

COVENANT MARRIAGE AND THE LAW OF CONFLICTS OF LAWS

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INTRODUCTION

This Article is the result of cooperation between two authors who do not claim an expertise in each other's specialty. The senior author has taught family law for almost three decades and has drafted Louisiana's 1997 covenant marriage legislation.¹ She claims no particular insights into the "murky area" of conflicts law. The junior author has taught conflicts law for more than two decades, drafted Louisiana's 1992 conflicts codification, and confesses ignorance of anything but rudimentary principles of family law. He has not supported the covenant marriage legislation, but has repeatedly stated that "the task of the conflicts codifier is not to alter, favor, or disfavor a rule of substantive law, but rather to help delineate its operation at the multistate level."² He takes the same position when wearing the hat of a conflicts commentator.

Part One of the Article, written by the senior author, discusses covenant marriage in the domestic context.³ The purpose of this Part is not to persuade other states to adopt covenant marriage but rather to explain why Louisiana has chosen to do so and to describe those features of covenant marriage that are pertinent to the discussion in Part Two.

Part Two of the Article, written primarily by the junior author, ascends to the multistate level and explores some of the questions likely to arise when courts outside Louisiana are faced with a Louisiana covenant marriage.⁴ This Part calls for a re-examination of the current regime in the United States that equates jurisdiction to grant a divorce with an automatic license to apply the forum's divorce law. As in other multi-state cases, the choice-of-law question should be separated from the jurisdictional question in order for the court to consider the possibility of applying another state's divorce law. A standard choice-of-law inquiry would lead to the conclusion that when both or either covenant-spouses continue being domiciled in Louisi-

1. In a previous life, she had also drafted Louisiana's no-fault divorce legislation on behalf of the Louisiana State Law Institute. See LA. CIV. CODE ANN. arts. 102-03 (West 1993).

2. Symeon C. Symeonides, *Louisiana's New Law of Choice of Law for Tort Conflicts: An Exegesis*, 66 TUL. L. REV. 677, 743 (1992) (emphasis omitted).

3. See *infra* notes 5-91 and accompanying text.

4. See *infra* notes 28-35 and accompanying text.

ana, their right to obtain a divorce should be governed by Louisiana law.

PART ONE: SUBSTANTIVE LAW

I. COVENANT MARRIAGE

Principally, in an effort to strengthen the institution of marriage,⁵ the Louisiana Legislature enacted America's first covenant marriage law.⁶ The new law makes available one additional type of marriage, in addition to the traditional "standard" marriage, for those spouses who voluntarily, mutually, and solemnly opt for it after the necessary marital counseling.⁷

Despite media reports and other commentary which assert that covenant marriage legislation attempts to prohibit divorce, the Louisiana law permits an *immediate* divorce in four instances that involve reprehensible conduct by one spouse.⁸ The law merely slows down divorce in instances in which a spouse cannot prove such conduct by the other.⁹ In instances in which there is no serious offensive conduct by a spouse, the legislature, in designing covenant marriage, may reasonably assume that the marriage might be salvageable. Thus, in "no-fault" divorce, the extension of the waiting period allows for the time and opportunities for covenant couples to try to preserve their mar-

5. The legislative intent is to strengthen not only the marriages of the Louisiana couples who opt for a covenant marriage, but also the marriages of all Louisiana citizens, including "standard" marriages. The professed hope is that information about the value of lifelong marriage and the strength of a couple's marriage vows will provoke attention and conversations about marriage among the general population of the state.

6. Arizona enacted covenant marriage legislation, which was signed by the Governor on May 21, 1998. ARIZ. REV. STAT. § 25-901 (West 1998). Covenant marriage legislation was introduced in sixteen other states: S.B. 606 (Ala. 1998); ; S.B. 1377 (Cal. 1997); H.B. 249, 144th G.A. (Ga. 1997); H.B. 1052, 110th G.A. (Ind. 1998); H.B. 2839, 77th Leg. (Kan. 1998); S.B. 2935, 80th (Minn. 1998); H.B. 1645, (Miss. 1998); H.B. 1864, 89th G.A. (Mo. 1998); L.H. 1214, 95th Leg. (Neb. 1998); H.B. 567, 122nd G.A. (Ohio 1997); H.B. 2208, 46th Leg. (Okla. 1998); S.B. 961, 112th G.A. (S.C. 1998); H.B. 2101, 100th G.A. (Tenn. 1998); H.B. 1056 (Va. 1998); S.B. 6135, 55th Leg. (Wash. 1998); H.B. 4562, 73rd Leg. (W. Va. 1998). Two Wisconsin legislators have indicated they intend to introduce covenant marriage legislation. See David Callender, *Two Push Curbs on Divorce with Kids*, CAPITAL TIMES, July 29, 1998, at 1A.

7. LA. REV. STAT. § 9:273 (Supp. 1998) (addressing engaged couples); LA. REV. STAT. ANN. § 9:275 (West 1991 & Supp. 1998) (declaring that already married couples can convert a "standard" marriage into a "covenant" marriage). There is an additional requirement that the effects of a "covenant" marriage be discussed with already married couples by a counselor. See *id.* § 9:275(a)(b)(i).

8. LA. REV. STAT. ANN. § 9:307(a)(1)-(4) (West 1991 & Supp. 1998). The four instances are adultery, commission of a felony and sentence to imprisonment at hard labor or death, abandonment for one year, and physical or sexual abuse of a spouse or a child of the parties. *Id.*

9. LA. REV. STAT. ANN. § 9:307(a)(5), (6). These include living separately for at least one year. *Id.*

riage. If low-conflict marriages can be preserved, the couple's children benefit.¹⁰ Furthermore, all of these potential effects of covenant marriage result from the knowing and voluntary commitment of the spouses.

As explained in greater detail in Section IV, covenant marriage restricts the availability of unilateral divorce by extending the waiting period from six months to twenty-four months, during which time spouses must live separate and apart in order to obtain a "no-fault" divorce.¹¹ In so doing, the covenant marriage legislation restores some protection and power to the "innocent" spouse who kept his or her promises and still desires to preserve the marriage. Unilateral divorce deprives the "innocent" spouse — who desires a continuation of the marriage — of any defense to an action for divorce initiated by the spouse who "broke up" the family.¹² A strong supporter of no-fault divorce, Dean Herma Hill Kay,¹³ acknowledged that unilateral no-fault divorce is "closer to desertion than to mutual separation."¹⁴ The only no-fault ground for divorce under the new law empowers the "innocent" spouse by providing a two-year period of living separate and apart and granting him or her the exclusive right to a divorce for the

10. See PAUL A. AMATO & ALAN BOOTH, *A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL* (1997) (concluding that approximately 70% of marriages that end in divorce are low-conflict marriages and that the children of such marriages would benefit more by preservation of the marriage than by the divorce). Amato and Booth comment: "Spending one-third of one's life living in a marriage that is less than satisfactory in order to benefit children — children that parents elected to bring into the world — is not an unreasonable expectation." *Id.* at 238. See also GLENN S. STANTON, *WHY MARRIAGE MATTERS: REASONS TO BELIEVE IN MARRIAGE IN POST-MODERN SOCIETY* (1997) (providing an excellent summary of all of the studies about the effect of divorce prior to the publication of the Amato and Booth book).

11. See *infra* notes 71-91 and accompanying text.

12. For an example of the result of no-fault divorce on the spouse who desires to preserve the marriage, see Katherine Shaw Spaht, *Why Covenant Marriage? A Change in Culture For the Sake of the Children*, 46 *LA. B.J.* 116 (Aug. 1998), discussing reasons for adopting covenant marriage. Even Dean Herma Hill Kay acknowledges as much in her article. See HERMA HILL KAY, *BEYOND NO-FAULT: NEW DIRECTIONS IN DIVORCE REFORM AT THE CROSSROADS* 36 (1990). Dean Kay stated:

The fault doctrine may have served to lend emotional vindication to the rejected spouse, as well as a measure of financial protection and status as the preferred custodian of children. If so, greater justification may be required in those cases for eliminating that doctrine from the related core areas of support, property distribution, and child custody. . . . But if fault is withdrawn, the party formerly able to invoke that doctrine may be left in a vulnerable position both when negotiating a dissolution agreement and when litigating the matter in court.

Id.

13. See KAY, *supra* note 12, at 36.

14. *Id.* at 8.

fault of his or her spouse. This bargaining power¹⁵ can be used as leverage for insisting upon serious counseling in an effort to preserve the marriage and, if counseling fails, for extracting financial equity in the form of spousal or child support or an advantageous property settlement.¹⁶ If the other spouse wants to remarry, he or she is more likely to respond to the pressure available through this shift in divorce-law policy.

Inclusion of immediate grounds for divorce in the nature of "fault,"¹⁷ although not slowing down the divorce process, restores "moral discourse"¹⁸ to divorce law. "Fault" grounds for divorce represent society's collective condemnation of certain reprehensible conduct within the marital relationship. Despite protestations synoptically described by the oft-repeated phrase "you can't legislate morals," everyone knows that Congress and legislatures do it every day.¹⁹ Permitting one spouse to effectively destroy a family unit that consists of five persons — for example, a husband, wife, and three children — without good reason and without significant consequences has had a corrosive effect on our society.

Covenant marriage has been discussed in detail elsewhere.²⁰ This Article will describe three pertinent features of covenant marriage. These features are:

15. See Robert Mnoonkin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 977 (1959) (suggesting a different use of the law at the time of divorce).

16. Even a critic of the legislation observed the following: "The delay offers two possible advantages to divorcing spouses: First, it permits an economically weaker spouse more time to make financial adjustments by prolonging the support obligation of marriage; and second, it may facilitate reconciliation if the partners' marital difficulties are not irremediable." Jeanne Carriere, *"It's Deja Vu All Over Again": The Covenant Marriage Act in Popular Cultural Perception and Legal Reality*, 72 TUL. L. REV. 1701, 1720 n.118 (1998). See Cynthia Samuel, *Letter From Louisiana: An Obituary for Forced Heirship and A Birth Announcement for Covenant Marriage*, 12 TUL. EUR. & CIV. L. FORUM 183 (1997) (recognizing the leverage accorded to the innocent spouse).

17. See *infra* notes 72-74 and accompanying text.

18. See Carl E. Schneider, *Marriage, Morals, and the Law: No-Fault Divorce and Moral Discourse*, 1994 UTAH L. REV. 503 (discussing no-fault divorce and underlying social attitudes).

19. It is only when the morals to be legislated have the potential of impeding the affected person's "liberty" that such objections are raised.

20. See Katherine Shaw Spaht, *Louisiana's Covenant Marriage: Social Analysis and Legal Implications*, 59 LA. L. REV. 63 (1998) (discussing how covenant marriage legislation is an attempt to strengthen marriage through legal means); Katherine Shaw Spaht, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547 (1998) (discussing theoretical problems concerning law, marriage, family and community and reviewing Louisiana's Covenant Marriage legislation); Katherine Shaw Spaht, *Beyond Baehr: Strengthening the Definition of Marriage*, 12 BYU J. PUB. L. 277 (1998) (examining the definition of marriage and the crisis affecting the social institution of marriage); Katherine Shaw Spaht, *Why Covenant Marriage? A Change in the Culture For the Sake of the Children*, 46 LA. B.J. 116 (Aug. 1998) (discussing reasons for adopting covenant marriage).

