressful event, and mediation allows for a more collaborative and amicable divorce process.¹⁰⁴ Mediation also may

94. *Id.*

95. *Id.* at 434.

96. See WEISBERG & APPLETON, *supra* note 1.

97. See generally Kenneth R. Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5 (1989).

98. *Id.* at S33.

99. *Id.* at S29.

100. *Id.*

101. *Id.*

102. See, e.g., Panel Discussion, *Core Values of Dispute Resolution: Is Neutrality Necessary?*, 95 MARQ. L. REV. 805 (2012).

103. See generally Feinberg, *supra* note 97. See also Steven Demby, *Commentary on Entrenched Postseparation Parenting Disputes: The Role of Interparental Hatred*, 55 FAM. CT. REV. 417, 420 (2017).

104. Demby, *supra* note 103.

enhance self-determination in an area of law that is closely related to people's everyday lives, and this personal nature of divorce makes people want to decide the outcomes for themselves when possible.¹⁰⁵

There are also issues with mediation, such as unequal bargaining power if one of the parties is overpowering or abusive, especially problematic in family law cases.¹⁰⁶ Many spouses seek a divorce due to an abusive spouse, who then has the potential to be a bully in mediation without the oversight of a court.¹⁰⁷

Nonetheless, mediation has become commonplace in divorce proceedings.¹⁰⁸ The Family Law Bar has worked to advance mediation.¹⁰⁹ Various forms of mediation have developed to deal with family law divorce cases, such as shuttle mediation (maintaining physical separation between the spouses) or online mediation (using technology) in the case of abusive spouses.¹¹⁰

Even when mediation is not required, some state statutes encourage it.¹¹¹ For example, Indiana Code 31-15-9.4-1 states,

Whenever the court issues an order . . . the court shall determine whether the proceeding should be referred to mediation. In making this determination, the court shall consider: (1) the ability of the parties to pay for the mediation services; and (2) whether mediation is appropriate in helping the parties resolve their disputes.¹¹²

Nonetheless, mediation does not replace the judicial process entirely.

In sum, American courts have been involved in divorces since the earliest cases. While methods have developed to simplify the American

105. M. Katherine Kerbs, Comment, *Robbing the Cradle: The Use of Mediation in Parental Rights Termination with Evidence of Drug Abuse by the Mother*, 2016 J. DISP. RESOL. 217 (2016). One commentator has identified at least eight separate advantages to divorce mediation. Kenneth J. Rigby, *Alternate Dispute Resolution*, 44 LA. L. REV. 1725, 1744 (1984).

106. Mary F. Radford, *Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters*, 1 PEPP. DISP. RESOL. L.J. 241 (2001).

107. Dafna Lavi, *Till Death Do Us Part?!: Online Mediation as an Answer to Divorce Cases Involving Violence*, 16 N.C. J. L. & TECH. 253, 266 (2015); see also Aimee Davis, *Mediating Cases Involving Domestic Violence: Solution or Setback?*, 8 CARDOZO J. CONFLICT RESOL. 253, 275 (2006).

108. Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce*, 43 WAKE FOREST L. REV. 441, 468–69 (2008).

109. Pauline H. Tesler, *Can This Relationship Be Saved? The Legal Profession and Families in Transition*, 55 FAM. CT. REV. 38 (2017).

110. Fernanda S. Rossi et al., *Shuttle and Online Mediation: A Review of Available Research and Implications for Separating Couples Reporting Intimate Partner Violence or Abuse*, 55 FAM. CT. REV. 390 (2017).

111. See generally *Mediation Requirements*, 50 State Statutory Surveys: Family Law: Divorce and Dissolution, Westlaw 0080 Surveys 12 (database updated May 2018) (surveying state mediation requirements).

112. IND. CODE ANN. § 31-15-9.4-1 (West 2018).

divorce, it is not possible to fully exclude judicial involvement in divorce.¹¹³

B. Recognition of Foreign Non-Judicial Divorces

Comity is a reciprocal norm among nations to recognize the court judgments of others.¹¹⁴ While a non-judicial divorce is not possible in the United States, comity will be extended to a foreign non-judicial divorce if it comports with general U.S. standards of due process, including adequate notice¹¹⁵ and the opportunity to be heard.¹¹⁶ Comity also requires that the court issuing the original divorce decree had personal jurisdiction in the matter¹¹⁷ and that the decree was valid under the laws of that country.¹¹⁸ Additionally, the original proceeding must be absent of fraud¹¹⁹ and there

113. Contrast this to the doctrine of non-intervention in an intact marriage. See Elaine M. Chiu, *That Guy's a Batterer!: A Scarlet Letter Approach to Domestic Violence in the Information Age*, 44 FAM. L.Q. 255, 286 (2010).

