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THE SHACKLES OF COVENANT MARRIAGE: WHO HOLDS THE KEYS TO WEDLOCK?

Chauncey E. Brummer*

[T]o have and to hold, from this day forward, for better, for worse, for richer, for poorer, in sickness or in health, to love, and to cherish, as long as life shall last¹

These words, which have always signaled enduring commitment, have somehow lost their glow in a society steeped in suspicion and faltering in faith. No longer are wedding vows sufficient evidence of an intent to form a permanent bond. Now in force and continually on the horizon are state laws that create super marriages with super vows that threaten traditional assumptions about the institution.² Couples may now explore a marriage alternative that protects them against themselves and legally binds them to their wedding vows.

I. INTRODUCTION

For centuries marriage has been considered a relationship that transcends its legal definition as a civil status by adopting fundamental precepts of natural law and religious heritage.³ The concept of marriage as a union between one man and one woman for life has been basic to so many civilizations that it has withstood numerous attempts to dramatically alter its design.⁴ In fact, governments have gone to great lengths to preserve good, healthy marriages by providing laws that establish marital rights and acknowledge the right of a party to seek dissolution only when the relationship no longer serves the state's or the parties' interests.⁵ The bottom line has

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1. W. VA. CODE ANN. § 48-2-404 (LEXIS Supp. 2002) (providing specifically for the use of these words as part of the ritual for marriage conducted by a judge or justice).

2. See Editorial, "*Super Marriage*" *Hasn't Caught On*, BATON ROUGE ADVOC., Oct. 29, 1997, at B10 [hereinafter "*Super Marriage*"].

3. See, e.g., John J. Coughlin, *Natural Law, Marriage, and the Thought of Karol Wojtyla*, 28 FORDHAM URB. L.J. 1771, 1774 (2001).

4. See Anita K. Blair, *Constitutional Equal Protection, Strict Scrutiny, and the Politics of Marriage Law*, 47 CATH. U. L. REV. 1231, 1235-36 (1998).

5. Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 163-65 (1998).

always been to maintain marriages that work and to permit disposal of those which serve no beneficial purpose.

In a recent crusade to protect the integrity of marriage, Louisiana, Arizona, and Arkansas have passed laws that are designed to accentuate the lifelong character of marriage by permitting parties to enter into what are called "covenant marriages."⁶ Since passage of the first covenant marriage law in Louisiana in 1997, covenant marriage legislation has been introduced in at least twenty-three states.⁷ Currently, covenant marriage bills are under consideration in Indiana, Missouri, Oklahoma, and South Carolina.⁸ The formation of national interest groups like the Covenant Marriage Movement provides the clearest indication that legislators in other states will face persistent pressure from civic and religious organizations to enact such laws.⁹

Covenant marriage laws extend, to both couples anticipating marriage and to those already married, the option of designating their marriage as a "covenant marriage," thereby limiting the grounds upon which divorce can be achieved.¹⁰ The direct consequence of such a relationship can be viewed as either liberating or debilitating, based upon the ability of the couple to

6. See ARIZ. REV. STAT. ANN. §§ 25-901 to -906 (West 2000 & Supp. 2002); ARK. CODE ANN. § 9-11-801 (LEXIS Repl. 2002); LA. CODE ANN. CIV. art. 102 (West 1999).

7. Alabama, Arizona, Arkansas, California, Georgia, Iowa, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and West Virginia. See Divorce Reform Page, at <http://patriot.net/~crouch/divorce.html> (last visited Jan. 9, 2003).

8. See S.B. 1259, 114th Gen. Assem. (S.C. 2002); H.B. 1878, 91st Gen. Assem., 2d Reg. Sess. (Mo. 2002); H.B. 901, 2002 Leg., Reg. Sess. (Miss. 2002); H.B. 2641, 48th Leg. Sess. (Okla. 2002); S.B. 384, 112th Gen. Assem., 2d Reg. Sess. (Ind. 2002).

9. The Covenant Marriage Movement consists of church and para-church organizations that promote covenant marriage through religious leaders, politicians, educators, counselors, statisticians, social scientists, and others to affirm the importance of establishing and maintaining wholesome marriage relationships. Among the organizations affiliated are: Covenant Marriages Ministry, Covenant Rebuilders, CrossLife Ministries, Ethics and Religious Liberty Commission of the Southern Baptist Convention, Family Evangelism Unit of the North American Mission Board, FamilyLife, Family Foundations International, FOCCUS, Inc., Focus on the Family, Friends of the Family, Growth in Marriage Ministries, Heart Menders International, Inc., Intimate Life Ministries, Journey to Intimacy, LifeMates Ministries, LifeWay Christian Resources, Living Way Ministries, Marriage Ministries International, Marriage Savers, Masterful Living, Moody Bible Institute, National Association of Marriage Enhancement, Promise Keepers, Smally Relationship Center, Southern Baptist Association of Counselors and Family Ministers, Southwestern Baptist Theological Seminary Department of Pastoral Care and Counseling, Turnbull Ministries, Wellington Boone Ministries, and Your Ministry Counseling Services. Covenant Marriage Movement, *About Us*, at <http://www.covenantmarriage.com/templates/cuscovmarriage/details.asp?id=20786&PI D=34215> (last visited Jan. 10, 2003).

10. Katherine Shaw Spaht, *Beyond Baehr: Strengthening the Definition of Marriage*, 12 BYU J. PUB. L. 277, 292 (1998).

weather the storms of matrimony.¹¹ Because states typically provide a broad range of grounds for divorce, which may range from adultery to irreconcilable differences, parties who enter into covenant marriages will generally be denied access to an immediate divorce, except for the most egregious conduct.¹² Although this form of marriage does not prevent the divorce that is inevitable, it does postpone the action until the parties have had adequate time to attempt reconciliation or until permissible grounds become available.¹³ In addition to the impact which the delay may have upon interpersonal relations, such a postponement may have a profound impact on post-marital support and property interests.¹⁴

Marriage has always been considered a relationship in which the parties enter with the intent of lifelong commitment.¹⁵ In fact, contracts entered into before a marriage which express an intent to obtain divorce have been generally viewed as unenforceable.¹⁶ Why then is there a need for covenant marriage? To whom would such a union be attractive? Apparently, legislators in some states wish to allow couples, rather than the government, to have the final say in defining an important aspect of marriage—its permanence.¹⁷ Any criticism of such a laudable goal may seem unwarranted, but the problems created by recognizing an additional form of marriage may ultimately outweigh its utility.

A covenant marriage may be viewed as a premarital contract that evidences not only the present, mutual intent of the parties to be married, but the common agreement and expectation that such a marriage will endure under circumstances which would justify legal termination of other marriages.¹⁸ Although many religious marital vows include language which expresses lifelong commitment, the covenant marriage transforms statements made before God, family, and friends into a legally binding contract, enforceable in the state in which the marriage was contracted.¹⁹

11. *Id.* at 290 (stating “The declaration of intent signed by the prospective spouses after the counseling restores integrity to the dedicating promise itself; for what we say and mean shapes the nature and destiny of the marriage.”).

12. See Katherine Shaw Spaht, *Louisiana's Covenant Marriage: Social Analysis and Legal Implications*, 59 LA. L. REV. 63, 107–08 (1998).

13. See Raymond C. O'Brien, *The Reawakening of Marriage*, 102 W. VA. L. REV. 339, 366 (1999).

14. A delay will continue the accumulation of marital property and continue any spousal support obligation.

15. June Carbone, *Income Sharing: Redefining the Family in Terms of Community*, 31 HOUS. L. REV. 359, 367 (1994).

16. See RESTATEMENT (SECOND) OF CONTRACTS § 190 (1981).

17. See James Herbie DiFonzo, *Customized Marriage*, 75 IND. L.J. 875, 882 (2000).

18. See *id.* at 956.

19. See *id.* at 958–59.

This merger of private expectations, religious beliefs, and governmental interests has produced a new institution, which will likely present numerous legal questions for courts and lawyers, for instance: (1) Are all parties who are competent to enter into traditional marriage competent for covenant marriage? (2) May the covenant aspect of a covenant marriage be annulled without setting aside the marriage itself? (3) To what extent may the parties strengthen or modify the covenant through premarital agreements? (4) May changes in state marriage and divorce laws that take place after the covenant marriage affect the terms of the existing marriage? (5) To what extent will there be recognition of a covenant marriage outside the state where the marriage was contracted? and (6) May a couple convert a covenant marriage into a traditional marriage, and if so, may such a conversion take place without the participation or consent of the state?