(1) mandatory premarital counseling which stresses the seriousness of marriage and the expectation that the couple's marriage will be lifelong;²¹

(2) the signing by the spouses of a *legally* binding agreement,²² the "Declaration of Intent,"²³ which provides that if difficulties arise during the marriage the spouses will take all "reasonable efforts to preserve [the] marriage, including marriage counseling;"²⁴ and

(3) limited grounds for divorce, making termination of the marriage depend on either misconduct by a spouse which society collectively condemns,²⁵ or a longer waiting period of two years living separate and apart.²⁶

21. LA. REV. STAT. § 9:273(A)(2)(a) (Supp. 1998). In addition, the counseling includes discussing the *obligation* to "take all reasonable efforts to preserve [the] marriage" and the differences between the grounds for a divorce in a "standard" marriage and a "covenant" marriage. LA. REV. STAT. ANN. § 9:273(A)(1) (West 1991 & Supp. 1998); see *infra* notes 28-38 and accompanying text.

22. The agreement of husband and wife to "take all reasonable steps to preserve the marriage, including marital counseling" is a legally binding contract permitted and sanctioned by the state as a limited exception to the fundamental principle that the personal obligations of the marriage contract may not be altered by the parties. LA. CIV. CODE art. 86, cmt. (b) (1991); LA CIV. CODE ANN. art. 86, cmt. (b) (West 1991). See also Spaht, 59 LA. L. REV. at 95 (disclosing the Declaration of Intent).

23. LA. REV. STAT. § 9:273(A)(1) (Supp. 1998). Section 9:273(A)(1) provides in part:

We do solemnly declare that marriage is a covenant marriage between a man and a woman who agree to live together as husband and wife for so long as they both may live. We have chosen each other carefully and disclosed to one another everything which could adversely affect the decision to enter into this marriage. We have received premarital counseling on the nature, purposes, and responsibilities of marriage. We have read the Covenant Marriage Act, and we understand that a Covenant Marriage is for life. If we experience marital difficulties, we commit ourselves to take all reasonable efforts to preserve our marriage, including marital counseling.

With full knowledge of what this commitment means, we do hereby declare that our marriage will be bound by Louisiana law on Covenant Marriages and we promise to love, honor, and care for one another as husband and wife for the rest of our lives.

Id.

24. LA. REV. STAT. § 9:273(A)(1); see *infra* notes 39-69 and accompanying text.

25. See LA. REV. STAT. ANN. § 9:307(A), (B) (West 1991 & Supp. 1998) (describing acts such as adultery, conviction of a felony and sentenced to imprisonment at hard labor or death, abandonment for one year, physical or sexual abuse of a spouse or a child of the parties, and a legal separation for cruel treatment (mental cruelty) or habitual intemperance that renders the life together insupportable, plus an additional one year or one year and six months of living separate and apart).

26. *Id.* § 9:307(A)(5). This ground for divorce in a covenant marriage is considered to be an example of unilateral no-fault divorce. The significant difference between unilateral no-fault divorce in a "standard" Louisiana marriage and that in a "covenant" marriage is the lengthier waiting period of one year and one-half in a "covenant" marriage. Thus, the two-year waiting period significantly slows down the process of divorcing when compared to the 180-day waiting period for divorce in a "standard" marriage. Compare LA. CIV. CODE arts. 102-03 (West 1991) (requiring a 180-day waiting period), with LA. REV. STAT. ANN. § 9:307(A)(5) (requiring a two-year waiting period).

As evidence mounts of the social destruction in the wake of surging divorce rates and currently surging cohabitation rates,²⁷ action is required to restore and protect the institution of marriage — the foundation upon which the family is built. The Louisiana covenant marriage law is one possible response to this crisis. It is certainly not the only response and it is not presented as perfect. However, it is better than no response at all.

II. THE FIRST FEATURE: MANDATORY PREMARITAL COUNSELING

Louisiana couples who wish to contract a covenant marriage are required to receive premarital counseling. The new law assigns premarital counseling to qualified members of the clergy,²⁸ in addition to a secular alternative.²⁹ The law does not prescribe the length or period of time required for the counseling nor its precise content other than to require: (1) “a discussion of the seriousness of covenant mar-

27. See *Marriage U.S.A.*, WORLD MAG., Sept. 19, 1998, in which the recently released figures in “Marital Status and Living Arrangements” by the United States Census Bureau show a steady increase in the number of unmarried couples in America. The article also includes studies by Illinois and Wisconsin researchers describing the bleak outlook for cohabiting couples, which prompted Robert Knight of the Family Research Council to comment: “Until we hit rock bottom and . . . see the damage . . . it’s likely that large numbers of people will continue to live together.”

David Popenoe and Barbara Dafoe Whitehead have completed a massive study of countries throughout the West and conclude that in countries where marriage as an institution is weakest, cohabitation is the most widespread. David Popenoe & Barbara Whitehead, *Cohabitation in America: A Report to the Nation*, NATIONAL MARRIAGE PROJECT AT RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY. See MAGGIE GALLAGHER, *THE ABOLITION OF MARRIAGE: HOW WE DESTROY LASTING LOVE* 123 (1996) (“There seems to be a tipping point at which marriage becomes so fragile and divorce so common that an increasing number of women decide it may be safer to dispense with marriage altogether: Illegitimacy surges in the wake of a surge in divorce.”); Allan Carlson, *The Family, Public Policy & Democracy: Lessons from the Swedish Experiment*, 12 *The Family in America* (newsletter of The Howard Center for Family, Religion & Society, Aug. 1998).

28. LA. REV. STAT. ANN. § 9:273(A)(2)(a) (West 1991 & Supp. 1998). The legislation essentially invites religion back into the public square for the purpose of performing a function for which religion is uniquely qualified: preparing for and preserving marriages. See RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (1984). Preventing bad marriages or identifying potential areas of disagreement through serious premarital counseling requires intensive one-on-one sessions, more efficiently and effectively performed by clergy who can communicate the religious view of marriage and the “community’s” expectation that the couple will devote serious effort to preserving their marriage.

Although less obvious, revitalizing and reinvigorating the “community” of the Church was also an objective of the legislation. See *supra* note 21 and accompanying text.

29. See LA. REV. STAT. ANN. § 9:273(A)(2)(a) (describing the secular alternative as a “marriage counselor”). The statute, however, does not define the term “marriage counselor.” See *id.* (failing to define the term). For a complete discussion of the meaning of “marriage counselor” under Louisiana law, see *supra* note 20 and Spaht, 59 LA. L. REV. at 85-87.

riage;" (2) "communication of the fact that a covenant marriage is a commitment for life," which obviously is an aspirational objective;³⁰ (3) "a discussion of the obligation to seek marital counseling in times of marital difficulties," and (4) "a discussion of the exclusive grounds for legally terminating a covenant marriage by divorce or by divorce after a judgment of separation from bed and board."³¹ To have been any more specific concerning time or content of the premarital counseling would have been unnecessarily intrusive, because many religious denominations have extensive, time-honored counseling programs already in place.

Interestingly, because of this mandatory premarital counseling, covenant couples in Louisiana are given more information about the legal consequences of marriage than non-covenant couples. The counselor is required to discuss the couple's special commitment and its legal consequences, but must also discuss the *exclusive* grounds for divorce in a covenant marriage. Another paragraph of the statute requires the spouses to sign an affidavit that the counselor provided the parties with "the informational pamphlet developed and promulgated by the office of the attorney general, which pamphlet entitled 'Covenant Marriage Act' provides a full explanation of the terms and conditions of a covenant marriage."³² The pamphlet explains the differences in grounds for divorce in a covenant and in a "standard" marriage and is available at the Clerk of Court's office to applicants for a marriage license.³³

After receiving and discussing this information from the counselor, the couple executes the "Declaration of Intent." The Declaration of Intent includes statements to the effect that they have read the Covenant Marriage Act,³⁴ they understand that a covenant marriage lasts for life,³⁵ they have *full* knowledge of the meaning of their com-

30. This statement would prohibit divorce in a covenant marriage; however, section 9:307(A), which contains the grounds for divorce in a covenant marriage, begins with the phrase, "[n]otwithstanding any other law to the contrary." LA. REV. STAT. ANN. § 9:307(A) (West 1991 & Supp. 1998). Any other law to the contrary would include not only LA. CIV. CODE arts. 102-03 (divorce in a "standard" marriage), but also the law between the parties, which they may argue was established by their contract (Declaration of Intent). See LA. CIV. CODE art. 1983 (describing the requirements for breaking a contract).

31. LA. REV. STAT. ANN. § 9:273(A)(2)(a).

32. *Id.* § 9:273(A)(2)(b).

33. This pamphlet was modeled after the pamphlet to be distributed to all applicants for a marriage license explaining Louisiana's community property law. See LA. REV. STAT. ANN. § 9:237 (West 1991) (requiring the distribution of community property pamphlets to marriage license applicants).

34. LA. REV. STAT. § 9:273(A)(1).

35. See *id.* (including the phrase, "and we understand that a Covenant Marriage is for life").

mitment,³⁶ and "declare that [their] marriage will be bound by Louisiana law on Covenant Marriages."³⁷ The execution of the Declaration of Intent by the couple is followed by a second document containing an affidavit by the couple and an attestation by the counselor, both of which are notarized.³⁸ The counseling and the execution of both documents are designed to assure that the couple's choice of a covenant marriage is knowledgeable and deliberate.

III. THE SECOND FEATURE: THE OBLIGATION TO MAKE EFFORTS TO PRESERVE THE MARRIAGE, INCLUDING MARRIAGE COUNSELING

In their Declaration of Intent, covenant couples agree to the following: "If we experience marital difficulties, we commit ourselves to take all reasonable efforts to preserve our marriage, including marital counseling."³⁹ This agreement, which is a limited exception to the general principle that spouses' personal obligations are matters of public order not subject to contractual modification,⁴⁰ constitutes a legally enforceable contractual obligation.⁴¹ The sentence contained in the Declaration of Intent is not simply "aspirational."⁴² This explains

36. *See id.* ("With full knowledge of what this commitment means, we do hereby declare that our marriage will be bound by Louisiana law on Covenant Marriages and we promise to love, honor, and care for one another as husband and wife for the rest of our lives.").

37. *Id.*

38. *See id.* § 9:273(A)(2)(b) (stating that "a notarized attestation, signed by the counselor and attached to or included in the parties' affidavit, confirming that the parties were counseled as to the nature and purpose of the marriage and the grounds for termination thereof and acknowledging that the counselor provided to the parties the informational pamphlet developed and promulgated by the office of the attorney general").

39. LA. REV. STAT. § 9:273(A)(1) (Supp. 1998). For a discussion of what constitutes "reasonable" efforts other than marital counseling, which is only an illustrative example, see Spaht, 59 LA. L. REV. at 100-01, stating that in many instances, to fulfill this obligation a covenant spouse will seek the expertise of the counselor who performed the premarital counseling for the couple. In most cases the counselor will have been a member of the clergy. The work of preserving marriages through counseling when difficulties arise necessitates the same time-consuming personal investment which a minister, priest, or rabbi can perform well, not only by virtue of the commitment of his time, but also by virtue of his moral authority.

40. LA. CIV. CODE art. 98 cmt. (e) (West 1991). *See, e.g.,* Holliday v. Holliday, 358 So. 2d 618 (La. 1978); Favrot v. Barnes, 332 So. 2d 873 (La. Ct. App.), *rev'd in part on other grounds*, 339 So. 2d 843 (La. 1976) (stating that contractual modification of marital obligations is not allowed by law).

41. *See* LA. CIV. CODE art. 1906 (West 1987) ("A contract is an agreement by two or more parties whereby obligations are created, modified, or extinguished.") (emphasis added).