114. Gil Seinfeld, *Reflections on Comity in the Law of American Federalism*, 90 NOTRE DAME L. REV. 1309, 1309 (2015).

115. On proper notice, see, e.g., *Downs v. Yuen*, 748 N.Y.S.2d 131, 132 (App. Div. 2002) (recognizing a Hong Kong divorce under principles of comity given that husband was afforded ample opportunity to be heard); *Ashfaq v. Ashfaq*, 467 S.W.3d 539, 544 (Tex. App. 2015) (recognizing a divorce decree from Pakistan that met notice and domicile requirements). On improper notice, see, e.g., *In re Marriage of Seewald*, 22 P.3d 580, 584 (Colo. App. 2001) (declining to recognize a Mexican divorce decree due to improper notice to wife during Mexican proceeding); *Rivas v. Pena-Hernandez*, 2014 WL 2038281 (Nev. May 14, 2014) (declining to recognize a divorce decree from El Salvador under principles of comity due to lack of notice to the former wife); *Maqsudi v. Maqsudi*, 830 A.2d 929, 931 (N.J. Super. Ct. Ch. Div. 2002) (declining to recognize divorce decree issued in Uzbekistan due to issues with jurisdiction and failure of proper notice); *Tal v. Tal*, 601 N.Y.S.2d 530, 533 (Sup. Ct. 1993) (declining to extend comity to decree of divorce issued in Israel to issues with jurisdiction and failure of proper notice); *Farag v. Farag*, 772 N.Y.S.2d 368, 371 (App. Div. 2004) (declining to recognize Egyptian divorce decree due to improper notice to wife during Egyptian proceeding).

116. *In re Estate of Toland*, 329 P.3d 878, 884 (Wash. 2014) (extending comity to a divorce decree issued by a Japanese court).

117. For divorce decrees upheld on the basis of domicile, see, e.g., *Chaudry v. Chaudry*, 388 A.2d 1000, 1007 (N.J. Super. Ct. App. Div. 1978) (recognizing a *talaq* divorce involving a Pakistani couple); *Badawi v. Wael Mounir Alesawy*, 24 N.Y.S.3d 683, 684 (App. Div. 2016) (recognizing a divorce decree obtained in Abu Dhabi, United Arab Emirates while both parties were living there). For divorce decrees not recognized because of domicile issues, see, e.g., *Basiouny v. Basiouny*, 445 So. 2d 916, 919 (Ala. Civ. App. 1984) (refusing to recognize Egyptian divorce decree due to issues with domicile under the principle of comity); *Juma v. Aomo*, 68 A.3d 148, 153 (Conn. App. Ct. 2013) (declining to extend comity to Kenyan divorce decree due to issues with domicile); *In re Ramadan*, 891 A.2d 1186, 1190 (N.H. 2006) (declining to recognize Lebanese divorce decree due to issue with domicile where the couple had resided in New Hampshire for the past three years); *Atassi v. Atassi*, 451 S.E.2d 371, 375–76 (N.C. Ct. App. 1995) (remanding case to trial court due to genuine issue of material fact regarding husband's domicile in obtaining Syrian divorce).

118. *Adams v. Adams*, 869 A.2d 124, 129 (Vt. 2005) (holding that a divorce decree signed in Honduras was not valid and effective under Honduran law and thus declining to recognize the decree under the doctrine of comity).

119. *Greschler v. Greschler*, 414 N.E.2d 694, 699 (N.Y. 1980) (finding a court in the Dominican Republic to have jurisdiction over the divorce proceeding and the wife's fraud claim to have failed).

can be no strong public policy objection to the recognition of the divorce.¹²⁰

There are not many public policy reasons that prevent comity,¹²¹ but objections have been raised when gender inequality is an issue. For example, gender equality has been an issue for divorce decrees coming from countries in which only the husband can file for divorce. In *Aleem v. Aleem*, the Maryland court did not recognize a *talaq* divorce obtained by a husband under Islamic religious law and secular Pakistan law because the foreign *talaq* divorce provision was contrary to Maryland public policy.¹²² Under Islamic religious law and secular Pakistan law, only a husband has an independent right to *talaq*, and the wife needed the husband's permission for it, which deprived the wife of due process and was contrary to Maryland's Equal Rights Amendment.¹²³ Thus, the Maryland court did not recognize the foreign divorce.