This article will discuss the philosophical basis of covenant marriage and address numerous questions its adoption presents. It will also examine the approaches to covenant marriage taken in the states that have so far enacted covenant marriage statutes—Louisiana, Arizona, and Arkansas—considering covenant marriage in the context of longstanding social and legal principles relating to marriage. The most recent state to adopt covenant marriage, Arkansas, is both the least considered to date in the literature and the heir to some of the lessons from Louisiana and Arizona. Its statute will be most carefully scrutinized to demonstrate the many challenges and problems inherent in covenant marriage legislation. The article considers the scholarly literature that has thus far examined covenant marriage, challenging the assumptions of the authors to date. It concludes with a recognition that covenant marriage laws may breed serious unintended consequences, some of which may be avoided by premarital contract, but others which require scrutiny and reform by both the legislatures and the courts.

II. MARRIAGE AND CONTRACT

Marriage has traditionally been seen as the state's recognition of the present intent and agreement of a man and woman to live together in a relationship defined by the state, under rules promulgated by the state which serve important state interests.²⁰ Because the relationship so closely resembles a contract at the time of its formation, all too often the nature of this civil status is improperly subordinated to the premarital expectations of the parties.²¹ Courts have made it clear, however, that marriage is inextricably

20. David S. Caudill, *Legal Recognition of Unmarried Cohabitation: A Proposal To Update and Reconsider Common-Law Marriage*, 49 TENN. L. REV. 537, 556–57 (1982).

21. See David B. Cruz, "Just Don't Call It Marriage": *The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 983 (2001).

tioned to the state and that premarital expectations may not redefine its essentials.²²

All marriages are preceded by a contract.²³ The mutual exchange of promises serves as legally sufficient consideration.²⁴ At common law this contract was legally enforceable through the action for breach of promise to marry, with monetary damages awarded for such breach.²⁵ Like all other contracts, the contract to marry is based upon the mutual consent and capacity of the contracting parties at the time they enter into the relationship.²⁶ An innocent party may avoid a marriage that takes place when consent is involuntary or fraudulently induced.²⁷ Lack of capacity to contract based upon age or mental condition may also serve as a basis for nonperformance of the marriage contract.²⁸

The civil status of marriage is created after execution of the promise to marry, and at that point the contract is replaced by the three-party relationship consisting of the husband, the wife, and the state.²⁹ There is no longer a contract between husband and wife because the state fully defines the terms of the union, the parties lack the ability to dissolve the relationship without the consent and involvement of the state, and there are no recoverable damages arising out of any breach.³⁰ The state uses the marriage to promote its vital interests, and although it will acknowledge concern for the expectations

22. See, e.g., *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (characterizing marriage as "an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society").

23. See *id.* at 210.

24. Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U.L. REV. 65, 115 (1998).

25. See, e.g., *Wightman v. Coates*, 15 Mass. (15 Tyng) 1, 3-4, 6 (1818).

26. See, e.g., Steve Escalera, *California Marital Annulments*, 11 J. CONTEMP. LEGAL ISSUES 153, 156 (2000).

27. See, e.g., ARK. CODE ANN. § 9-12-201 (LEXIS Repl. 2002).

When either of the parties to a marriage is incapable from want of age or understanding of consenting to any marriage, or is incapable of entering into the marriage state due to physical causes, or where the consent of either party shall have been obtained by force or fraud, the marriage shall be void from the time its nullity shall be declared by a court of competent jurisdiction.

Id.

28. Katherine Shaw Spaht, *Revision of the Law of Marriage: One Baby Step Forward*, 48 LA. L. REV. 1131, 1146 (1988); see also RESTATEMENT (SECOND) OF CONTRACTS §§14-15 (1979).

29. See *Maynard v. Hill*, 125 U.S. 190, 210-11 (1888). In *Maynard*, the Court opined: It is also to be observed that, whilst marriage is often termed by text writers and in decisions of courts as a civil contract—generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization—it is something more than a mere contract.

Id.

30. *Id.*

of the parties, the degree to which the interests of the parties can coexist with other important state interests will govern the weight attached to this particular concern.³¹

III. MARITAL INTENT

Critical to the legal validity of any marriage is the present intent of the parties to be married.³² This means that each party has a present desire to assume the rights and responsibilities the state and their religion ascribe to them through this status.³³ Implicit in this is the intent to enter into a relationship of indefinite duration.³⁴ Despite the fact that individuals may envision marriage in different ways, the only intent that is relevant to the state is the intent to enter a marriage that comports with critical state interests.³⁵ These interests include the intent of the parties to stay married as long as they possibly can.

The intent necessary to form a covenant marriage goes beyond that which would be required to create other marriages.³⁶ In this instance, each party must freely and voluntarily desire to form a union that is not subject to the same rules as other marriages. They must understand the full legal implications of the marriage, including restrictions that may apply to them regarding separation and divorce.³⁷ An informed consent in this instance may also imply knowledge of grounds for divorce that would be available to them in the absence of a covenant marriage. An intent to enter into a covenant marriage that is based solely upon pressure coming from family or the religious community may lack the individualized reflection and consideration sufficient to satisfy statutory requirements for intent.³⁸

31. See Brian H. Bix, *State of the Union: The States' Interest in the Marital Status of Their Citizens*, 55 U. MIAMI L. REV. 1, 6 (2000).

32. Although present intent to be married is most often identified with common law marriages, license and solemnization requirements verify intent in ceremonial marriages.

33. See Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 970 (2000).

34. Catherine T. Smith, *Philosophical Models of Marriage and Their Influence on Property Division Methods at Divorce*, 11 J. CONTEMP. LEGAL ISSUES 214, 215 (2000).

35. See, e.g., Note, *The Constitutionality of the INS Sham Marriage Investigation Policy*, 99 HARV. L. REV. 1238, 1241 (1986).

36. Couples entering a covenant marriage are required to document their intent through the execution of a "declaration of intent," discussed *infra* Part VII.B.1.

37. In each state permitting covenant marriage, the parties must attest to the fact that they have received and read a pamphlet entitled "Covenant Marriage Act," which provides a full explanation of the terms and conditions of a covenant marriage.

38. See ARK. CODE ANN. § 9-12-201 (LEXIS Repl. 2002) (permitting annulment of a marriage "where the consent of either party shall have been obtained by force or fraud").

As is the case with all contracts, the requisite intent at the time of formation of a marriage determines validity.³⁹ Solemnization of marriage has historically included whatever words or vows the parties wished to express, but the bottom line has always been the mutual present intent of the parties to be husband and wife.⁴⁰ It has not been uncommon for marital vows to convey additional words of commitment which include an intent that only death will sever the marriage.⁴¹ Prior to the advent of absolute divorce, this intent was fully accommodated and enforced.⁴² The notion that marriage is a lifelong relationship did not require support through specific words of assurance, but was understood from the absence of a means for dissolution.⁴³ As states have liberalized divorce laws, wedding vows that express lifelong commitment have evolved to carry no legal significance beyond the verification of present intent to be married.⁴⁴

IV. STATE INTERESTS IN COVENANT MARRIAGE AND DIVORCE

Covenant marriage is the direct result of lawmakers' dissatisfaction with rising divorce rates and what appears to be a weakening of the institution.⁴⁵ It may therefore be viewed as a prophylactic attempt to guard state interests associated with marriage. Because marriage is viewed as something that is good and positive for society, contemporary legislative efforts to lengthen and strengthen marriage have been generally welcomed and have been seen as conducive to legitimate governmental concerns.⁴⁶ Covenant marriage attempts to reconcile a desire to protect the expectations of the parties with the states' selfish motives for preserving marriage.⁴⁷

Each state's interests are reflected in its marriage and divorce laws.⁴⁸ Some state interests in marriage, however, are universally shared. In addi-

39. See generally ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 536 (2d ed., West 1960).

40. Dubler, *supra* note 33, at 970.

41. See, e.g., Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1258 (1998).

42. See generally Michele Brewer Brooks, *The Biblical View of Marriage: Covenant Relationship*, 12 REGENT U. L. REV. 125 (1999); Harvey Couch, *The Evolution of Parliamentary Divorce in England*, 52 TUL. L. REV. 513 (1978). Absolute divorce recognized the right of the sovereign to dissolve a marriage and permit one or both parties to remarry.