42. *See* Carriere, 72 TUL. L. REV. at 1712 ("A more likely intent on the part of the legislature was to provide a statement of the aspirations of the parties to a covenant marriage. The commitment to seek marital counseling occurs in the declaration of in-

why the counselor is required to discuss "the *obligation*⁴³ to seek marital counseling in time of marital difficulties."⁴⁴

The legislature intended that this obligation be legally enforceable through contractual remedies, rather than as a necessary prerequisite to obtaining a separation or divorce. Because the legislature was not explicit concerning the effect of a failure to take reasonable steps to preserve the marriage,⁴⁵ there is no appropriate procedural mechanism to assure dismissal of a plaintiff's suit for separation or divorce if the obligation is not fulfilled.⁴⁶ Rather, the legislature intended that the agreement to take steps to preserve the marriage be subject, for the most part, to the general rules that apply to contracts.

One potential exception to the application of general contract rules, however, is the inability to dissolve this obligation by mutual agreement. Although a contract and its provisions would ordinarily be subject to dissolution by mutual agreement,⁴⁷ considerations of

tent, in the midst of other statements couched as agreements and promises, but conveying aspirations rather than constituting binding contracts.").

43. "Obligation" is defined in article 1756 of the Louisiana Civil Code as: "An obligation is a legal relationship whereby a person, called the obligor, is bound to render a performance in favor of another, called the obligee. . . ." LA. CIV. CODE art. 1756 (West 1987). See also *id.* art. 1760, cmt. (b) (stating that an obligation without preceding adjective means "civil obligation," which can be enforced by legal action); *Id.* art. 1758 (stating the general effect of obligation).

By contrast, the aspirational statement in the Declaration of Intent that a covenant marriage is for life is treated differently in the provision that mandates the content of pre-marital counseling. The counselor "shall include . . . communication of the fact that a covenant marriage is a commitment for life." LA. REV. STAT. ANN. § 9:273(A)(2)(a) (West 1991 & Supp. 1998) (emphasis added); see *supra* notes 28-38 and accompanying text.

44. LA. REV. STAT. ANN. § 9:273(A)(2)(a).

45. *Id.* § 9:307(A). Section 9:307(A) provides: "Notwithstanding any other law to the contrary and *subsequent to the parties obtaining counseling*, a spouse to a covenant marriage may obtain a judgment of divorce *only upon proof of* . . ." *Id.* (emphasis added). The construction of the sentence in this paragraph mentions *counseling* in the introductory clause as preliminary to a covenant spouse obtaining a judgment of divorce or separation. *Id.* However, when the same sentence in its main clause addresses the obtaining of the judgment and includes the word *only*, the sole requirement for the judgment is proof of one of the grounds listed, such as adultery. *Id.* The construction of section 9:307(B), which lists the grounds for separation from bed and board, begins in the identical fashion. See *id.* § 9:307(B) (stating language similar to section 9:307(A)).

46. Under Louisiana law, the appropriate procedural mechanism for a dismissal of plaintiff's suit would be either a dilatory exception if the action is premature or a peremptory exception if plaintiff has no cause of action. See LA. CODE CIV. PROC. ANN. arts. 926-27 (West 1984). The dilatory exception assumes that whatever prevents the maturity of the action can be cured, but the obligation to take reasonable efforts is generally incapable of specific performance so the obligation may not ever be fulfilled. Because the legislation does not use the word *only* to describe the preliminary counseling, the exception could not be peremptory; without the strength of *only* to support the argument that no judgment of divorce or separation can be rendered in a "covenant" marriage without counseling first, it is implausible the legislature intended that plaintiff had no cause of action.

47. LA. CIV. CODE art. 1983 (1987).

public policy⁴⁸ may well preclude the enforceability of an agreement (which itself is a contract) to dissolve this provision of the Declaration of Intent. Considering that the purpose of the covenant marriage law is to strengthen marriage, a strong argument can be made that, once the agreement to take steps to preserve their marriage is signed, it may not be later altered by the parties.

Other principles of Louisiana contract law would also apply: the obligation to take reasonable efforts to preserve the marriage must be performed in *good faith*;⁴⁹ a spouse may seek rescission of this portion of the Declaration of Intent upon proof of a vice of consent;⁵⁰ and, as a matter of interpretation of the agreement, reasonable *efforts* to preserve the marriage may include steps other than marital counseling;⁵¹ and the content of the counseling should be to preserve the marriage.⁵²

Upon the occurrence of the condition⁵³ "if marital difficulties arise," the obligation to take reasonable steps to preserve the marriage may be enforced. As an "obligation to do,"⁵⁴ the court would ordinarily award damages rather than specific performance, although specific performance is within the discretion of the court.⁵⁵ To order

48. *Id.* art. 1968.

49. *Id.* art. 1983. *See, e.g.,* *Grisaffi v. Dillard Dep't Stores, Inc.*, 43 F.3d 982 (5th Cir. 1995) (stating that under Louisiana law, good faith is implied in every contract); *Commercial Nat'l Bank v. Audobon Meadow Partnership*, 566 So. 2d 1136 (La. App. 1990) (recognizing the good faith requirement under Louisiana law).

50. LA. CIV. CODE art. 1948 (1987). Article 1948 states: "Consent may be vitiated by error, fraud, or duress." *Id.*

51. The Declaration of Intent includes the phrase, "including marital counseling," which means that marital counseling is simply an illustrative example. LA. REV. STAT. ANN. § 9:273(A)(1) (West 1991 & Supp. 1998). Reasonable efforts could include sessions with family or friends during which the couple discusses difficulties in their marriage, with a Sunday School class, with a Bible study group, or with a mentoring couple. *See supra* notes 22-24 and accompanying text.

52. *See Spaht*, 59 LA. L. REV. at 102 (contemplating the content of the counseling).

53. LA. CIV. CODE art. 1767 (1987). Article 1767 states: "A conditional obligation is one dependent on an uncertain event. If the obligation may not be enforced until the uncertain event occurs, the condition is suspensive. . . ." *Id.* The equivalent at common law is a condition precedent.

54. LA. CIV. CODE art. 1986 (1986). According to article 1986:

Upon an obligor's failure to perform an obligation to deliver a thing, or not to do an act, or to execute an instrument, the court shall grant specific performance plus damages for delay if the obligee so demands. If specific performance is impracticable, the court may allow damages to the obligee.

Upon a failure to perform an obligation that has another object, such as an obligation to do, the granting of specific performance is at the discretion of the court.

Id. *See also id.* cmt. (c) ("If the obligation which the obligee has failed to perform is an obligation to do, the granting of specific performance lies with the discretion of the court, to be exercised in a manner consistent with the principle that the obligor's personal freedom ordinarily may not be encroached upon.") (emphasis added).

55. A court order requiring the couple to enter marriage counseling appears self-defeating in this context.

marriage counseling in an effort to reconcile the couple would appear to be self-defeating in this context.⁵⁶ However, the spouse who fails or refuses to comply with his or her obligation and thus breaches the contractual agreement owes the other spouse damages, both pecuniary⁵⁷ and non-pecuniary.⁵⁸ Pecuniary damages consist of damages to compensate for *pecuniary* loss sustained and profit of which the spouse was deprived by the other's breach. Pecuniary loss may include, if causally related to the breach,⁵⁹ increased expenses for maintaining two households rather than one during the period of separation, or expenses necessitated by attempts to obtain the other spouse's compliance with the obligation.⁶⁰ Profit of which the spouse was deprived would ordinarily not include lost future profits due to the difficulty of proving causation with sufficient precision.⁶¹ The ultimate recovery of these pecuniary damages will depend upon whether the other spouse breached his or her obligation in "good faith"⁶² or "bad faith,"⁶³ the latter being defined as a failure to perform that is both intentional and malicious.⁶⁴ Virtually always the breach will be intentional; the diffi-

56. Carriere, 72 TUL. L. REV. at 1711.

57. See LA. CIV. CODE art. 1995 (1987) ("Damages are measured by the loss sustained by the obligee and the profit of which he has been deprived.").

58. *Id.* art. 1998. Damages for nonpecuniary loss may be recovered when the contract, because of its nature, is intended to gratify a nonpecuniary interest and, because of the circumstances surrounding the formation or the nonperformance of the contract, the obligor knew, or should have known, that his failure to perform would cause that kind of loss. *Id.* Regardless of the nature of the contract, these damages may be recovered also when the obligor intended, through his failure, to aggrieve the feelings of the obligee. *Id.*

59. LA. CIV. CODE art. 1994 (1987) ("An obligor is liable for the damages caused by his failure to perform a conventional obligation.") (emphasis added). Causation, of course, is a serious issue in the breach of a contractual object like that in the Declaration of Intent. For analogous jurisprudence, see for example: Sanders v. Gore, 676 So. 2d 866 (La. Ct. App. 1996) (involving breach of promise to marry; promise to marry declared against public policy because the person in breach was married to someone else at time promise made); Glass v. Wiltz, 551 So. 2d 32 (La. Ct. App. 1989) (involving breach of promise to marry; failed to prove breach caused damages).

60. In the former case a causal connection could be provided if "reasonable steps" would have included living together while steps to preserve the marriage were pursued. Such expenses might include rent or house note, ordinary living expenses (*i.e.*, food, furnishings, staples, telephone, utilities, etc.), and other extraordinary expenses related to living separately from the spouse who desires to preserve the marriage.

61. See, *e.g.*, Folds v. Red Arrow Towbar Sales Co., 378 So. 2d 1054, 1059 (La. Ct. App. 1979) (stating that lost profits may not be based on speculation, but must be proved with reliable certainty).

62. LA. CIV. CODE art. 1996 (1987). Article 1996 states: "An obligor in good faith is liable only for the damages that were foreseeable at the time the contract was made." *Id.*

63. LA. CIV. CODE art. 1997 (1987). According to Article 1997: "An obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence of his failure to perform." *Id.*

64. LA. CIV. CODE art. 1997 cmt. (b).

culty will be proving that the breach was also designed to injure the offended spouse.

Non-pecuniary damages are also recoverable because the nature of the agreement is "intended to gratify a nonpecuniary interest and because of the circumstances surrounding the formation or the non-performance of the contract the [other spouse knew], or should have known, that his or her failure to perform would cause that kind of loss."⁶⁵ "That kind of loss" refers to "damage of a moral nature which does not affect a 'material' or tangible part of a person's patrimony,"⁶⁶ but the damage must be more than "mere worry or vexation."⁶⁷ Examples of the type of loss suffered by the aggrieved spouse if the other breaches his or her obligation include embarrassment, mental anguish, humiliation, and psychological damage.⁶⁸ As to these damages, Article 1999 of the Louisiana Civil Code affords the court "much discretion."⁶⁹ Under Louisiana law, the sum awarded for these non-pecuniary damages need not be nominal.⁷⁰

IV. THE THIRD FEATURE: RESTRICTED GROUNDS FOR DIVORCE

By signing the Declaration of Intent, the covenant spouses agree to restrict their pursuit of a "no-fault" divorce, and by virtue of the premarital counseling, do so knowingly and deliberately.⁷¹ Divorce in a covenant marriage requires proof of fault in the nature of: adultery; conviction of a felony and a sentence of imprisonment at hard labor or death; abandonment (for one year); physical or sexual abuse of a spouse or child of one of the spouses;⁷² or habitual intemperance or cruel treatment.⁷³ In addition to these fault grounds for divorce,

65. *Id.* art. 1998.

66. *Id.* art. 1998 cmt. (b).

67. *Id.* cmt. (e).