The hallmark case in the United States on comity is *Hilton v. Guyot*, which addressed the force and effect of foreign judgments.¹²⁴ The case laid the groundwork for comity and distinguished it from the Full Faith and Credit Clause, which requires divorce recognition among American states but does not extend to foreign nations.¹²⁵ *Hilton* stated that foreign court judgments meeting the basic requirements of reliability and fairness should be given legal effect, but the court has discretion in making this determination.¹²⁶ The *Restatement (Second) of Conflict of Laws* has provided similar guidance for comity.¹²⁷

While many state statutes on comity are general, North Carolina specifically mentions divorce in its comity statute, requiring the fundamental constitutional rights of parties to be upheld.¹²⁸ The United

120. Ann Laquer Estin, *Marriage and Divorce Conflicts in International Perspective*, 27 DUKE J. COMP. & INT'L L. 485, 492 (2017).

121. *Id.* at 505.

122. *Id.*

123. *Aleem v. Aleem*, 947 A.2d 489 (Md. 2008); see also Rajni K. Sekhri, *Aleem v. Aleem: A Divorce From the Proper Comity Standard—Lowering the Bar that Courts Must Reach to Deny Recognizing Foreign Judgments*, 68 MD. L. REV. 662, 683 (2009).

124. *Hilton v. Guyot*, 159 U.S. 113, 182–84 (1895).

125. *Id.* at 202–03.

126. Ann Laquer Estin, *Foreign and Religious Family Law: Comity, Contract, and the Constitution*, 41 PEPP. L. REV. 1029, 1033 (2014) [hereinafter *Foreign and Religious Family Law*].

127. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (AM. LAW INST. 1971) (“A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying cause of action are concerned.”).

128. N.C. GEN. STAT. ANN. § 1-87.14 (West 2018) (“A court, administrative agency, arbitrator, mediator, or other entity or person acting under the authority of State law shall not apply a foreign law in any legal proceeding involving, or recognize a foreign judgment involving, a claim for absolute divorce, divorce from bed and board, child custody, child support, alimony, or equitable distribution if doing so would violate a fundamental constitutional right of one or more natural persons who are parties to the proceeding.”); see also ARIZ. REV. STAT. ANN. § 12-3103 (West 2018); KAN. STAT.

States does not have a treaty requiring the recognition of foreign divorces, nor is it a party to the Hague Convention on the Recognition of Divorces and Legal Separations.¹²⁹

The recognition of foreign divorces is easier when foreign divorce procedures are similar to those in the United States. However, unlike in the United States, non-judicial divorce exists in a number of foreign countries. Japan, Thailand, Mexico, Russia, and China all currently allow for a government-regulated form of non-judicial, administrative divorce.¹³⁰ The popularity of the non-judicial method varies by country, but in Japan most divorces are non-judicial, called *kyogi rikon*.¹³¹

Despite the high number of non-judicial divorces in Japan and other countries, there is little guidance on recognizing them in the United States.¹³² The early authority was a pair of cases regarding divorce decrees issued by the King of Denmark.¹³³ Both decrees were upheld because they were in line with the practices of Denmark and were not contrary to U.S. public policy.¹³⁴ Recently, however, a Hawaiian family court recognized a Taiwanese non-judicial divorce agreement.¹³⁵ Perhaps other courts will follow.

Some countries still allow for customary divorce, which can be similar to non-judicial divorces. These divorce procedures are typically guided by the participants' family and community members or religious leaders. Such divorces from Ghana, Turkey, and India have been recognized by courts in the United States.¹³⁶

ANN. § 60-5103 (West 2018); OKLA. STAT. ANN. tit. 12, § 20 (West 2017); TENN. CODE ANN. § 20-15-102 (West 2018).

129. *Divorce Abroad—Legal Issues*, U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, <https://travel.state.gov/content/travel/en/international-travel/while-abroad/divorce-abroad/divorce-abroad-legal.html> [<https://perma.cc/BLY7-EHBX>].

130. JEREMY D. MORLEY, INTERNATIONAL FAMILY LAW PRACTICE § 5:14 ADMINISTRATIVE DIVORCE (Dec. 2017 Update).

131. *Id.*

132. *Id.*; *Divorce in Japan*, U.S. EMBASSY & CONSULATE IN JAPAN, <https://jp.usembassy.gov/u-s-citizen-services/child-family-matters/divorce/> [<https://perma.cc/GW3V-JPHY>] (The “United States has no procedure for extra-judicial divorce and the legality of this procedure in various states in the U.S. is uncertain.”).