43. Brooks, *supra* note 42, at 129.

44. See Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2372 (1994).

45. See Katherine Shaw Spaht, *Why Covenant Marriage? A Change in Culture for the Sake of the Children*, 46 LA. B.J. 116-18 (1998).

46. See generally Laura Bradford, Note, *The Counterrevolution: A Critique of Recent Proposals To Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607 (1997).

47. See Bix, *supra* note 31, at 23.

48. *Id.* at 29.

tion to protecting the expectations of the parties, all states are interested in promoting sexual stability, reducing welfare rolls by promoting economic support, facilitating procreation while protecting children, and promoting social relations which provide emotional support for its citizens.⁴⁹ States also are aware of the role that marriage plays in providing a political unit through which they may more effectively govern.⁵⁰ To the extent that covenant marriage evidences a commitment to stay married, the beneficial consequences of the civil status are promoted.

Among the most important state interests associated with marriage is the protection of the expectations of the parties at the time they enter into the union.⁵¹ Here the focus is not just on the subjective intent of the parties, but more importantly from the state's perspective, there is a desire to ensure the long-term stability of the relationship.⁵² The state is aware that if the parties are not linked in a common understanding regarding the critical terms of the marriage, there is a greater likelihood that marital discord will lead to disruption or dissolution and therefore frustrate other important state interests.⁵³ For example, most parties enter into a marriage anticipating the ability to sexually consummate the marriage. By permitting annulment based upon physical incapacity of a party, the state is not only acknowledging the breach of the contract underlying the marriage, but also is protecting its own interest in sexual stability, procreation, the psychological and emotional well-being of the parties, and economic support of a dependent spouse.⁵⁴

Covenant marriage places emphasis on the mutual expectation of the parties that their relationship will endure, a position that is not exactly uncommon for couples entering marriage.⁵⁵ Beyond highlighting the commitment to stay married and to resolve disputes, covenant marriage does not deal with specific expectations of the parties concerning marital rights and responsibilities which may be critical to the fulfillment of its purpose. The quality of marriage is subsumed by the fact of marriage. This underscores

49. These state interests are reflected in laws and public policy that enforce child support, prohibit bigamy, presume paternity of a child born during a marriage, and allow couples to enter into premarital agreements. See, e.g., Lynn D. Wardle, "Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation, 24 HARV. J.L. & PUB. POL'Y 771, 779-80 (2001).

50. Marriage facilitates the collection of taxes, the transfer of property, and the distribution of wealth. The marital unit has served as a way in which the state can generally keep track of its citizens.

51. See, e.g., Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79 (2001).

52. See Bix, *supra* note 31, at 7-8.

53. See Sean E. Brotherson & Jeffrey B. Teichert, *Value of the Law in Shaping Social Perspectives on Marriage*, 3 J.L. FAM. STUD. 23, 42 (2001).

54. See Wardle, *supra* note 49, at 781-87.

55. See Regan, *supra* note 44, at 2372.

the state's reluctance to address issues of marital cooperation, productivity, or happiness in the ongoing relation. The position taken in this regard seems to be "for better or for worse, make it last!"

That a state sets minimum qualifications to enter into marriage demonstrates the state's concern that the parties are not only capable of possessing the requisite intent for marriage, but that they can also at least initially consummate the marriage in a way that supports the state's vital interests.⁵⁶ In the context of a covenant marriage, qualifications for marriage take on added significance for the state and for the parties. Certainly, those who are not qualified to enter into traditional marriage may not contract a covenant marriage. Any disability reflected in the lack of qualification is exaggerated in a relationship that is not easily dissolved. Those who choose covenant marriage should not only be qualified to enter marriage, but their qualifications must also include the ability to comprehend the unique character of their union. Because a person's consent to marry may have been initially defective due to nonage or mental incapacity but may become valid after removal of the impediment, the validity of the covenant aspect of the marriage may be brought into question years later.⁵⁷

Annulment serves as the vehicle by which the state permits a party to show that there was never an execution of the marriage contract due to ineffective capacity or consent or that a critical impediment exists that is inconsistent with the mutual expectations of the parties.⁵⁸ Annulment therefore centers around the contract analogy and the state's interest in protecting the integrity of the bargain.⁵⁹ Failure to secure an annulment of a voidable marriage leaves intact a union that may be incompatible with articulated state interests. Later, this article will specifically address some of the unique legal problems surrounding annulment of a covenant marriage.

Circumstances may exist which prevent a marriage from satisfying any critical state interests, and in such cases the marriage will be deemed *void ab*

56. See Lynne Marie Kohm, *A Reply to "Principles and Prejudice": Marriage and the Realization That Principles Win over Political Will*, 22 J. CONTEMP. L. 293, 306 (1996) ("Any 'exclusion from marriage' is due to a basic incapacity based on qualification, not individual rights.")

57. In most states a marriage due to nonage can only be set aside during the minority of the underage party. When a minor enters into a covenant marriage, capacity to understand marital responsibilities and the covenant at the time of the marriage comes into play. Because the most significant distinction between covenant and traditional marriages lies in grounds for divorce, and there is no proceeding specifically designed to challenge the covenant, questions regarding capacity may only arise at that time. See, e.g., ARK. CODE ANN. § 9-12-201 (LEXIS Repl. 2001).

58. Jeanne Louise Carriere, *"It's Deja Vu All over Again": The Covenant Marriage Act in Popular Cultural Perception and Legal Reality*, 72 TUL. L. REV. 1701, 1729 (1998).

59. See Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869 (1994).

initio.⁶⁰ When a marriage takes place without dissolution of a previous marriage or within prohibited degrees of kinship, it will be considered invalid from its inception.⁶¹ In these instances the impediments are so reprehensible that the parties lack any ability to validate the union.⁶² Here the state retains the exclusive authority to define marriage in a way that fundamental values are not compromised. The distinction between covenant marriage and traditional marriage becomes irrelevant due to the overriding concerns associated with such relationships.

While most states share the same interests in the creation of a marriage, divorce grounds accurately reflect the balance between marriage as a contract and marriage as a civil status.⁶³ States that allow divorce without considering the conduct of the parties are showing deference to the contract analogy which will honor the wishes of a party.⁶⁴ These states are acknowledging the indispensable aspect of marital harmony, as defined by either party, to the fulfillment of state interests. On the other hand, states that focus upon marital misconduct as proof that the marriage is no longer serving important state interests are diminishing the value of personal assessment and focusing upon standards of behavior deemed relevant to these interests.⁶⁵

Absolute divorce, which has its roots in the Protestant Reformation, permits the dissolution of a marriage and the subsequent remarriage to someone else.⁶⁶ Traditionally states have considered divorce by looking at marriage from the perspective of whether it is capable of being salvaged or whether the marriage is irretrievably broken.⁶⁷ Evidence probative of this issue may relate to specific conduct of a party that the state does not deem acceptable, or one or both of the parties' mere assertion that reconciliation will not take place.⁶⁸

60. An agreement *void ab initio* is defined as "[a] contract [that] is null from the beginning . . ." BLACK'S LAW DICTIONARY 1568 (6th ed. 1990).

61. See, e.g., ARK. CODE ANN. § 9-11-106(a) (LEXIS Repl. 2002) (relating to incestuous marriages); ARK. CODE ANN. § 9-12-101 (LEXIS Repl. 2002) (prohibiting bigamous marriages).

62. See Escalera, *supra* note 26, at 155.

63. See Bix, *supra* note 31, at 21.

64. *Id.* at 22.