68. See, e.g., *Sanders*, 676 So. 2d at 868 (stating the reasons the plaintiff sought damages for breach of promise to marry); *Glass*, 551 So. 2d at 33 (stating the reasons the plaintiff sought damages for breach of promise to marry).

69. LA. CIV. CODE art. 1999 (1987). Article 1999 states: "When damages are insusceptible of precise measurement, much discretion shall be left to the court for the reasonable assessment of these damages." *Id.*

70. LA. CIV. CODE art. 1999 cmt. (b).

71. See *infra* notes 72-91 and accompanying text.

72. LA. REV. STAT. ANN. § 9:307(A)(1)-(4) (West 1991 & Supp. 1998).

73. *Id.* § 9:307(B)(6). Section 9:307 provides:

(a) The spouses have been living separate and apart continuously without reconciliation for a period of one year from the date the judgment of separation from bed and board was signed.

(b) If there is a minor child or children of the marriage, the spouses have been living separate and apart continuously without reconciliation for a period of one year and six months from the date the judgment of separation from bed and board was signed; however, if abuse of a child of the marriage or a child of

either spouse may obtain a divorce upon proof of living separate and apart for two years.⁷⁴ Thus, the covenant marriage law permits an immediate divorce for proof of fault by the other spouse in more circumstances than the law applicable to "standard" marriages.⁷⁵ In contrast, in the absence of fault, the covenant marriage law requires significantly more time living separate and apart.⁷⁶

Furthermore, the offended spouse in a covenant marriage may choose to pursue a legal separation rather than a divorce for reasons such as religious conviction or the desire to maintain spousal support at a higher level;⁷⁷ the option of a legal separation does not exist for couples in a "standard" marriage. Should a spouse choose to obtain a legal separation, the length of time that must elapse between the judgment of separation from bed and board and the divorce differs, depending upon whether there are minor children of the marriage.⁷⁸ If there are minor children of the marriage, as a general rule, the spouses must live separate and apart for one year and six months after the legal separation before either spouse may file suit for divorce.⁷⁹ By contrast, if there are no minor children of the marriage, the

one of the spouses is the basis for which the judgment of separation from bed and board was obtained, then a judgment of divorce may be obtained if the spouses have been living separate and apart continuously without reconciliation for a period of one year from the date the judgment of separation from bed and board was signed.

Id. § 9:307 (A)(6).

74. LA. REV. STAT. ANN. § 9:307(A)(5).

75. Compare LA. CIV. CODE cmt. 103 (stating that in a "standard" marriage, a spouse may obtain an immediate divorce only for adultery or commission of a felony and a sentence to imprisonment at hard labor or death), with LA. REV. STAT. § 9:307(A)(1)-(4) (West 1991 & Supp. 1998) (stating that divorce can be obtained for abandonment for one year or physical or sexual abuse of a spouse or a child of one of the spouses). Article 102 of the Louisiana Civil Code permits a spouse to obtain a divorce 180 days after service of a petition for divorce, in which the spouse need only request the divorce, if the spouses have lived separate and apart for 180 days since the petition was filed. LA. CIV. CODE art. 102 (1987). Under article 103, a spouse may obtain a divorce upon proof of adultery or commission of a felony with a sentence to imprisonment at hard labor or death (just as in a "covenant" marriage) or upon proof of living separate and apart for six months prior to filing a suit for divorce (no-fault grounds). *Id.* art. 103.

76. See LA. REV. STAT. ANN. § 9:307(A)(5) (requiring two years); see *supra* note 26 and accompanying text.

77. LA. REV. STAT. ANN. § 9:307(B). According to article 113 of the Louisiana Civil Code:

[T]he court may award a party an interim periodic allowance based on the needs of that party, the ability of the other party to pay, and the *standard of living of the parties during the marriage*. The obligation to pay interim periodic support shall not extend beyond one hundred eighty days from the rendition of the judgment of divorce, except for good cause shown.

LA. CIV. CODE art. 113 (1987) (emphasis added).

78. LA. REV. STAT. § 9:307(A)(6)(b) (West 1991 & Supp. 1998).

79. *Id.* § 9:307(A)(6)(b).

spouses need to live separate and apart for only one year after the legal separation before either may file for divorce.⁸⁰

The distinction in grounds for divorce after a legal separation depending on the existence of minor children of the marriage supports the claim that covenant marriage legislation is "for the sake of the children."⁸¹ Despite the obvious concern for the preservation of a covenant marriage when there are minor children, there is an exception to the slowdown of divorce if "abuse of a child . . . is the basis for which the judgment of separation from bed and board was obtained."⁸² The focus of the covenant marriage law remains on the child of the marriage: preserve the marriage for the sake of the child unless the marriage poses an actual, realistic threat to the safety and psychological health of the child.⁸³

Termination of a covenant marriage necessarily affects status, because being married or divorced is a matter of status.⁸⁴ Thus, termination of a covenant marriage is not a matter governed by the principles of contract law. Section 274 of Title 9 of the Louisiana Revised Statutes imposes upon a "covenant" marriage the methods for terminating a "standard" marriage:⁸⁵ death of a spouse; divorce; or "a judicial declaration of its nullity when the marriage is relatively null."⁸⁶ Causes for termination of a "standard" marriage are exclusive.⁸⁷ The judiciary has always distinguished marriage from an ordi-

80. *Id.* § 9:307(A)(6)(a).

81. See Spaht, 59 LA. L. REV. at 121-22. In troubled marriages where there are children of the marriage, "slowing down" the process of divorce in an effort to permit steps to be taken is a realistic response if the goal is to preserve the covenant marriage. If there are no minor children of the marriage, the legislature lacks the compelling concern to preserve the marriage that it has if there are such children.

82. LA. REV. STAT. § 9:307(A)(6)(b) (Supp. 1998).

83. If abuse of a child was the ground for legal separation, see LA. REV. STAT. ANN. § 9:307(B)(4) (West 1991 & Supp. 1998), then the threat posed to the child by the additional six-month period outweighs the policy permitting more time for the spouses to take steps to preserve the marriage.

84. See, e.g., LA. CIV. CODE art. 3521 (divorce or separation), which appears in Title II of Book IV (Conflict of Laws) of the Louisiana Civil Code entitled, "Status." The first article of the Title reads as follows: "The *status* of a natural person and the incidents and effects of that status are governed by the law of the state whose policies would be most seriously impaired if its law were not applied to the particular issue. . . ." LA. CIV. CODE art. 3519 (1994) (emphasis added).

85. LA. REV. STAT. ANN. § 9:274 (West 1991 & Supp. 1998). Section 9:274 provides: "A covenant marriage shall be governed by all of the provisions of Chapters 1 through 4 of Title IV of Book I of the Louisiana Civil Code and the provisions of Code Title IV of Code Book I of this Title." *Id.* Chapters one through four include: Chapter 1. Marriage. General Principles (LA. CIV. CODE arts. 86-93); Chapter 2. Nullity of Marriage (LA. CIV. CODE arts. 94-97); Chapter 3. Incidents and Effects of Marriage. (LA. CIV. CODE arts. 98-100); and Chapter 4. Termination of Marriage (LA. CIV. CODE art. 101).

86. LA. CIV. CODE art. 101 (1987).

87. See *Favrot v. Barnes*, 332 So. 2d 873 (La. Ct. App.), *rev'd in part on other grounds*, 339 So. 2d 843 (La.), *cert. denied*, 429 U.S. 961 (1976).

nary contract⁸⁸ as a relationship conferring status.⁸⁹ Speculation that a "covenant" marriage may be dissolved by mutual consent⁹⁰ like an ordinary contract overlooks not only the provisions of Section 274, but also those of Section 273, which instruct the counselor to discuss "the *exclusive* grounds for legally terminating a covenant marriage by divorce or by divorce after a judgment of separation from bed and board."⁹¹

PART TWO: CONFLICTS LAW

I. INTRODUCTION

It has been said that, by returning to more stringent divorce laws, Louisiana has raised the specter of "the return of migratory divorce;"⁹² that is, a divorce initiated in a jurisdiction which is not the parties' common domicile and which has more lenient divorce laws. This phenomenon resulted from, and perhaps was encouraged by, the United States Supreme Court's decision in *Williams v. North Carolina* ("*Williams I*").⁹³ In *Williams I*, the Court held that a state that was the domicile of only one of the spouses had jurisdiction to grant a divorce.⁹⁴ This part of *Williams I* is not controversial and is not contested here.

What is contested is the part of *Williams I* which opined that the forum state was free to apply its own divorce law and to disregard the law of the state which was the domicile of the other spouse as well as the matrimonial domicile. In so doing, *Williams I* created an incentive for unhappy spouses to forum shop for states with favorable divorce laws.⁹⁵ In turn, this created pressure on the states from which these

88. See *Mason v. Mason*, 399 So. 2d 1272 (La. Ct. App. 1981); *Stallings v. Stallings*, 148 So. 687 (La. 1933); *Hurry v. Hurry*, 81 So. 378 (Ala. 1919).

89. LA. CIV. CODE art. 86 (1987). "Marriage is a *relationship*" although "*created by civil contract*." *Id.* (emphasis added).

90. See the commentary by Professor William Crawford accompanying Prec. Form 361, in *Pleadings & Judicial Forms Annotated* at 25: "The 'covenant' part of the covenant marriage, apart from the C.C. art. 87 requirements, is a form of contract in addition to the C.C. 87 contract of marriage and should not be viewed as a rule of public order. . . . If the covenant contract is not a rule of public order, then that contract *may be mutually rescinded by the parties to the covenant*. Furthermore, if the covenant were rescinded then the ordinary divorce procedures but not separation, would be available to the parties. . . ." (emphasis added). Such a conclusion is not consistent with the law of marriage or the provisions of the covenant marriage legislation.

91. LA. REV. STAT. ANN. § 9:273(A)(2)(a) (West 1991 & Supp. 1998).

92. *Carriere*, 73 TUL. L. REV. at 1731.

93. 317 U.S. 287 (1942).

94. *Williams v. North Carolina*, 317 U.S. 287 (1942) (*Williams I*).

95. Professor *Carriere* aptly describes the effect of migratory divorces on the broader legal culture:

Migratory divorce results from two factors. The first is the dichotomy in American cultural values that produced, simultaneously, jurisdictions with narrow

spouses launched their forum shopping expeditions to liberalize their divorce laws. "[S]tate divorce laws . . . gradually converged to the lowest common denominator,"⁹⁶ and the resulting "relative uniformity of current divorce law . . . made migratory divorce an irrelevancy."⁹⁷ Although the eventual liberalization of divorce could well have been inevitable, *Williams I* accelerated it.

The enactment of covenant marriage legislation in Louisiana and Arizona,⁹⁸ and the subsequent movement to enact similar legislation in other states,⁹⁹ is a move in the opposite direction and a sign that this uniformity may not last much longer. In turn, this may fuel a new rush for migratory divorces. This part of the Article explores this possibility by examining the issues likely to arise when one or both spouses who entered into a Louisiana covenant marriage seek a divorce in another state.

Briefly stated, the thesis of this Part is that, in cases in which one or both of the spouses retain their Louisiana domicile, the courts of sister states should give due deference to the interests embodied in Louisiana's covenant marriage law. At a minimum, such deference is due as a matter of proper choice-of-law analysis. At a maximum, such deference may be due as a matter of full faith and credit. Admittedly, both the choice-of-law argument and the constitutional argument run contrary to the prevailing practice and the accepted constitutional doctrine. Nevertheless, it is submitted that it is time to re-examine the propriety and wisdom of both the practice and the doctrine. This re-examination can begin by re-separating two questions which in virtually all other multistate cases are separate: jurisdiction and choice of law.

divorce grounds and procedural rigidity, and others with short residence requirements for divorce and liberal divorce grounds and procedures. The second is the requirement, under the Full Faith and Credit Clause of the United States Constitution, that all states give recognition to a divorce lawfully granted in any state.