133. *Sorensen v. Sorensen*, 220 N.Y.S. 242 (App. Div. 1927); *Weil v. Weil*, 26 N.Y.S.2d 467 (Fam. Ct. 1941).

134. *Id.*

135. *Hsieh v. Sun*, 365 P.3d 1019, 1027 (Haw. Ct. App. 2016) (recognizing a Taiwanese non-judicial divorce agreement, where wife was domiciled in Taiwan for six months prior to the registration of the agreement).

136. *Annan v. Lynch*, 202 F. Supp. 3d 596, 605–06 (E.D. Va. 2016) (recognizing a customary divorce in Ghana where both husband and wife were citizens, though not residing in Ghana at the time, and the customary divorce was confirmed by a court in Ghana); *Kapigian v. Der Minassian*, 99 N.E. 264, 266 (Mass. 1912) (recognizing a customary, non-judicial divorce originating in Turkey); *Kaur v. Bharmota*, 914 N.E.2d 1087, 1096 (Ohio Ct. App. 2009) (recognizing a customary divorce performed in India in the 1960s).

Jewish and Islamic law also authorize non-judicial divorces through the Jewish *get* and Islamic *talaq*.¹³⁷ However, recognition of these types of religious divorces in the United States depends on whether U.S. civil procedure requirements were met, such as jurisdiction, notice, and the opportunity to be heard.¹³⁸ Thus, a religious divorce will often not receive comity unless there are subsequent judicial proceedings.¹³⁹ These procedural safeguards are particularly important in religious divorces due to the gender inequalities that may arise.¹⁴⁰ Receiving proper notice and having an opportunity to be heard in court increase the likelihood that women receive a fair, gender-neutral divorce outcome.¹⁴¹

For example, in *Chaudry v. Chaudry*, the husband's *talaq* divorce, made at the Pakistani consulate in New York, was granted comity because the divorce had been subsequently upheld by the courts in Pakistan.¹⁴² An important factor in *Chaudry* was that the wife was given notice and an opportunity to be heard in the Pakistani courts.¹⁴³ Conversely, in a similar case, *talaq* was not recognized by a U.S. court because it had not gone through the process of being formally recognized in the courts of Pakistan.¹⁴⁴

The legal tradition of the country where the religious divorce originates matters. In *Leshinsky v. Leshinsky*, a divorce issued by a rabbi

137. Reed, *supra* note 2, at 311. "Talaq allows a husband to unilaterally divorce his wife without cause, judicial proceeding, or her consent." Nathan B. Oman, *How to Judge Shari'a Contracts: A Guide to Islamic Marriage Agreements in American Courts*, 2011 UTAH L. REV. 287, 304 (2011) (surveying the types of *talaq*). "A *talaq* divorce circumvents the civil court system entirely. While it is enforceable under *Shari'a* law, it is a difficult proposition for Western courts." Emily L. Thompson & F. Soniya Yunus, Comment, *Choice of Laws or Choice of Culture: How Western Nations Treat the Islamic Marriage Contract in Domestic Courts*, 25 WIS. INT'L L.J. 361, 381 (2007). Meanwhile, "a Jewish religious divorce, or 'Get,' is necessary for the wife in order to remarry, but a 'Get' is not necessary for the husband, who can be granted a 'letter' by a rabbinical court, which will serve the same function." Barbara Stark, *Only in New York: The Geography of Family Law*, 29 WIS. J.L. GENDER & SOC'Y 21, 32 (2014).

138. *Tal v. Tal*, 601 N.Y.S.2d 530 (Sup. Ct. 1993) (The New York Supreme Court did not afford comity to decree of divorce issued in Israel, where wife had not resided in Israel for approximately the past seven years, wife was not given notice of commencement of civil divorce action in Israel, and she did not appear in the civil action.).

139. Ann Laquer Estin, *Toward A Multicultural Family Law*, 38 FAM. L.Q. 501, 511 (2004) [hereinafter *Multicultural Family Law*].

140. See, e.g., Donna J. Sullivan, *Gender Equality and Religious Freedom: Toward A Framework for Conflict Resolution*, 24 N.Y.U. J. INT'L L. & POL. 795 (1992).

141. *Foreign and Religious Family Law*, *supra* note 126, at 1041.