65. See Thomas E. Carbonneau, *A Consideration of Alternatives to Divorce Litigation*, 1986 U. ILL. L. REV. 1119, 1151.

66. See Gary H. Nichols, Note, *Covenant Marriage: Should Tennessee Join the Noble Experiment?* 29 U. MEM. L. REV. 397, 399-400 (1999).

67. See UNIF. MARRIAGE & DIVORCE ACT § 302, 9A U.L.A. 200 (1998); see also Herma Hill Kay, *Equality and Difference: A Perspective on No-fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1 (1987).

68. See, e.g., WASH. REV. CODE ANN. § 26.09.030(3) (West 1997). The Washington statute provides that:

[I]f the other party denies that the marriage is irretrievably broken the court shall consider all relevant factors, including the circumstances that gave rise to the fil-

To the extent that the state requires evidence of a party's conduct, fault-based divorce is said to exist. When conduct is irrelevant and a party asserts the existence of irreconcilable differences, no-fault divorce is available.⁶⁹ Many states today incorporate both fault and no-fault grounds into their divorce schemes, allowing the parties to determine the relevance of marital misconduct to the dissolution.

Before widespread adoption of no-fault divorce, couples would avoid their state's rigid fault grounds by traveling to a more lenient state or by manufacturing facts that would justify granting a divorce based on fault.⁷⁰ Collusion was widespread, and many divorce proceedings were relegated to theatrical productions.⁷¹ Recognizing that couples desiring a divorce would find a way to do so, some states began to allow uncontested divorces without corroboration of facts necessary for fault grounds.⁷² Ultimately, this form of divorce became a popular and efficient way for a couple who realized that divorce was inevitable to shed the bonds of matrimony.

No-fault divorce gained widespread acceptance in the 1970s as a result of: (1) the changed role of women in our society; (2) changed attitudes regarding premarital sex and the stigma attached to children born outside of marriage; (3) dissatisfaction with the cost of fault divorce and its economic implications for a dependent spouse; (4) a decreased role for religion in defining the nature and incidents of marriage; and (5) growing recognition of marriage as a partnership in which the cooperation of both parties is necessary to achieve success.⁷³ In 1969 California became the first state to enact no-fault divorce, setting the stage for the Uniform Marriage and Divorce

ing of the petition and the prospects for reconciliation and shall: (a) Make a finding that the marriage is irretrievably broken and enter a decree of dissolution of the marriage; or (b) At the request of either party or on its own motion, transfer the cause to the family court, refer them to another counseling service of their choice, and request a report back from the counseling service within sixty days, or continue the matter for not more than sixty days for hearing. If the cause is returned from the family court or at the adjourned hearing, the court shall: (i) Find that the parties have agreed to reconciliation and dismiss the petition; or (ii) Find that the parties have not been reconciled, and that either party continues to allege that the marriage is irretrievably broken. When such facts are found, the court shall enter a decree of dissolution of the marriage.

Id.

69. See Brotherson & Teichert, *supra* note 53, at 47–48.

70. Nora J. Lauerman, *A Step Toward Enhancing Equality, Choice, and Opportunity to Develop in Marriage and at Divorce*, 56 U. CIN. L. REV. 493, 497 (1987).

71. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 497–521 (2d ed. 1988).

72. See, e.g., ARK. CODE ANN. § 9-12-306(a) (LEXIS Repl. 2002) (stating that “[i]n uncontested divorce suits, corroboration of plaintiff’s grounds for divorce shall not be necessary or required”).

73. See Kay, *supra* note 67, at 5; Erin R. Melnick, Note, *Reaffirming No-Fault Divorce: Supplementing Formal Equality with Substantive Change*, 75 IND. L.J. 711, 713 (2000).

Act's adoption of irretrievable breakdown as the sole basis to dissolve a marriage.⁷⁴

When no-fault divorce was introduced in America, it arrived in two different versions. The first and purer form permits either party to dissolve a marriage upon an individual assessment that the marriage is irretrievably broken or that reunification is impossible because of irreconcilable differences.⁷⁵ Under this version of no-fault, a court is in no position to deny either party access to divorce and therefore need not consider the conduct of the petitioner or the period of separation.⁷⁶ Once other matters have been resolved, the entire divorce process may only take weeks and involve minimum contact with lawyers or the court.⁷⁷ The state's interest in complying with the immediate wishes of the petitioning party outweighs any other consideration.⁷⁸

A second version of no-fault divorce requires the parties to live separate and apart without reconciliation for a statutorily prescribed period that may range from six months to three years.⁷⁹ Under this approach the state wishes to verify the breakdown of the marriage through the fact of physical separation for an extended period of time.⁸⁰ The time requirement not only ensures the irreconcilable nature of the breakup, but also ameliorates the harshness of divorce proceedings. The state has a vested interest in expediting divorce by providing sufficient time in advance of any proceedings to work out details of the post-marital relationship. Once the designated period has expired, however, the court will treat the marriage as irretrievably broken and grant a divorce without consideration of marital misconduct.⁸¹

Each state's interests associated with divorce are centered around its interest in marriage. In fault divorce a determination is made that critical state interests typically associated with marriage are not being served, and therefore, little justification exists for continuing such a marriage.⁸² For example, adulterous conduct frustrates the state's interest in promoting sexual stability and avoiding children born out of wedlock. Physical cruelty to a spouse runs contrary to the state's interest in public peace and safety. When a party to a

74. O'Brien, *supra* note 13, at 354; *see also* UNIF. MARRIAGE & DIVORCE ACT §§ 302, 305, 9A U.L.A. 200, 242 (1998).

75. For a general summary of no-fault grounds for divorce, *see* W. WADLINGTON, DOMESTIC RELATIONS CASES AND MATERIALS 313-20 (5th ed. 2002).

76. *Id.*

77. Many states will permit the divorce after a short period of time has elapsed since filing the petition. Usually this period will not exceed thirty days.

78. *See* Bix, *supra* note 31, at 22.

79. *See* CLARK, *supra* note 71, at 518-21.

80. *Id.*

81. *Id.* at 521.

82. *See* Bix, *supra* note 31, at 8.

marriage engages in such reprehensible conduct, the state is more than willing to let the innocent spouse out of the marriage.

In granting a divorce based upon fault, the state may be interested in: (1) punishing the guilty party; (2) vindicating and protecting the innocent spouse; (3) ensuring that the marriage is irretrievably broken; (4) encouraging an appropriate standard of marital conduct; or (5) protecting children of the marital household.⁸³ In such cases evidence exists which validates the broken character of the marriage; therefore, the state's primary interest shifts to protecting those who may be victims of the relationship. Because many of the basic benefits derived by the state from the marriage have been compromised, dissolution is not only permitted, but also, under some circumstances, may be encouraged.⁸⁴

V. MARRIAGE CONTRACTS AND COVENANTS

Despite the fact marriages are not considered contracts, courts have historically permitted parties contemplating marriage to enter into legally binding agreements that may have an impact on the ongoing marital relationship.⁸⁵ For many years antenuptial or premarital agreements were tools used by older persons who wished either to preserve property after death for their children of a previous marriage or to protect such property from the statutory and common law claims of their future spouse.⁸⁶ Testamentary disposition was not completely effective because of the ability of the surviving spouse to take by dissent from the terms of the will.⁸⁷ Because such agreements usually involved older and wealthier individuals, the agreements did not offend major public policy considerations.⁸⁸ In fact, because they removed obstacles to marriages, premarital agreements were encouraged and viewed favorably by courts.⁸⁹

Efforts to expand the use of premarital agreements to limit the marital or post-marital support obligation and to dictate the property interests of the parties upon the contingency of divorce initially met resistance.⁹⁰ Gradually, courts permitted broader use of premarital agreements, including a determi-

83. See generally Twila L. Perry, *No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts?*, 52 OHIO ST. L.J. 55 (1991).

84. A state may actually encourage divorce by permitting a victim spouse to recover attorney's fees and court costs from an abusing spouse.

85. Richard W. Bartke, *Marital Sharing—Why Not Do It by Contract?*, 67 GEO. L.J. 1131, 1147–51 (1979) (discussing the history of antenuptial agreements in the United States).

86. See generally CLARK, *supra* note 71, at 1–20.

87. *Id.* at 295.

88. *Id.* at 2.