Carriere, 73 TUL. L. REV. at 1732. Carriere concludes that "[t]he availability of migratory divorce subverted restrictive divorce regimes . . . by providing not only actual divorces, but also scandalous practices that undermined the dignity of the legal system." *Id.*

96. SYMEON C. SYMEONIDES ET AL., CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL 428 (1998).

97. Carriere, 73 TUL. L. REV. at 1731.

98. Arizona has also adopted the option of a covenant marriage, although the grounds for divorce are in some respects different. ARIZ. REV. STAT. ANN. § 25-903 (West 1991 & Supp. 1998).

99. See *supra* note 6.

II. THE MERGER OF CHOICE OF LAW AND JURISDICTION IN DIVORCE CASES

A. EX PARTE DIVORCES: REVISITING *WILLIAMS I*

Once upon a time, back at the beginning of the century, the only state that had jurisdiction to grant a divorce was the state of the matrimonial domicile — *i.e.*, the spouses' common domicile.¹⁰⁰ Under such a regime, it was justifiably taken for granted that the forum state would apply its own substantive law of divorce. Thus, unknowingly or understandably, the choice-of-law question had been merged into the jurisdictional question. However, when *Williams I* allowed the separate domicile of the fleeing spouse to assert divorce jurisdiction, the two questions could and should have been separated. Nevada, as the new domicile of one of the spouses, could be allowed to assert jurisdiction, but it should not necessarily have been given the power to apply its own divorce law to the merits, at least when the other spouse remained a domiciliary of the state of the former matrimonial domicile. To be sure, had *Williams I* taken this route of separating the choice-of-law question from the jurisdictional question, there would be little incentive for spouses, such as the plaintiffs in *Williams*, to seek divorce in another state, and the movement for migratory divorces would not have begun. This may well have been the reason for which the Court did not separate the two questions.

Technically, the choice-of-law question was not before the Court in *Williams I*, because that case reached the Supreme Court not on direct review from the Nevada Supreme Court, but rather on review from the Supreme Court of North Carolina after the latter state refused to give full faith and credit to the Nevada divorce judgment. The Supreme Court had already held in *Fauntleroy v. Lum*¹⁰¹ that a judgment rendered by a court that had jurisdiction could not be collaterally attacked in another state for, *inter alia*, applying the wrong law.¹⁰² North Carolina did not and could not challenge the substantive part of the Nevada judgment, but North Carolina did challenge the jurisdictional part. Thus, the only question before the Supreme Court in *Williams I* was whether Nevada had jurisdiction, not whether it could permissibly apply its divorce law. The Supreme Court could have disposed of the jurisdictional question as it did, with-

100. See *Atherton v. Atherton*, 181 U.S. 155 (1901) (holding that Kentucky law should apply when the matrimonial domicile of the parties was Kentucky).

101. 210 U.S. 230 (1908).

102. *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908). For a reaffirmation of *Fauntleroy*, see *Baker v. General Motors*, 118 S. Ct. 657 (1998). For an excellent discussion of *Baker* and its implications on the law of marriage, see Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147 (1998).

out addressing the choice-of-law question other than by citing *Fauntleroy*.

However, both the majority and the dissenting opinions in *Williams I* assumed that the two questions were intrinsically interconnected. The majority opinion, authored by Justice William O. Douglas, disposed of the question of jurisdiction, but also felt the need to address the choice-of-law question. Although the majority's statements on the latter question were dicta, the majority opined that, by virtue of being the domicile of one of the spouses, Nevada had the constitutional power to apply its divorce law to the merits of the case.¹⁰³ The majority thought that this power flowed inescapably from the Court's full faith and credit precedents, which held that a state that has significant contacts and interests may constitutionally apply its law even if those contacts and interests were no more significant than those of another state.¹⁰⁴ However, those precedents could have been easily distinguished on the ground that in all of them the choice-of-law question had been, or could have been, fully litigated in truly adversary proceedings that were susceptible to direct review by the Supreme Court. The Nevada proceeding in *Williams I* did not meet any of these criteria.¹⁰⁵

More interesting, perhaps, is the fact that the two dissenting Justices, Murphy and Jackson, also assumed that the Supreme Court's granting of divorce jurisdiction to Nevada inevitably entailed the power to apply its own law, and they based their stinging criticism of the majority opinion on that ground. Nobody suggested the obvious compromise of granting Nevada the former but not the latter power. Nevada could be allowed to provide a divorce forum to its new domiciliaries, but Nevada could be required to respect the policies of North

103. See *Williams I*, 317 U.S. at 299.

It is difficult to perceive how North Carolina could be said to have an interest in Nevada's domiciliaries superior to the interest of Nevada. Nor is there any authority which lends support to the view that the full faith and credit clause compels the courts of one state to subordinate the local policy of that state, as respects its domiciliaries, to the statutes of any other state. . . . Indeed, the recent case of *Pacific Employers Ins. Co. v. Industrial Accident Comm.*, 306 U.S. 493, 502, [1939], held that in the case of statutes "the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events."

Id. at 296.

104. See *supra* note 103.

105. Because the plaintiffs in *Williams I* had gone to Nevada precisely to take advantage of its liberal divorce law, they, of course, had no incentive to argue for the application of North Carolina law. The Nevada court, of course, could have considered the choice-of-law question *sua sponte*, but chose not to do so, perhaps for equally obvious reasons. Finally, the circumstances of the case were such that the Nevada judgment would not or could not be appealed to the United States Supreme Court.

Carolina in preserving the marriage or in allowing divorce under more exacting circumstances than Nevada.

This is not to say that the Court's failure to separate the choice of law question from the jurisdictional question can be attributed to either naivete or inattentiveness. The opposite is closer to the truth. The Court was undoubtedly aware that if the two questions were to be separated the whole campaign for migratory divorces would have been stopped in its tracks. Despite the Court's protestations to the contrary,¹⁰⁶ its decision in *Williams I* did "involve selection of a rule which will encourage . . . the practice of divorce."¹⁰⁷ If multistate social engineering was not what the Court intended, it is certainly what the Court produced.¹⁰⁸

B. BILATERAL "SUITCASE" DIVORCES: REVISITING *SHERRER*

The United States Supreme Court had another opportunity to disassociate the choice-of-law question from the jurisdictional question in the cases of bilateral "suitcase divorces," in which the forum state is not even claimed to be the domicile of either spouse. However, in *Sherrer v. Sherrer*,¹⁰⁹ the Supreme Court held that the principle of jurisdictional finality would be impermissibly undermined if the spouses were allowed to collaterally attack the divorce judgment in another state.¹¹⁰ Thus, again jurisdictional considerations absorbed or displaced substantive considerations. The fact that such proceedings are not truly, or even remotely, adversary and that consequently the choice-of-law issue is not even raised, much less litigated, by the parties, was not seen by the Court as a sufficient reason to differentiate divorce cases from other cases. Nor did the Court accept Justice

106. See *Williams I*, 317 U.S. at 302-03. The Court stated:

[This] question . . . does not involve a decision on our part as to which state policy on divorce is the more desirable one. It does not involve selection of a rule which will encourage on the one hand or discourage on the other the practice of divorce. That choice in the realm of morals and religion rests with the legislatures of the states. Our own views as to the marriage institution and the avenues of escape which some states have created are immaterial. It is a Constitution which we are expounding.

Id.

107. *Williams I*, 317 U.S. at 303.

108. See *id.* at 307 (Frankfurter, J., concurring) ("[A] court is likely to lose its way if it strays outside the modest bounds of its own special competence and turns the duty of adjudicating only the legal phases of a broad social problem into an opportunity for formulating judgments of social policy quite beyond its competence as well as its authority."); *Id.* at 312 (Jackson, J., dissenting) ("It is not an exaggeration to say that this decision repeals the divorce laws of all the states and substitutes the law of Nevada as to all marriages, one of the parties to which can afford a short trip there.")

109. 334 U.S. 343 (1948).

110. See *Sherrer*, 334 U.S. at 357 (stating that when a competent court has rendered a divorce, the litigation stops there).

Felix Frankfurter's solid arguments that societal interests above and beyond the parties' interests are implicated in divorce proceedings. Frankfurter said:

If the marriage contract were no different from a contract to sell an automobile, the parties thereto might well be permitted to bargain away all interests involved, in or out of court. But the State has an interest in the family relations of its citizens vastly different from the interest it has in an ordinary commercial transaction. That interest cannot be bartered or bargained away by the immediate parties to the controversy by a default or an arranged contest in a proceeding for divorce in a State to which the parties are strangers. Therefore, the constitutional power of a State to determine the marriage status of two of its citizens should not be deemed foreclosed by a proceeding between the parties in another State, even though in other types of controversy considerations making it desirable to put an end to litigation might foreclose the parties themselves from reopening the dispute.¹¹¹

In *Alton v. Alton*,¹¹² the federal district court for the Virgin Islands did what state courts rarely do. It held that the existence of *in personam* jurisdiction over both spouses, who were Connecticut domiciliaries, did not carry with it the power to divorce them under the law of the forum without actual proof that the plaintiff had acquired a domicile in the forum.¹¹³ The Court of Appeals affirmed over a dissent by Judge Hastie, who advanced for the first time the argument of separating choice of law from jurisdiction. Hastie properly recognized that "the due process clause does not prevent the entertaining and adjudicating of a divorce action in any American state or territory which has personal jurisdiction over both spouses,"¹¹⁴ but proceeded to point out that:

if a state proceeds upon this new basis of divorce jurisdiction another conflict of laws difficulty must be faced before the merits of the claim can be decided. That difficulty is the proper choice of law. . . . It is quite possible that some of the difficulties which have arisen in this field are the result of

111. *Sherrer*, 334 U.S. at 358 (Frankfurter J. dissenting). Judge Frankfurter continued as follows:

The nub of the *Williams* decision was that the State of domicile has an independent interest in the marital status of its citizens that neither they nor any other State with which they may have a transitory connection may abrogate against its will. Its interest is not less because both parties to the marital relationship instead of one sought to evade its laws.

Id. at 361-62 (Frankfurter, J., dissenting).

112. 207 F.2d 667 (3d Cir. 1953).

113. *Alton v. Alton*, 207 F.2d 667, 670-73 (3d Cir. 1953).

114. *Alton*, 207 F.2d at 684 (Hastie, J., dissenting).

failure to keep in view that these are distinct problems, although the existence of a domiciliary relationship is thought to solve both.¹¹⁵

He then suggested that "under correct application of conflict of laws doctrine, and even under the due process clause, it [may be] incumbent upon the Virgin Islands, lacking connection with the subject matter, to apply the divorce law of some state that has such connection, here Connecticut."¹¹⁶ Unfortunately, the Supreme Court did not have the opportunity to address Hastie's argument, because in the meantime Mr. Alton obtained a bilateral divorce in Connecticut and the case became moot.