142. *Chaudry v. Chaudry*, 388 A.2d 1000 (N.J. Super. Ct. App. Div. 1978).

143. *Multicultural Family Law*, *supra* note 139, at 511–12.

144. *Shikoh v. Murff*, 257 F.2d 306, 309 (2d Cir. 1958) (holding invalid a declaration of divorce obtained in New York through a religious head in accordance with Islamic law, but not New York law); Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540, 588 (2004); Mervate Mohammad, *The Evolution of Sharia Divorce Law: Its Interpretation and Effect on a Woman's Right to Divorce*, 7 ALB. GOV'T L. REV. 420, 440 (2014).

in Russia was upheld in New York because it complied with Russian law, which authorized certain churches to grant divorces.¹⁴⁵ Conversely, in *Chertok v. Chertok*, a divorce granted by a rabbi in New York was invalid because New York law does not recognize non-judicial religious divorce.¹⁴⁶

In sum, the general rule is that all forms of non-judicial divorce, including religious, customary, and administrative divorce, are not valid in the United States if originating domestically. However, a non-judicial divorce decree originating in a foreign country may be extended comity if proper procedural safeguards have been observed, the decree comports with the laws of the originating country, and the decree does not offend U.S. public policy.¹⁴⁷

III. A COMPARATIVE ANALYSIS

Cumbersome divorce procedures have been criticized as inefficient, painful, and a waste of judicial resources.¹⁴⁸ In the United States, “family courts have become congested with a backlog of pending marital dissolutions and post-judgment matters.”¹⁴⁹ The number of divorces in the United States has only increased in the past few decades, possibly resulting from the introduction of no-fault divorce in every state, women’s ability to divorce given their financial independence, and social acceptance of divorce.¹⁵⁰

145. *Leshinsky v. Leshinsky*, 25 N.Y.S. 841 (Sup. Ct. 1893).

146. *Chertok v. Chertok*, 203 N.Y.S. 163, 164 (App. Div. 1924).

147. “Non-judicial divorces generally have been recognized so long as they were performed within the foreign jurisdiction which permitted them.” *Shikoh v. Murff*, 257 F.2d 306, 308–09 (2d Cir. 1958) (discussing legislative divorces, Indian divorces, and divorces by executive decree).

148. “The apparent normative goal of modern divorce law is the efficient termination of unsuccessful marriages. Once the couple (or either party) determine that the marriage is no longer satisfactory, then quick and easy exit is deemed desirable. As Carl Schneider suggests, the law has withdrawn from moral discourse about divorce, adopting a neutral stance toward marital dissolution.” Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 9 (1990). This explains the unpopularity of covenant marriage. See, e.g., Daniel W. Olivas, Comment, *Tennessee Considers Adopting the Louisiana Covenant Marriage Act: A Law Waiting to be Ignored*, 71 TENN. L. REV. 769, 770 (2004). Fear of a cumbersome divorce may be why some people today do not bother marrying. For the first time in history, there are more single people in the United States than married people. See, e.g., REBECCA TRAISTER, *ALL THE SINGLE LADIES: UNMARRIED WOMEN AND THE RISE OF AN INDEPENDENT NATION* (2016). Many of these singles choose to cohabitate with someone instead of getting married. Anna Stepień-Sporek & Margaret Ryznar, *The Consequences of Cohabitation*, 50 U.S.F. L. REV. 75 (2016). The French also have experienced a decline in marriage. Kim, Oliver & Ryznar, *supra* note 11, at 87.

149. Munro, *supra* note 81, at 431.

150. See, e.g., Eliza K. Pavalko & Glen H. Elder, Jr., *World War II and Divorce: A Life-Course Perspective*, 95 AM. J. SOC. 1213 (1990) (suggesting various reasons for an increase in divorces in the post-World War II era). But see Kenneth Rigby, *Report and Recommendation of the Louisiana State Law Institute to the House Civil Law and Procedure Committee of the Louisiana Legislature Relative*

The French non-judicial divorce eases the divorce process.¹⁵¹ Divorce in the United States has also been simplified with the introduction of no-fault and unilateral divorce.¹⁵² However, the United States has not yet moved to France's model of non-judicial divorce. France's adoption of non-judicial divorce serves as an example for those jurisdictions wanting to follow.

Despite not adopting non-judicial divorce, American family law has changed in ways to facilitate parties to settle their own divorce. For example, American family law has become more formulaic and codified, as seen in the starting presumptions of equal property division,¹⁵³ strict alimony guidelines,¹⁵⁴ child support guidelines,¹⁵⁵ and parenting time guidelines.¹⁵⁶ This introduction of bright line legislative rules or guidelines reduces the role of judicial discretion, and thus the need for court divorce proceedings.