89. See *id.* at 8.

90. See generally Klarman, *Marital Agreements in Contemplation of Divorce*, 10 U. MICH. J.L. REFORM 397, 407–09 (1977).

nation of postmarital spousal support and property division.⁹¹ Fundamental to the enforceability of such agreements was the requirement that they contain fair provisions for a potentially dependent spouse or that there be full and frank disclosure of the assets of the parties.⁹² Expanded use of premarital agreements has been precipitated by several factors: (1) the diminished role of fault in the divorce and alimony determinations; (2) the greater economic independence of women; (3) the growing number of "second marriages"; and (4) the advent of equal or equitable division of marital property upon divorce.⁹³ Because today's courts are interested in expediting divorce proceedings and are less concerned with issues relating to spousal support or assigning blame for marital breakdown, premarital agreements serve as useful tools to courts and married couples who wish to clarify their marital and post-marital, economic, and personal relationships.

The wide latitude given to parties in premarital contracting serves as a strong justification for covenant marriage. If the state is willing to enforce promises made before marriage regarding matters that range from the disposition of property upon divorce to the availability of post-marital support, why should it not be interested in enforcing the voluntary promise of the parties to remain married? On the other hand, does the availability of premarital contracting obviate any need for covenant marriage by offering an alternative means of enforcing commitments emanating from marriage? Should state involvement be restricted to the enforcement of contracts that are entered into before the marriage takes place and that adhere to traditional legal principles affecting premarital agreements?

VI. THE LOUISIANA AND ARIZONA COVENANT MARRIAGE STATUTES

In 1997 Louisiana became the first state to enact a covenant marriage law.⁹⁴ In what its proponents characterized as an effort not to eliminate divorce but to strengthen marriage, this new law allowed a couple to insulate their marriage from many of the traditional fault and no-fault grounds for divorce by committing themselves to matrimony for life.⁹⁵ The act set forth three basic requirements for forming such a marriage: (1) premarital coun-

91. See, e.g., *Posner v. Posner*, 233 So. 2d 381, 386 (Fla. 1970) (finding premarital agreements valid if made under the proper conditions); *Scherer v. Scherer*, 292 S.E.2d 662, 666 (Ga. 1982) (holding premarital agreements are not per se void as against public policy); *Osborne v. Osborne*, 428 N.E.2d 810, 815 (Mass. 1981) (upholding a premarital contract).

92. CLARK, *supra* note 71, at 3.

93. See WADLINGTON, *supra* note 75, at 520-22.

94. See LA. REV. STAT. ANN. § 9:272 (West 2000).

95. See Joel A. Nichols, Comment, *Louisiana's Covenant Marriage Law: A First Step Toward a More Robust Pluralism in Marriage and Divorce Law?*, 47 EMORY L.J. 929, 929 (1998) (citing State Representative Tony Perkins, sponsor of Louisiana's Covenant Marriage Law).

seling which emphasizes the significance of marriage and the lifelong commitment being made; (2) execution of a declaration of intent to enter into a covenant marriage by both parties, which includes an affidavit stating that they have received premarital counseling and a state pamphlet explaining the legal implications of such a marriage;⁹⁶ and (3) an attestation signed by the counselor accompanying the parties' affidavit confirming that the appropriate counseling was provided.⁹⁷ Couples entering into a covenant marriage may not obtain a divorce without consideration of fault, but must comply with the statute's two-year separation requirement.⁹⁸ Even when contemplating divorce, the statute mandates counseling in an attempt to foster reconciliation.⁹⁹

The Louisiana covenant marriage law allows for divorce based upon (1) adultery; (2) felony conviction and subsequent sentence of death or imprisonment "at hard labor"; (3) abandonment for one year; (4) sexual abuse of the spouse or a child of one of the spouses; (5) living separate and apart for two years; or (6) separate cohabitation after a judgment of separation of bed and board for: (a) one year, if the marriage produced no children; (b) eighteen months, if the marriage produced any minor children; or (c) one year, if the judgment of separation was based on abuse of a minor child of one of the spouses.¹⁰⁰ In addition to the above-stated grounds for divorce, grounds for legal separation include "habitual intemperance of the other spouse, or excesses, cruel treatment, or outrages of the other spouse, if such . . . is of such a nature as to render their living together insupportable."¹⁰¹ Parties without children who are legally separated and have lived apart without reconciliation must wait only one year from the time of the legal

96. See LA. REV. STAT. ANN. § 9:273(A)(1)-(2)(a) (West 2000). The contents of a declaration of intent include the following:

We do solemnly declare that marriage is a covenant 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.

Id.

97. See *id.* § 9:273(A)(2).

98. See *id.* § 9:307 (West 2000).

99. *Id.*

100. *Id.*

101. See Susan Hager, Comment, *Nostalgic Attempts To Recapture What Never Was: Louisiana's Covenant Marriage Act*, 77 NEB. L. REV. 567, 576 (1998) (quoting LA. REV. STAT. ANN. § 9:307).

separation to obtain a divorce.¹⁰² When there are minor children from the marriage, the parties must wait an additional six months.¹⁰³

In its first year, covenant marriage was not exactly welcomed with open arms in Louisiana—only one percent of marriages contracted chose the covenant option.¹⁰⁴ Currently, only about three percent of Louisiana marriages are covenant marriages.¹⁰⁵ Proponents of the new law have attributed its slow start to lack of information and education regarding the desirability of covenant marriage as an option.¹⁰⁶ Opponents may argue that the lack of popularity is due to the general satisfaction with traditional marriage and the rejection of the notion that some marriages may not be as secure as others.¹⁰⁷

The suspicion with which the people of Louisiana viewed covenant marriage has not stopped other states from taking a close look at this form of marriage option. A number of states introduced covenant marriage bills that were not passed.¹⁰⁸ Despite the failure of covenant marriage to take hold in these states, the Louisiana law has prompted lawmakers in many states to take a closer look into serious marriage and divorce reform.¹⁰⁹

The Arizona covenant marriage law, which was enacted in 1998, closely resembles the Louisiana law enacted a year earlier.¹¹⁰ This statute permits a couple with the legal capacity to marry to declare their intent to enter into a covenant marriage and be bound by Arizona law regarding such marriage.¹¹¹ Arizona's provisions relating to premarital counseling and supporting affidavits and documents are identical to those in Louisiana.¹¹² The only major differences in the Arizona law appear in the grounds for marital dissolution. The Arizona covenant marriage statute permits a party to seek a divorce when the other spouse has habitually used drugs or alcohol, thus avoiding the period of prolonged separation required in Louisiana.¹¹³ Arizona also permits parties to a covenant marriage to obtain a divorce when

102. *Id.*

103. *See id.*

104. Christine B. Whelan, *No Honeymoon for Covenant Marriage*, WALL ST. J., Aug. 17, 1998, at A14.

105. Krisy Gashler, *Wedded Bliss?*, DESERT NEWS (Salt Lake City), Aug. 1, 2002, at C1.

106. *See Spaht, supra* note 10, at 298.

107. *See* Melissa Lawton, Note, *The Constitutionality of Covenant Marriage Laws*, 66 FORDHAM L. REV. 2471, 2502 n.289 (1998) (citing "*Super Marriage*," *supra* note 2).

108. *See* Nichols, *supra* note 95, at 973-74 (citing failed attempts to pass bills in California, Mississippi, Indiana, Kansas, Minnesota, Missouri, Nebraska, Ohio, South Carolina, Tennessee, Washington, and West Virginia).

109. *See id.* at 974.

110. *See* ARIZ. REV. STAT. ANN. §§ 25-901 to -906 (West 2000).

111. *Id.* § 25-901.

112. *Compare* ARIZ. REV. STAT. ANN. § 25-901, with LA. REV. STAT. ANN. § 9:273(A)(2)(a) (West 2000).

113. ARIZ. REV. STAT. ANN. § 25-903(7).

they mutually agree to do so.¹¹⁴ This provision is the clearest indication that Arizona wishes to emphasize the contractual nature of covenant marriage by recognizing the right of rescission.