C. THE PREVAILING AMERICAN PRACTICE AND ATTITUDE

The practice of merging the choice-of-law question into the jurisdictional question in divorce cases has never been seriously re-examined. Today this practice is thought to be so deeply imbedded in the American jurisprudence that the drafters of the Second Conflicts Restatement, who so rarely opted for inexorable rules, felt confident enough to proclaim that "[t]he local law of the domiciliary state in which the action is brought will be applied to determine the right to divorce."¹¹⁷ No qualifications or "unless" clauses were thought necessary. Absent is the usual adage that accompanies the vast majority of all other sections of the Restatement, which provides that the law designated as applicable is not to be applied "if another state has a more significant relationship."¹¹⁸ Apparently, in the restaters' opinion, no other state can have a more significant relationship than the state of one spouse's domicile, not even a state which was the former matrimonial domicile and continues to be the domicile of the other spouse and of their children.¹¹⁹

In fairness to the Restatement, this position is widely accepted in this country. For example, even Louisiana has repudiated the only known attempt in this country to separate the two questions. In 1988, during the drafting of the Louisiana Conflicts Codification, the drafter

115. *Id.* at 684-85 (Hastie, J., dissenting).

116. *Id.* at 685 (Hastie, J., dissenting).

117. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 285 (1971).

118. SYMEONIDES ET AL., *supra* note 96, at 337.

119. The Restatement states that "[t]he local law of the forum determines the right to a divorce, not because it is the place where the action is brought but because of the peculiar interest which a state has in the marriage status of its domiciliaries." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 285 cmt. (a) (1971). This is a sound statement when there is only one "domiciliary" state, but not when, as in *Williams*, there are two such states and the forum state is the domicile of only the deserting spouse. In such a case, the interest of the forum state "in the marriage status of its domiciliaries" is "peculiar" enough but it is not necessarily any more legitimate than the interest of the former matrimonial domicile which continues to be the domicile of the deserted spouse.

of that codification (the junior author here) proposed an article which provided that "[w]hen one of the parties is domiciled in this state, a court of this state *may* grant a divorce or separation for grounds provided by the law of this state."¹²⁰ As the italicized word "may" indicates, this article was intended to merely permit, rather than require, the application of the law of the forum in cases in which the forum's jurisdiction was based on domicile. Furthermore, in cases in which jurisdiction was based on lesser grounds, as in the case of jurisdiction by consent, the proposed article did not affirmatively authorize the application of forum law. Rather, these cases were relegated to the residual article on matters of status, which requires a full-fledged choice-of-law analysis. This scheme, however, was objected to by trial lawyers who argued that it would be "unthinkable" for the courts of Louisiana to apply the divorce law of another state. The fact that in the rest of the world courts routinely apply foreign divorce law¹²¹ was of little persuasive value. Thus, the trial lawyers' argument prevailed and the article was amended to provide that "[a] court of this state may grant a divorce or separation *only* for grounds provided by the law of this state."¹²² Ten years later, this shortsighted article¹²³ poses severe obstacles to any appeal by the State of Louisiana for other states to respect its covenant-marriage divorce law.

D. A COMPARATIVE EXCURSUS

The fact that American legislators, courts, and lawyers are so accustomed to ignoring the choice-of-law question in divorce cases does not mean that this is the best way of approaching this matter. It is worth recalling that most foreign countries have kept the two questions separate. The pertinent practices of other countries are discussed in detail elsewhere.¹²⁴ Suffice it to cite here two recent examples from two European countries which are not known for rigid attitudes towards divorce.

Article 61 of the 1987 Swiss conflicts codification provides that "when the spouses possess a common foreign nationality and only one of them is domiciled in Switzerland, their common national law ap-

120. Louisiana State Law Institute, Revision of the Louisiana Civil Code of 1870, Conflicts Law, Chapter VII: Law Governing Status, Council Draft # 1, Article 3 (Prepared for Meeting of the Council, Nov. 19, 1988, New Orleans, by Symeon C. Symeonides, Reporter) (emphasis added).

121. See *infra* notes 124-26 and accompanying text.

122. LA. CIV. CODE ANN. art. 3521 (West 1994) (emphasis added).

123. For criticism of this article, see Symeon C. Symeonides, *Private International Law Codification in a Mixed Jurisdiction: The Louisiana Experience*, 57 *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* 460, 484-85 (1993).

124. See SYMEON C. SYMEONIDES, *PRIVATE INTERNATIONAL LAW AT THE END OF THE 20TH CENTURY: PROGRESS OF REGRESS?* (forthcoming 1999).

plies" to their right to obtain a divorce, and that "[w]hen the common foreign national law does not allow divorce or subjects it to extraordinarily severe conditions, Swiss law applies if one of the spouses is also a Swiss national or has been residing in Switzerland for two years."¹²⁵

Similarly, Article 17 of the 1986 German conflicts codification provides that "[d]ivorce is governed by the law which governs the effects of marriage in general on the date when the petition for divorce is served." Furthermore, only "[i]f the marriage cannot be dissolved under that law, the divorce is governed by German law if the petitioning spouse is a German citizen at that time or was a German citizen when the marriage was concluded."¹²⁶

Thus, both the Swiss and the German systems begin with the premise that just because the forum has jurisdiction to entertain a divorce action does not mean that the forum is free to apply its own law. This is a genuine choice-of-law question, which the forum's choice-of-law rules assign to the "proper law" of the marriage. Although both of the above articles provide exceptions from the proper law when that law denies divorce or subjects it to "extraordinarily severe conditions," those exceptions are narrowly drafted so as to encompass only cases in which the forum's connection with at least one of the spouses is sufficiently strong or prolonged so as to implicate the forum's interests in granting divorce under its more permissive law. These sensible rules explain, *inter alia*, why "migratory divorces" have never been a problem in Europe.

III. RETURN TO REALITY: LOUISIANA COVENANT MARRIAGE LAW IN THE COURTS OF SISTER STATES

A. CURRENT LAW

In any event, for better or for worse, the law of the land in the United States is to the effect that: (a) a state that is the domicile of one of the spouses may constitutionally apply its law to grant a divorce for grounds not allowed by the law of the matrimonial domicile; and (b) a state which is the domicile of neither spouse, but which has *in personam* jurisdiction over both of them, may render a divorce judgment that is unassailable by the spouses and their privies in another state.

B. SWIMMING AGAINST THE CURRENT

The arguments advanced here are: (a) that the long-suppressed choice-of-law inquiry should be resurrected and detached from the ju-

125. Swiss Federal Law on Private International Law of 1987, art. 61.

126. EGBGB (Introductory Law to the German Civil Code as revised in 1986) art. 17.

isdictional inquiry; and (b) that the question of what is constitutionally permissible should be separated from the question of what is appropriate from the choice-of-law perspective. More specifically, when a court of a sister state is asked to grant a divorce to a Louisiana covenant-marriage spouse in a situation in which one or both spouses continue to be domiciled in Louisiana,¹²⁷ the court should undertake a choice-of-law analysis for determining the law applicable to the question of divorce. It is further submitted that in the majority of cases this analysis should lead to the application of Louisiana law.

It bears repeating that what is constitutionally permissible is not necessarily appropriate. The fact that, under current practice, the forum state is free to apply its own divorce law does not mean that it should. Even *Williams I* did not say that Nevada must apply its divorce law, but only that it may. In the case of Louisiana's covenant marriages there are two additional reasons for which a court in another state should pause before automatically applying its own divorce law. These reasons are:

(a) the fact that the distinguishing characteristic of a covenant marriage is the parties' voluntary commitment undertaken after specific and meaningful counseling and expressed in an *additional contract* (the "covenant") which is superimposed on the traditional "marriage contract" (the exchange of vows), and which contains an express choice of Louisiana law; and

(b) the fact that the covenant-marriage law does not eliminate, but simply delays, the availability of a unilateral no-fault divorce.

C. ORDINARY CONTRACTS AND COVENANT-MARRIAGE CONTRACTS

Regarding the first point, it is worth recalling what courts do in the case of ordinary commercial contracts. Suppose for example that, rather than entering into a covenant marriage, two Louisiana domiciliaries enter into an ordinary contractual business relationship. After continuing that relationship for twenty years, one of the partners becomes unhappy with the relationship and sues the other partner in Nevada for dissolution of the partnership, after serving him or her with process while on a brief visit in that state. Under these circumstances, even under the exceedingly lax standards of *Allstate Insurance Co. v. Hague*,¹²⁸ Nevada could not constitutionally apply its own contract law. The same would be true if the plaintiff had moved his or

127. If neither spouse retains a Louisiana domicile, then Louisiana would no longer be considered an interested state.

128. 449 U.S. 302 (1981). The Court in *Allstate* held that subsequently acquired domicile alone did not warrant application of the domicile law to contractual disputes. *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

her domicile to Nevada before filing suit. In *Allstate* and other cases,¹²⁹ the Supreme Court held that the plaintiff's after-acquired domicile alone is not sufficient to permit the application of the forum's law to a contractual dispute.

What, then, is the difference between the above hypothetical and a marriage case? In *Williams I* the Supreme Court thought that the difference lies in the fact that a divorce proceeding is essentially a proceeding *in rem*, whereas a proceeding to resolve a partnership requires *in personam* jurisdiction. In the case of an *ex parte* divorce, it suffices if half of the *res* is unilaterally brought by the plaintiff into the territory of the court,¹³⁰ whereas in the case of a bilateral "suitcase" divorce it suffices if both halves of the *res* are submitted to the court's authority. But even accepting the inevitability of the Court's logic, this addresses only the question of jurisdiction. In the partnership hypothetical, jurisdiction is not questioned, because the defendant was served with process in Nevada and the Court has managed to preserve this basis of jurisdiction in *Burnham v. Superior Court*.¹³¹ But none of this addresses the question of whether it is constitutionally permissible, much less appropriate, for Nevada to apply its law to this contractual partnership dispute. The indisputable answer that emerges from the Court's full faith and credit jurisprudence is that Nevada may not do so.

If Nevada is required by the full faith and credit jurisprudence to defer to the interests of Louisiana and apply Louisiana law to an ordinary contract (or, as Justice Jackson observed, to a contract for groceries¹³²), why should it be permissible or appropriate for Nevada to apply Nevada law to a foreign marriage? As Justice Jackson observed:

I see no reason why the marriage contract, if such it be considered, should be discriminated against, nor why a party to a marriage contract should be more vulnerable to a foreign

129. See, e.g., *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178 (1936) (declaring that a post-occurrence change of domicile to the forum state — standing alone — was insufficient to justify application of the forum law).

130. See, e.g., *Williams I*, 317 U.S. at 316-17 (Jackson, J., dissenting). According to Justice Jackson:

The marriage relation is to be reified and treated as a *res*. Then it seems that this *res* follows a fugitive from matrimony into a state of easy divorce, although the other party to it remains at home where the *res* was contracted and where years of cohabitation would seem to give it local situs. Would it be less logical to hold that the continued presence of one party to a marriage gives North Carolina power to protect the *res*, the marriage relation, than to hold that the transitory presence of one gives Nevada power to destroy it?

Id. (Jackson, J., dissenting).

131. 495 U.S. 604 (1990).

132. See *Williams I*, 317 U.S. at 616 (Jackson, J., dissenting) ("[S]ettled family relationships may be destroyed by a procedure that we would not recognize if the suit were one to collect a grocery bill.").

judgment . . . than a party to any other contract. I agree that the marriage contract is different, but I should think the difference would be in its favor.¹³³

Indeed, while a partnership or an ordinary commercial contract is freely dissolvable, a marriage is not. As Justice Frankfurter stated: "Nowhere in the United States, not even in the States which grant divorces most freely, may a husband and wife rescind their marriage at will as they might a commercial contract."¹³⁴ Indeed, it is ironic to say that in disputes arising out of ordinary contracts, which are freely dissolvable and which are litigated in truly adversary proceedings, the forum state is required to give more deference to the interests of another state than in cases involving marriages, which are not freely dissolvable and which are often litigated in non-adversary proceedings.