Indeed, American courts already allow divorcing spouses to create their own settlement agreements, often simply rubber stamping them.¹⁵⁷ Summary dissolution, which does not require a hearing, is also an option in many states. Finally, the heavy reliance on mediation also supports this trend.¹⁵⁸

Despite the increasing autonomy afforded to divorcing couples in the United States, a primary justification for judicial involvement is to provide safeguards for the parties to a divorce.¹⁵⁹ However, restrictions on non-

to the Reinstatement of Fault as a Prerequisite to a Divorce, 62 LA. L. REV. 561 (2002) (finding no correlation between the introduction of no-fault divorce in Louisiana and an increase in divorces).

151. See *supra* Part I.

152. See generally Ira Mark Ellman, *Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional Marital Roles*, 34 FAM. L.Q. 1, 3 (2000).

153. See, e.g., IND. CODE ANN. § 31-15-7-5 (West 2018) (mandating a presumption for equal division of marital property).

154. See, e.g., *id.* § 31-15-7-2 (noting the few circumstances under which an alimony-like payment can be ordered).

155. The Child Support Enforcement Amendments of 1984 required states to establish numerical formulas to help judges set child support awards. Pub. L. No. 98-378, 98 Stat. 1305 (1984) (codified as amended in scattered sections of 42 U.S.C.). If the states did not have the Guidelines by 1987, they would lose a percentage of federal welfare funds. ROBERT H. MNOOKIN & D. KELLY WEISBERG, *CHILD, FAMILY, AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW* 195 (6th ed. 2009). The Family Support Act of 1988 required states to use the Guidelines as a rebuttable presumption for child support awards. 42 U.S.C. § 667(b)(2) (2012).

156. A few states have moved toward instating guidelines to ensure a minimum amount of parenting time. See, e.g., S.D. CODIFIED LAWS § 25-4A-9 (2018); IND. PARENTING TIME GUIDELINES § 2 (2013), https://www.in.gov/judiciary/rules/parenting/#_Toc470860988 [<https://perma.cc/5HWA-AUXJ>]; STATE COURT ADMIN. OFFICE, MICHIGAN PARENTING TIME GUIDELINE, http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Manuals/focb/pt_gdlns.pdf [<https://perma.cc/87ML-Q77J>].

157. See *supra* Part II.A.

158. See *supra* Part II.A.

159. See *supra* Part II.A.

judicial divorce in France offer similar protections. For example, protections built into the French non-judicial divorce include required consent from both parties to its non-judicial nature, as well as mandatory representation of each party by a different lawyer. Contested divorces and other types of divorces still proceed through the judicial process.¹⁶⁰ Furthermore, in some situations, divorce by mutual consent remains judicial, such as when the couple's minor children request to be heard by a judge, or when a spouse does not have sufficient mental capacity. In these situations, the reintroduction of the judge in France aims to protect vulnerable parties.¹⁶¹ Thus, protections for the vulnerable party do not need to be sacrificed for ease of divorce. Indeed, non-judicial divorce in France offers protections despite simplifying the process.

Family law in the United States has proven to be slow to change in the past, and taking the court out of the divorce process will be no exception.¹⁶² Nonetheless, the contractualization of family law and the liberalization of divorce continues around the world. France serves as a model of the non-judicial divorce, suggesting one future direction if American attitudes toward divorce continue to ease.

CONCLUSION

In sum, American divorce law is synonymous with court proceedings. However, various countries around the world have permitted non-judicial divorce, recently including France. These developments have raised divorce recognition issues in the United States and provide models for non-judicial divorce.

The United States has indeed started to move in this direction by a heavier reliance on mediation, more formulaic divorce laws, and summary dissolution, but no state thus far has permitted non-judicial divorces to occur within its borders. If a state decides to further liberalize divorce law, France provides a compelling model to simplify the process while protecting the parties.

160. *Different Types of Divorce*, *supra* note 12.

161. CODE CIVIL [C. CIV][Civil Code] art. 229-1 (Fr.); *see also Different Types of Divorce*, *supra* note 12.

162. *See, e.g.,* Deborah Zalesne, *The Intersection of Contract Law, Reproductive Technology, and the Market: Families in the Age of Art*, 51 U. RICH. L. REV. 419 (2017).