In the absence of covenant marriage, no-fault divorce is available in both Louisiana and Arizona. Obtaining a no-fault divorce in Louisiana requires only a six-month residency period and separation for six months.¹¹⁵ In Arizona domicile is required for divorce jurisdiction, but a no-fault divorce can easily be obtained by showing that the marriage is irretrievably broken.¹¹⁶ In both states the ease with which couples could obtain a no-fault divorce played a major role in legislative decisions to adopt covenant marriage.¹¹⁷ Covenant marriage was simply viewed as a speed bump to divorce for couples who wished to have one in place.

VII. THE ARKANSAS COVENANT MARRIAGE STATUTE

A. Legislative History

Identified by the governor as a key 2001 legislative priority, State Representative Russ Hunt filed a covenant marriage bill with the Arkansas General Assembly on February 23, 2001.¹¹⁸ Advocates of the legislation, labeled as House Bill 2039, cited statistics showing that Arkansas had the third highest divorce rate nationally, exceeded only by Nevada and Tennessee.¹¹⁹ They pointed to the fact that Arkansas had a divorce rate of 6.4 per 1000 people in 1998 and asserted that the state government has a direct interest in preserving marriage because children in broken families often require more social services, a cost which is borne by taxpayers.¹²⁰ Although there was the stated concern that divorce had become too easy, legislators acknowledged that little interest existed to toughen divorce laws.¹²¹

114. *Id.* § 25-903(8).

115. LA. CIV. CODE ANN. art. 103 (West 1999).

116. ARIZ. REV. STAT. ANN. § 25-312 (West 2000).

117. See Kelly Ryan, *Super Vows' Aim To Put Marriages to the Test: Louisiana Covenant Measure May Boost Other Efforts To Curb Divorce*, DALLAS MORNING NEWS, June 29, 1997, at A1; see also Maggie Gallagher, *Choosing the Ties That Bind*, N.Y. POST, May 30, 1998, at O15.

118. See Suzi Parker, *Covenant Marriages Near: Arkansas Poised To Approve the Option for Couples*, DALLAS MORNING NEWS, Mar. 31, 2001, at 33A.

119. See Michael Rowett & Michael R. Wickline, *House Passes Bill Allowing Couples To Enter Covenant: New Contract Meant To Deter Divorce*, ARK. DEMOCRAT-GAZETTE, Mar. 13, 2001, at B1.

120. Michael Rowett, *Bill Would Let Couples Enter Covenant Marriage Contracts*, ARK. DEMOCRAT-GAZETTE, Feb. 24, 2001, at B1.

121. See Amy Schlesing, *"I Do" Means Forever with Covenant—New Legal Option Makes Divorce More Difficult To Obtain*, ARK. DEMOCRAT-GAZETTE, Sept. 9, 2001, at B4.

During debate over this legislation before the General Assembly's City, County, and Local Affairs Committee, supporters expressed concern that since the 1960s, divorce had become too accessible in Arkansas, thereby ignoring the nature of the contractual obligations assumed by the parties.¹²² The bill's sponsor compared marriage to buying a house or a car: "[Y]ou can't get out of it just because you change your mind."¹²³ Opponents of the legislation argued that the state should not have an active role in preserving marriages, and they feared that passage of a voluntary statute could lead to a mandatory version down the road.¹²⁴ Concerns were also expressed that the law could lead to physical and mental abuse, that the presence of a covenant marriage and its reconciliation provisions could mean a delay in the issuance of a protective order, or that those entering into such agreements may be unable to comprehend all of the legal ramifications of their decision.¹²⁵ Despite the misgivings expressed by critics of the legislation, House Bill 2039 passed the Arkansas State House of Representatives on March 12, 2001, by a fifty-seven to thirty-seven vote and later was approved by the Senate.¹²⁶ On August 13, 2001, Act 1486 establishing covenant marriages took effect.¹²⁷

B. Key Provisions of Act 1486

The Arkansas Covenant Marriage Act of 2001 is virtually identical to the Louisiana statute described above. It provides that a covenant marriage is a marriage entered into between a male and a female who understand and agree that their marriage should be a lifelong relationship.¹²⁸ The parties recognize the significance of marriage and have participated in authorized counseling, which placed emphasis upon the purposes and responsibilities of marriage.¹²⁹ There is the further recognition that a party should seek a divorce only when there has been a complete and total breach of the marital covenant.¹³⁰ The couple may contract a covenant marriage by simply "declaring their intent to do so on their application for a marriage license . . . and executing a declaration of intent to contract a covenant marriage" in a

122. See Michael Rowett, *Covenant Marriage Option Endorsed by Panel*, ARK. DEMOCRAT-GAZETTE, Mar. 8, 2001, at A8.

123. *Id.*

124. *Id.*

125. See Seth Blomeley, *Senate Panel Oks Measure To Let Couples Enter Covenant*, ARK. DEMOCRAT-GAZETTE, Mar. 23, 2001, at A8.

126. *Id.*

127. See Diana Jean Schemo, *In Covenant Marriage, Forging Ties That Bind*, N.Y. TIMES, Nov. 10, 2001, at A10.

128. ARK. CODE ANN. § 9-11-803(a)(1) (LEXIS Repl. 2002).

129. *Id.* § 9-11-803(a)(2).

130. *Id.* § 9-11-803(a)(3).

manner consistent with the statute.¹³¹ The application for the marriage license is then filed with the circuit clerk in the office which issues the marriage license.¹³²

1. *Declaration of Intent*

The statute requires a couple contemplating covenant marriage to formally declare their intent to do so in a recitation signed by both parties and submitted with the application for the marriage license.¹³³ This declaration of intent expresses the fact that the parties have agreed to live together as husband and wife for the remainder of their lives.¹³⁴ It expresses the seriousness of the decision to marry and states that the parties have fully disclosed to one another matters that could adversely affect the decision to enter into the marriage.¹³⁵ This declaration also states that the parties have received authorized counseling regarding the nature, purposes, and responsibilities of the marriage; that they both have read the provisions of the Covenant Marriage Act of 2001; and that they understand that a covenant marriage is for life.¹³⁶ The declaration also requires a commitment to make all reasonable efforts to preserve the marriage in the event of marital difficulties.¹³⁷

The declaration of intent includes an agreement by the parties to submit to the law of the State of Arkansas regarding covenant marriage.¹³⁸ The declaration is accompanied by an affidavit by the parties that repeats the fact that they have received authorized counseling pertaining to the seriousness of covenant marriage and the fact that covenant marriage is a commitment for life.¹³⁹ It must also attest that the parties have received the informational pamphlet promulgated by the Administrative Office of the Courts and state that the couple has been advised of the exclusive grounds for legally terminating a covenant marriage by divorce.¹⁴⁰ This document must then be signed by both parties before a notary, and if one of the parties is a minor, written consent must be executed by the person charged by statute with consenting to the marriage of a minor.¹⁴¹

The declaration of intent requirement is designed to short circuit claims that may subsequently be made that the parties either did not desire the

131. *Id.* § 9-11-803(b)(1).

132. *Id.* § 9-11-803(b)(2).

133. *Id.* § 9-11-804(a)(1) (LEXIS Repl. 2002).

134. ARK. CODE ANN. § 9-11-804(a)(1).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* § 9-11-804(a)(2)(A).

140. ARK. CODE ANN. § 9-11-804(a)(2)(B).

141. *Id.* § 9-11-804(a)(3)(A)-(B).

covenant union or did not fully understand the responsibilities of such a marriage. This document in some ways serves as the premarital contract for the covenant marriage, with the key consideration being the parties' joint execution. The contractual analogy is weakened, however, by the fact that there are no damages for breach and the parties have no right of rescission.¹⁴²

2. *Counseling Requirement*

Covenant marriage requires that couples be advised of the nature, purposes, and responsibilities of marriage by a person authorized under the statute.¹⁴³ Specifically identified as authorized counselors are priests, ministers, rabbis, clerks from the Religious Society of Friends, clergy members from any religious sect, licensed professional counselors, licensed associate counselors, licensed marriage and family therapists, licensed clinical psychologists, or licensed associate marriage and family therapists.¹⁴⁴ This listing of authorized counselors seems designed to offer a couple contemplating covenant marriage a broad range of options for meeting the statute's requirement. For a couple with ties to a religious congregation, it is likely that the necessary counseling services can be provided without cost. For those without such connections, the cost of premarital counseling can be a considerable financial obstacle.