Of course the above arguments, although cogent, have been rejected by the majority of the Supreme Court's justices. Do these arguments somehow acquire any greater force in the case of covenant marriage? It is submitted that the answer ought to be affirmative. Why? Because what distinguishes a covenant marriage from the "standard" marriage in *Williams I* is the presence of an *additional* contract (the "covenant" contract) which is superimposed on the traditional marriage contract (the exchange of vows). This additional contract makes the marriage less easily dissolvable and, in this sense, it moves it further away from ordinary contracts. However, in a different sense, this additional contract makes a covenant marriage more analogous to ordinary contracts, because it is based on the *informed* and *voluntary* consent of the parties. Arguably, it can be said that the marriage contract (the exchange of vows) is also informed and voluntary. One is free to say "I do" or "I don't." However, for many people, the choice is not whether to say "I do" but rather when, where, and to whom to say it.

The covenant marriage law gives to people who choose to say so one additional option which, in a sense, is more voluntary than the

133. *Id.* at 617-18 (Jackson, J., dissenting).

134. *Sherrer*, 334 U.S. at 359 (Frankfurter, J., dissenting). Frankfurter continued as follows:

As a contract, the marriage contract is unique in the law. . . . The parties to a marriage do not comprehend between them all the interests that the relation contains. Society sanctions the institution and creates and enforces its benefits and duties. As a matter of law, society is represented by the permanent home State of the parties, in other words, that of their domicile. . . . Has [that state] not also the right to frustrate evasion of its policies by those of its permanent residents who leave the State to change their spouses rather than to change their homes, merely because they go through a lukewarm or feigned contest over jurisdiction?

Id. at 360-61 (Frankfurter, J., dissenting).

basic option to marry: they may undertake the additional commitment to exert all reasonable efforts to preserve the marriage and to not seek a divorce for grounds other than those permitted by *Louisiana's* covenant marriage law. It is important to underscore that this additional commitment is undertaken by the parties only after receiving competent and detailed pre-marital counseling, which not only stresses that "a covenant marriage is a commitment for life,"¹³⁵ and reminds them of the "obligation to seek marital counseling in times of marital difficulties,"¹³⁶ but also draws their attention to "the *exclusive* grounds of terminating a covenant marriage by divorce."¹³⁷

D. THE CHOICE-OF-LAW CLAUSE

All of these reminders are included in the Declaration of Intent that the parties sign before marriage. In addition, the Declaration of Intent contains this language: "With full knowledge of what this commitment means, we do hereby declare that our marriage will be *bound by Louisiana law on Covenant Marriages*. . . ."¹³⁸ Experienced conflicts lawyers would recognize that the phrase last quoted is nothing but a choice-of-law clause, inartfully drawn perhaps, but a choice nonetheless. The law chosen is *Louisiana's Covenant Marriage* law, not Louisiana's "standard" marriage law, nor Nevada's marriage law or that of any other state. Again, there is no reason why this choice-of-law clause should be given any less deference than a similar clause in a commercial contract.

In such contract, the degree of deference given by American courts to party autonomy has increased at least ten-fold since the time of *Williams I*.¹³⁹ At that time, the prevailing Conflicts Restatement (First) did not even recognize the principle of party autonomy, because of the misguided belief that it amounted to a license for private legislation.¹⁴⁰ By 1969, the time the Second Restatement was promulgated, party autonomy became widely accepted and was strengthened by the Restatement. Today, this principle is "perhaps the most widely accepted private international rule of our time."¹⁴¹ Section 187 of the *Restatement (Second) of Conflict of Law*, which is followed in the vast

135. LA. REV. STAT. ANN. § 9:273(A)(2)(a) (West 1991 & Supp. 1998).

136. *Id.*

137. *Id.* (emphasis added).

138. *Id.* § 9:273(A)(1) (emphasis added).

139. See SYMEONIDES ET AL., *supra* note 96, at 319.

140. See *id.* at 318.

141. Russell J. Weintraub, *Functional Developments in Choice of Law for Contracts*, 187 RECUEIL DES COURS 239, 271 (1984).

majority of American jurisdictions,¹⁴² imposes a very heavy burden on the party who seeks to defeat the application of the law chosen by the parties. This law is to be applied unless:

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of section 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.¹⁴³

If a Nevada court were to apply this section in the circumstances contemplated here (namely a Louisiana "Declaration of Intent" signed by Louisiana spouses, at least one of whom continues to be a Louisiana domiciliary), then it would be virtually impossible to defeat the application of the chosen law. For example, Louisiana would *have* a "substantial relationship"¹⁴⁴ both at the time of the signing of the declaration and at the time of trial. Secondly, under section 188 of the Restatement, Louisiana "*would be* the state of the applicable law in the absence of an effective choice of law by the parties,"¹⁴⁵ and thus, the court would not need to undertake the inquiry contemplated by subparagraph (b), *supra*. Even if a court in Nevada concludes that Nevada law would have been applicable in the absence of choice of law, then the court would be hard-pressed to explain why the application of the law of the chosen state would be "contrary to a fundamental policy"¹⁴⁶ of Nevada or why Nevada has "a materially greater interest than the chosen state in the determination of the particular issue."¹⁴⁷ Indeed, Nevada's interest is non-existent in the case of a bilateral divorce proceeding and very weak in the case of an *ex parte* divorce proceeding (such as the one in *Williams I*). These two situations are further discussed below.

E. BILATERAL DIVORCE

Bilateral divorce proceedings can be subdivided into contested and uncontested. In the first situation, the defendant spouse objects

142. See Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1253-55 (1997) (noting the number of states adopting the Second Restatement).

143. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1971).

144. *Id.* (emphasis added).

145. *Id.*

146. *Id.*

147. *Id.*

to the application of Nevada law (and argues for the application of Louisiana covenant marriage law), while in the second situation ("suitcase divorce") neither party objects to the application of Nevada law.

In the first situation, it is clear that Nevada has neither an interest nor an excuse to apply its divorce law. This proposition should not be controversial, except for the convenient but deplorable tendency to confuse choice of law with jurisdiction.

In the second situation, Nevada's lack of interest continues to be clear but Nevada now has a better excuse to apply its own law. For example, Nevada can cite the standard practice of many American courts¹⁴⁸ which apply the law of the forum unless the opposing party offers a good reason to apply a foreign law and establishes its content to the court's satisfaction. When neither party does so, the court feels free to apply its own law as the basic or residual law.

While this practice is justified in adversary proceedings, it is unjustified in non-adversary proceedings such as the one involved here, especially in light of the effect such a proceeding may have on the lives of third parties like the children of the marriage. One should not lose sight of the fact that in this proceeding *both* parties are essentially in the same position as plaintiffs in other cases. As the Supreme Court stated in one of its recent full faith and credit decisions, *Phillips Petroleum Co. v. Shutts*:¹⁴⁹

Even if one could say that the plaintiffs "consented" to the application of [forum] law . . . , plaintiff's desire for forum law is rarely, if ever controlling. In most cases the plaintiff shows his obvious wish for forum law by filing there. "If a plaintiff could choose the substantive rules to be applied to an action . . . the invitation to forum shopping would be irresistible."¹⁵⁰

Of course, the counter-argument is that *Sherrer* stands for the proposition that forum shopping, which is so vilified in adversary proceedings, is perfectly acceptable — if not commendable — in non-adversary divorce proceedings. However, it is time to re-examine the wisdom of this proposition. There is no rational reason to give more deference to a party's desire to have forum law in divorce cases than in other cases.

This point can be illustrated not only by comparing marriages with ordinary contracts, as was done *supra*, but also even by compar-

148. See EUGENE F. SCOLES ET AL., CONFLICT OF LAWS §§ 12-15, 12-19 (3d ed. 1999).

149. 472 U.S. 797 (1985).

150. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 820 (1985) (quoting *Allstate*, 449 U.S. at 337).

ing marriages with torts where, by definition, there is no contractual commitment to the law of one's domicile. Yet, even in such cases, American courts have resisted pleas to apply the law of the forum over the less favorable law of the parties' common domicile. For example, in *Schultz v. Boy Scouts of America*,¹⁵¹ the New York Court of Appeals chose to apply the law of the common domicile "because of its interest in enforcing the decisions of both parties to accept both the benefits and the burdens of identifying with that jurisdiction and to submit themselves to its authority."¹⁵² Similarly, another court proclaimed that at the core of the notion of applying the law of the common domicile is:

the notion of a *social contract*, whereby a resident assents to casting his or her lot with others in accepting the burdens as well as the benefits of identification with a particular community, and ceding to its lawmaking agencies the authority to make judgments striking the balance between his or her private substantive interests and competing ones of other members of the community.¹⁵³

The notion that a party binds himself or herself by a social contract of sorts to the *tort* law of his or her domicile may well be a rhetorical hyperbole. However, in the case of covenant marriages discussed here there is no need to resort to such hyperbolas, because the parties' commitment to the law of their common domicile is evidenced by a solemnly signed contract that contains an explicit choice of that state's law. This commitment is taken seriously by the parties' domicile. The fact that one or both parties now wants to break that contract gives Nevada no interest nor justification to ignore it.

F. EX PARTE DIVORCES

In the case where one of the spouses moves his domicile to Nevada and files for an *ex parte* divorce, Nevada acquires a newly born interest in determining that spouse's status. In *Williams I*, the Supreme Court articulated this same interest, but failed to compare this interest with North Carolina's stronger interests. Such a comparison is now necessary in the case of a covenant marriage for two reasons:

(a) because of the additional voluntary contractual element of this marriage and the choice-of-law clause contained therein, neither of which were present in the *Williams* marriages; and

151. 480 N.E.2d 679 (N.Y. 1985).

152. *Schultz v. Boy Scouts of Am.*, 480 N.E.2d 679, 685 (N.Y. 1985).

153. *Collins v. Trius, Inc.*, 663 A.2d 570, 573 (Me. 1995) (emphasis added).

(b) because, unlike North Carolina's law in *Williams I*, Louisiana's covenant-marriage law does not prohibit divorce altogether. In fact, it makes divorce *immediately* available if specific fault-based grounds are shown (such as adultery, abandonment, abuse, cruelty, etc.). If no-fault based grounds are shown, then a no-fault divorce can still be granted after the spouses have lived separate and apart for two years.¹⁵⁴

Point (a) has been discussed *supra* in connection with bilateral divorces and has the same relevance here. Point (b) is a reminder that, unlike *Williams I* where Nevada's choice was between divorce and no divorce, today's choice is between: (1) immediate, unilateral, no-fault divorce under Nevada law, or (2) a divorce under Louisiana's covenant-marriage law which, in the worst of circumstances, means a *delayed* divorce. A delayed divorce is not the same as a denied divorce, and the Supreme Court has so held, albeit in a different context.¹⁵⁵

Thus, if a choice-of-law analysis is undertaken in the cases of this pattern, most courts will probably conclude that the forum's interests, to the extent they exist, would not be seriously impaired by the non-application of the forum's divorce law. For example, Nevada's interests in "liberating" the plaintiff spouse from the bonds of matrimony at an earlier point than Louisiana (*e.g.*, six months as opposed to twenty-four months) would not be seriously impaired if the plaintiff were to wait a bit longer.

The opposite conclusion would be appropriate with regard to Louisiana's interests. Rightly or wrongly, Louisiana believes that in cases where fault-based grounds for divorce are absent, a two-year waiting period for a no-fault divorce, combined with the obligation to obtain marital counseling, may have the effect of preserving marriages which, at some point, appear doomed. Significantly, Louisiana does not make this assumption with regard to all marriages, but only with regard to the marriages of those of its domiciliaries who voluntarily and solemnly opt for a covenant marriage after pre-marital counseling. The assumption may appear wrong or misguided to outsiders; but it is an assumption that Louisiana is constitutionally empowered to make with regard to its domiciliaries. When at least one of the spouses, and especially the children, continue to be Louisiana domiciliaries, Louisiana has a strong interest in seeing that its value judgments are respected. This is not too much to expect from other states whose contacts with the marriage are less than Louisiana's.

154. See *supra* notes 72-76 and accompanying text.

155. See *Sosna v. Iowa*, 419 U.S. 393, 395, 410 (1975) (holding that an Iowa statute which imposed a one-year durational residency requirement before new Iowa domiciliaries could file for divorce did not violate the Constitution, because it was "not total deprivation . . . but only delay").

The above addresses only the choice-of-law inquiry, if one is undertaken. It does not answer the constitutional question in the sense that, under *Williams I*, Nevada may conclude that it has a free license to apply its law and ignore Louisiana's contacts and interests. The contention of this Article is that this license should be reviewed and eventually revoked or restricted by the Supreme Court, at least in situations like covenant marriages in which the parties freely assent to the application of the law of the marital domicile. In the meantime, one hopes that Nevada, or any other state with similar predilections, will use the license with restraint and respect for the interests of sister states.

IV. DIVISIBLE DIVORCES AND THE "INCIDENTS" OF A COVENANT MARRIAGE

Whether courts in the sister states will accept the above arguments remains to be seen. What is clear, however, is that even if these arguments are rejected and a court decides to grant a divorce for grounds not permitted by Louisiana's covenant marriage law, there are still certain features of that law that are not to be ignored by the court, unless the court has jurisdiction over both spouses. These features fall within the scope of the doctrine of "divisible divorce," which distinguishes between the effects of an *ex parte* divorce on the status of marriage, on the one hand, and on the other hand "incidents" or effects of marriage.

According to this doctrine, a court that meets the requirements of *Williams I* may sever the bonds of matrimony by granting a divorce, but may not render a judgment adversely affecting the property interests of the spouse who is not subject to the court's jurisdiction.¹⁵⁶ Incident to all marriages, these interests include spousal or child support and partition of community property or equitable distribution of marital property. The question here is whether there are any aspects of a covenant marriage, which include property rights or are sufficiently analogous to property rights, so as to come within the protection of the doctrine of divisible divorce. The answer is affirmative and is explored below.

In entering into a covenant marriage, the spouses sign a "Declaration of Intent," which obligates them to "take all reasonable efforts to

156. See *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 416-19 (1957) (holding that because the Nevada Court had no jurisdiction over the wife, it had no power to extinguish alimony rights under New York law); *Estin v. Estin*, 334 U.S. 541, 545-45 (1948) (holding that just because marital status had changed, not every other legal right incident to marriage had changed). *But see* *May v. Anderson*, 345 U.S. 528, 531 (1953) (refusing to allow Wisconsin Courts to determine children's legal domicile violations in person an jurisdiction).

preserve the marriage, including marital counseling,"¹⁵⁷ if marital difficulties arise. This additional contractual commitment is peculiar to "covenant" marriages. As a matter of contract not directly related to the ultimate question of the couple's status as husband and wife,¹⁵⁸ the obligation "to take all reasonable steps" can be analogized to the obligations assumed in the couple's marital property regime,¹⁵⁹ which in Louisiana is a matter about which spouses may contract.¹⁶⁰ In this respect, the obligation incurred by a covenant couple more closely resembles the other "incidents of marriage" or "incidents of divorce"¹⁶¹ rather than the grounds for divorce.

Obviously, this obligation is not susceptible to specific performance.¹⁶² However, as with any other contractual obligation, a breach of the above obligation entitles the non-breaching party to pecuniary and non-pecuniary damages¹⁶³ which, of course, are a property right. Thus, if the court of a sister state has no personal jurisdiction over the defendant "covenant" spouse, the court may not determine whether a breach occurred or the amount of damages owed, if any. In such a case, the defendant has two options: (a) appear in the other state and argue the choice-of-law question there, or (b) file an action in Louisiana.

157. LA. REV. STAT. ANN. § 9:273(A)(1) (West 1991 & Supp. 1998).

158. See *supra* notes 39-70 and accompanying text. See also Spaht, 59 LA. L. REV. at 96 (emphasizing the distinction based at least in part upon the recognition that submitting to marriage counseling is not an explicit prerequisite to divorce under the covenant marriage legislation).

159. See LA. CIV. CODE art. 2325 (1985) ("A matrimonial regime is a system of principles and rules governing the ownership and management of the property of married persons as between themselves and toward third persons.").

160. *Id.* arts. 2328-29.

161. Like other states, Louisiana distinguishes between the right to obtain a divorce and the incidents or effects thereof. For example, although article 3521 of the Louisiana Civil Code provides that forum law applies to the right to obtain a divorce, the next article, article 3522, provides that "the effects and incidents of marriage and of divorce are governed by the law applicable to [the particular issue] under Article 3519," which requires a full-fledged choice-of-law analysis. Compare LA. CIV. CODE art. 3521 (1994) (providing that forum law should apply to divorce proceedings), with *id.* art. 3522 (providing that the incidents to a divorce should be governed by law determined by a choice of law determination). The reason for requiring such an analysis is explained as follows by the official comments accompanying article 3522:

[T]he effects and incidents of divorce are matters on which the various states continue to differ, not only in details but also in basic policy. Because of these differences and the multitude of law-fact patterns that might come before Louisiana courts, it would have been unwise to assign a priori all of these incidents to the law of the forum, or, for that matter, to any single law. By referring these issues to the flexible approach of Article 3519, Article 3522 seeks to ensure that each such issue will receive the flexible, individualized treatment prescribed by that article.

Id. art. 3522 cmt. (d).

162. See *supra* notes 53-56 and accompanying text.

163. See *supra* notes 57-70 and accompanying text.

The second option, litigating in Louisiana,¹⁶⁴ has obvious tactical and logistical advantages for the aggrieved spouse. The only obstacle that the plaintiff will have to overcome will be that of obtaining personal jurisdiction over the spouse who left and is now domiciled elsewhere. Under Louisiana's "long-arm" statute, Louisiana Revised Statute 13:3201, Louisiana is likely to have such jurisdiction in virtually all cases.¹⁶⁵

The danger with the first option is that, by appearing in the other state, the defendant spouse subjects herself to the jurisdiction of that state, which leaves her only with the choice-of-law arguments. Regarding the issue of divorce *per se*, his or her arguments would be the same as those discussed above. Regarding the other aspects of the case, however, such as the nature of the obligation assumed in the covenant marriage's Declaration of Intent, the alleged breach, and the remedy available for the breach, his or her choice-of-law arguments would be much stronger and more likely to succeed.

Indeed, with regard to these issues, the court would have no excuse not to undertake a choice-of-law analysis. The analysis would be

164. In Louisiana, even before a divorce is rendered, the spouse who seeks damages for breach of the obligation to take all reasonable steps to preserve the marriage may sue the other spouse, because the action is one arising out of a contract. LA. REV. STAT. ANN. § 9:308 (West 1991 & Supp. 1998).

165. Paragraph A of section 3201 vests Louisiana courts with jurisdiction in two situations factually analogous to that of the covenant spouse: "Non-support of a [spouse or child] domiciled in this state to whom an obligation of support is owed and with whom the nonresident formerly resided in this state," and paragraph B provides that "[p]arentage and support for a child who was conceived by the nonresident while he resided in or was in this state." LA. REV. STAT. ANN. § 13:3201(A)(6), (7) (1991). In addition, paragraph B of the same section gives Louisiana courts personal jurisdiction over the defendant if the exercise of such jurisdiction is consistent with the Due Process Clause of the United States Constitution. *Id.* § 13:3201(B). As in other states, Louisiana courts have held that paragraph B (due process) is satisfied if the defendant has had "minimum" contacts with Louisiana resulting from his purposeful conduct and if it is fair or reasonable to require defendant to appear in Louisiana to defend himself. *See, e.g.,* Dickson Marine, Inc. v. Panalpina, Inc., 961 F. Supp. 947, 950 (E.D. La. 1997) (applying the minimum contacts test); American Valve Mfg. Co. v. Valvo Instrustria Ing. Rizzio, 685 So. 2d 1156, 1159 (La. Ct. App. 1996), *writ denied*, 689 So. 2d 1378 (La. 1997) (applying the minimum contacts test); Langley v. Oxford Chemicals, Inc., 634 So. 2d 950, 952 (La. Ct. App. 1994) (applying the minimum contacts test); Denmark v. Tzimas, 871 F. Supp. 261, 265-66 (E.D. La. 1994) (applying the minimum contacts test).

The significant activities conducted by the defendant covenant spouse in Louisiana which make it reasonable to require him to appear in court in Louisiana bear a strong resemblance to the specific examples of contacts in Subsection (A): he knowingly entered into a covenant marriage in Louisiana, which required submitting to pre-marital counseling conducted by counselors authorized to do so by Louisiana law; he executed and recorded the necessary documentation in Louisiana; he was domiciled in Louisiana where he and his wife lived as a covenant couple; he breached the obligation to take all reasonable efforts to preserve the marriage in Louisiana; he might have parented one or more children in Louisiana; and he left a spouse (and children) still domiciled in Louisiana to whom the obligation of support is owing. LA. REV. STAT. ANN. § 13:3201(A).

the same as the one applied in ordinary contract cases and should lead even more easily to the conclusion that Louisiana law should control these issues. Whether the forum state follows the First or the Second Conflicts Restatement or any other modern or traditional choice-of-law theory, the court can do little to avoid the conclusion that Louisiana law should apply. In the first place, as suggested above, the signing of Louisiana's "Declaration of Intent" contains a contractual choice of Louisiana law. As explained above, under the current American practice, a party who urges the court to disregard the law chosen by the parties has a very high burden of proof or persuasion, which is less likely to be discharged in this case. Secondly, even if the court does not treat the Declaration of Intent as containing a choice-of-law clause, the multiplicity of Louisiana's contacts¹⁶⁶ and interests as compared to the contacts and interests of the forum state are such to lead to the conclusion that Louisiana law should apply.

CONCLUSIONS

"The right of each state to experiment with rules of its own choice for governing matrimonial and social life" is one of the basic tenets of American federalism.¹⁶⁷ In exercising this right, Louisiana concluded that the free availability of unilateral no-fault divorce is a serious enough social problem to warrant the use of some new alternatives. The alternative Louisiana has chosen is to make available to *its own citizens* the *option* of a covenant marriage. The fact that this experiment seems to go in a direction that, at this point, other states do not find desirable does not detract from either the legitimacy or the value of the experiment. Indeed, other states may be able to draw valuable conclusions by watching this experiment. For this to be possible, however, the experiment must be allowed to work. The experiment cannot work if it can be defeated by a short trip across the border. In engaging in this experiment, Louisiana does not seek to impose its value judgments on citizens of other states, nor does it deny the right of other states to insist on their value judgments in cases involving their own citizens. The question is simply one of delineating the respective states' spheres of law-making competence. This Article has attempted such a delineation.

166. Louisiana's contacts would include being the place of negotiation and conclusion of the contract, the domicile of the parties at that time and the intervening period, and the current domicile of one of the spouses and more likely the children.

167. *Williams I*, 317 U.S. at 315 (Jackson, J., dissenting).