The quality of premarital counseling is not addressed by the statute.¹⁴⁵ In addition to discussing the nature and purposes of marriage, a counselor is merely required to inform the parties of the grounds for termination of a covenant marriage and to provide the couple with the informational pamphlet developed by the Administrative Office of the Courts.¹⁴⁶ Beyond knowledge of the grounds for terminating the covenant marriage, an authorized counselor is not expected to have specific understanding of any other legal aspects of covenant marriage. There is also the implied assumption that counseling both parties at the same time presents no conflict of interest and, in fact, is preferable.¹⁴⁷ Authorized counselors are not required to be neutral observers with respect to the desirability of covenant marriage and,

142. Some commentators believe that a breach of contract action may be allowed. See Brian H. Bix, *Premarital Agreements in the ALI Principals of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 231, 243 (2001).

143. ARK. CODE ANN. § 9-11-804(a)(1).

144. *Id.* § 9-11-802(1) (LEXIS Repl. 2002).

145. See, e.g., Spaht, *supra* note 10, at 290.

146. ARK. CODE ANN. § 9-11-804(2)(B).

147. The statute makes no mention of individual consultation and only includes references to the joint actions of the parties.

in the case of religious clergy, may be ardent advocates who see covenant marriage as the only spiritually viable option for the parties.

Conspicuously absent from the list of authorized counselors are lawyers who may be most familiar with the legal and practical ramifications of covenant marriage.¹⁴⁸ While attorneys play a key role in the negotiation and execution of premarital contracts that affect marital rights and obligations, the covenant marriage law makes no mention of the value of seeking independent legal counsel. Couples exploring covenant marriage may well be informed of the grounds for divorce pursuant to such marriages, but may not know until it is too late what rights they surrender by pursuing the covenant option.

In addition to premarital counseling, parties to a covenant marriage must commit to seeking counseling in times of marital difficulty.¹⁴⁹ This statutory requirement again assumes the accessibility of a party to such counseling and the reasonable possibility that the marriage is indeed salvageable. In some cases the statute may require a person who has been the victim of extreme physical or sexual abuse to obtain counseling to save the marriage. A covenant marital partner is unable to avoid what in some instances may be pressured reconciliation because the statute calls for marital counseling before divorce or judicial separation.

3. *Conversion of an Existing Marriage*

The statute permits couples who are already married to convert their marriages into a covenant marriage.¹⁵⁰ Conversion may be accomplished by a couple submitting their marriage license and executing a declaration of intent to designate their marriage as a covenant marriage, with the accompanying affidavit, to the officer who issues marriage licenses in the county where they are domiciled.¹⁵¹ The declaration of intent must meet the same requirements for couples initially entering into marriage.¹⁵² The affidavit of the parties must state that they have discussed their intent to designate their marriage as a covenant marriage and that they have received counseling regarding this decision.¹⁵³ It must also certify that they have discussed “the obligation to seek marital counseling in times of marital difficulty and the exclusive grounds for legally terminating a covenant marriage by divorce.”¹⁵⁴

148. See ARK. CODE ANN. § 9-11-802(1).

149. *Id.* § 9-11-804(a)(2)(A).

150. *Id.* § 9-11-807 (LEXIS Repl. 2002).

151. *Id.* § 9-11-807(a)-(b).

152. See *id.* § 9-11-807(c).

153. *Id.* § 9-11-807(c)(1)(B).

154. ARK. CODE ANN. § 9-11-807(c)(1)(B).

Ostensibly the least offensive application of covenant marriage arises in situations when a couple who have been married for some time, and fully understand their relationship, wish to accentuate their union by professing lifelong commitment. When this decision is freely and voluntarily made with full knowledge of what is at stake, there seems to be little basis for not enforcing such a decision. On the other hand, when the decision to convert a traditional marriage to a covenant marriage is caused by religious or family pressure, or is made based upon incomplete or inaccurate information, conversion becomes problematic.

Because covenant marriage may restrict divorce to fault grounds where many of the common law defenses apply, conversion to covenant marriage may present difficult factual and legal problems. There may be a question surrounding the relevance of facts supporting grounds or defenses that may have occurred before the conversion. For example, assume that a wife learns after a conversion to a covenant marriage that her husband had an affair many years earlier. Should this fact have been disclosed prior to the covenant marriage, and therefore, the wife's consent to the conversion be considered ineffective? Should the wife's consent to the covenant marriage constitute condonation for marital misconduct occurring before the covenant? Should a divorce based upon the pre-covenant adulterous conduct be allowed? There is currently no clear answer to these questions, and courts in Arkansas will undoubtedly be challenged by the issues presented.

A question may arise as to whether an effective conversion to covenant marriage has taken place or whether the parties properly fulfilled the statutory requirements. Because there is no ceremony or public renewal of vows, verification of mutual consent rests in the written documents filed and the attestation of the authorized counselor. The only physical evidence of the conversion to covenant marriage is the declaration of intent that is filed in the county where the parties are initially domiciled. Although the couple may have executed the document, there is no formal state certification that the couple's marital status has in any way changed and no court order indicating as much. Further, when there has been an *ex parte* or bilateral divorce in which the covenant marriage status is not presented to the court, a question regarding the validity of the divorce may arise in subsequent proceedings.

4. *Divorce Within a Covenant Marriage*

A couple who has entered into a covenant marriage may not seek a divorce until they have obtained authorized counseling.¹⁵⁵ Grounds for such a divorce will be limited to: (1) the other spouse committing adultery; (2) the

155. *Id.* § 9-11-808(a) (LEXIS Repl. 2002).

other spouse committing a felony or other infamous crime; (3) the other spouse physically or sexually abusing the spouse seeking the legal separation or divorce, or physically or sexually abusing a child of one of the spouses; (4) the spouse living separate and apart continuously without reconciliation for a period of two years; or (5) the spouses have been living separate and apart continuously without reconciliation for a period of two years from the date a judgment of judicial separation was signed.¹⁵⁶ When there are minor children of the marriage, the parties must live separate and apart continuously without reconciliation for a period of two years and six months from the date of a judgment of judicial separation to obtain a divorce.¹⁵⁷ If, however, one of the spouses has abused a child in the household, a judgment of divorce may be obtained if the spouses have been living separate and apart for a period of only one year from the date of the judgment of judicial separation.¹⁵⁸

Arkansas law permits parties to a traditional marriage to dissolve or set aside the union when either party at the time of the marriage was and still is impotent, thereby providing an ameliorative alternative to annulment.¹⁵⁹ Because this ground is unavailable in covenant marriage, an annulment, which may divest an innocent party of property rights or support is the only option to someone attempting to escape a marriage made impossible due to physical incapacity. There is no distinction made in covenant and traditional divorces regarding grounds based upon the conviction of a felony or other infamous crime, and an immediate divorce may be obtained in either instance when there is physical abuse of a spouse.¹⁶⁰ The covenant marriage does not, however, allow for a divorce based upon drug addiction or habitual drunkenness for one year, but covenant marriage does recognize judicial separation on this basis.¹⁶¹

Historically, the most popular ground for divorce in Arkansas has been based upon an individual offering "indignities to the person of the other as shall render his or her condition intolerable."¹⁶² This form of mental cruelty will not be sufficient to allow for immediate divorce in a covenant marriage, but like the habitual drunkenness ground, will permit a judicial separation

156. *Id.* § 9-11-808(a)(1)–(5)(A).

157. *Id.* § 9-11-808(a)(5)(B)(i).

158. *Id.* § 9-11-808(a)(5)(B)(ii).

159. *See id.* § 9-12-301(1) (LEXIS Repl. 2002) (allowing for divorce based upon physical incapacity).

160. *See* ARK. CODE ANN. § 9-12-301(2)–(3) (permitting divorce "[w]here either party . . . shall be guilty of such cruel and barbarous treatment as to endanger the life of the other").

161. *See id.* § 9-12-301(3) (allowing divorce "[w]here either party shall be addicted to habitual drunkenness for one (1) year"); *see also id.* § 9-11-808(b)(5)(A).

162. *See id.* § 9-12-301(3) (providing for divorce "[w]here either party . . . shall offer such indignities to the person of the other as shall render his or her condition intolerable").

that can be converted into a divorce after two years.¹⁶³ In the context of an uncontested divorce, this ground has sometimes been confused with no-fault. The ambiguity and breadth of conduct that has supported a divorce of this nature has made it a convenient ground in uncontested proceedings in which factual detail is unnecessary.¹⁶⁴

Immediate divorce based upon adultery remains available in both covenant and traditional marriage.¹⁶⁵ Because adultery is a traditional fault ground for divorce and is inconsistent with most state interests in marriage, the victim spouse is permitted the option to pursue divorce in spite of any commitment to marriage for life. Enforcing the covenant would be tantamount to sanctioning extra-marital affairs.

Unique to covenant marriages is the specific identification of spousal and child sexual abuse as a ground for divorce.¹⁶⁶ Although sexual abuse of a spouse may certainly be included in either the definition of "cruel and barbarous treatment" or "indignities to the person of the other," covenant marriage is the only specific instance in which Arkansas permits a divorce based upon sexual or physical abuse of a child of either party to the marriage.¹⁶⁷ This new ground for divorce which is specially tailored for covenant marriages may have been created to deal with the extreme mental cruelty that naturally accompanies knowledge that a partner is engaged in such reprehensible conduct toward children of the marital household or may simply be a means to protect children during what would otherwise be a prolonged period of separation without divorce. Regardless of the reason for its association with covenant marriages, there seems little justification for not specifically including such conduct as a ground for divorce in any marriage.

Omitted as grounds for divorce in a covenant marriage is a divorce which is generally permitted when either spouse is legally obligated to support the other, has the ability to provide the other with the common necessities of life, but willfully fails to do so.¹⁶⁸ Elimination of willful non-support as a basis for dissolving a covenant marriage offers a supporting spouse a way to avoid immediate distribution of marital property, and it places the burden on the taxpayer to support an abandoned dependent spouse.

163. *Id.* § 9-11-808(b)(5)(C).

164. *See id.* § 9-12-306(a) (LEXIS Repl. 2002) (providing "[i]n uncontested divorce suits, corroboration of plaintiff's grounds for divorce shall not be necessary or required").

165. *See id.* §§ 9-11-808(a)(1), 9-12-301(4).

166. ARK. CODE ANN. § 9-11-808(a)(3).

167. *See id.* §§ 9-11-808(a)(3), 9-12-301(3).

168. *Id.* § 9-12-301(7).

Covenant marriage was in large part enacted to address the concern for hasty divorces arising out of state laws permitting no-fault divorce.¹⁶⁹ The only instance in which Arkansas permits divorce in covenant marriages without any consideration of fault occurs when the parties have been living separate and apart continuously for eighteen months without cohabitation.¹⁷⁰ Because parties to a covenant marriage may obtain a no-fault divorce when they have been living separate and apart for two years without reconciliation, the practical significance of the covenant marriage in the context of divorce without fault is a six-month delay. With this minimal difference in period of separation, the sense of urgency stemming from Louisiana's and Arizona's quick no-fault divorce grounds does not seem to be the basis for the Arkansas covenant marriage statute. If indeed the proliferation of divorce serves as the principal justification for covenant marriage in Arkansas, it is the concern regarding hasty divorces based upon fault that serves as the overriding consideration.

The Arkansas covenant marriage law introduces a new proceeding that recognizes covenant spouses' rights to seek a judicial separation.¹⁷¹ This provision, although similar to the statute that permits a divorce from bed and board, allows a party to a covenant marriage to seek a judicial separation in lieu of absolute divorce, pursuant to specific grounds which differ somewhat from the previously mentioned divorce grounds. After obtaining authorized counseling, a spouse to a covenant marriage may seek a judicial separation based upon: (1) adultery committed by the other spouse; (2) the commission of a felony or capital offense by the other spouse; (3) the physical or sexual abuse of the spouse or a child of the spouse seeking the legal separation; (4) the spouses living separate and apart continuously without reconciliation for two years; or (5) the other spouse being addicted to habitual drunkenness for one year, guilty of such cruelty and barbarous treatment as to endanger the life of the other, or offering indignities to the person of the other as to render his or her condition intolerable.¹⁷²

5. *Interspousal Immunity*

In an attempt to minimize disruptive legal proceedings during marriage, the covenant marriage statute reinstated common law interspousal tort immunity. Couples who have entered into a covenant marriage may not sue each other except in actions relating to contracts, restitution of separate property, judicial separation in the covenant marriage, annulment, divorce,

169. See Katherine Shaw Spaht & Symeon C. Symeonides, *Covenant Marriage and the Law of Conflicts of Laws*, 32 CREIGHTON L. REV. 1085, 1088 (1999).

170. See ARK. CODE ANN. § 9-12-301(5).

171. See *id.* § 9-11-808(b).

172. *Id.*

and actions relating to spousal support for the support or custody of a child while the parties are living separate and apart.¹⁷³ The statute is unclear as to whether the immunity prohibits causes of action accruing during, but brought after a covenant marriage, and thus merely requires a judicial separation before legal action can be maintained. The statute effectively precludes causes of action based upon either intentional or unintentional torts while the parties continue to cohabit.

This statutory change may have produced a result contrary to legislative intent, and certainly inconsistent with prior case law in Arkansas. For almost a century, the Arkansas Supreme Court has recognized a victim spouse's right to bring a cause of action against an offending spouse for intentional torts committed during the marriage.¹⁷⁴ The same court has also permitted causes of action in negligence between marital partners.¹⁷⁵ In abrogating both forms of common law spousal immunity, the court has repudiated the goal of preserving marital harmony.¹⁷⁶ Unless the Arkansas Direct Action Statute¹⁷⁷ can be expanded to include actions against individual policies, the chief beneficiary of tort immunity in a covenant marriage may be the liability insurance carrier. By limiting judicial separation as the only right of an injured spouse to recover damages for injuries sustained at the hands of the other spouse, covenant marriage may actually be encouraging divorce.

173. See *id.* § 9-11-809(a) (LEXIS Repl. 2002).

174. See *Fitzpatrick v. Owens*, 124 Ark. 167, 177, 186 S.W. 832, 836 (1917).

175. See *Leach v. Leach*, 227 Ark. 599, 601, 300 S.W.2d 15, 17 (1957).

176. See *id.* at 600, 300 S.W.2d at 16.

The chief reason relied upon by all these courts, however, is that personal tort actions between husband and wife would disrupt and destroy the peace and harmony of the home, which is against the policy of the law. This is on the bald theory that after a husband has beaten his wife there is a state of peace and harmony left to be disturbed; and that if she is sufficiently injured or angry to sue him for it, she will be soothed and deterred from reprisals by denying her the legal remedy—and this even though she has left him or divorced him for that very ground, and though the same courts refuse to find any disruption of domestic tranquility if she sues him for a tort to her property, or brings a criminal prosecution against him. If this reasoning appeals to the reader, let him by all means adopt it.

Id., 300 S.W.2d at 16 (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 101 (2d ed. 1955)).

177. See ARK. CODE ANN. § 23-79-210 (LEXIS Repl. 1999) (providing for a direct cause of action against a liability insurer where the insured is not subject to tort suit).

6. *Jurisdiction over Divorce and Separation*

Any Arkansas court having jurisdiction to grant the divorce of a traditional marriage has jurisdiction to dissolve a covenant marriage.¹⁷⁸ Jurisdiction to grant a divorce is based upon sixty days residence in the state by either party prior to the commencement of the proceedings, and therefore, actual domicile need not be established.¹⁷⁹ A party to a covenant marriage may leave the state without affecting the Arkansas court's jurisdiction to respect the other party's rights as they relate to divorce.¹⁸⁰ Even if both parties at some point leave the state, covenant marriage restrictions will apply if jurisdiction is sought in another state to dissolve the marriage.¹⁸¹ Grounds for granting a divorce must have either occurred in the state or serve as a basis for divorce in this state.¹⁸² Facts supporting such grounds must have occurred within five years of the filing of the action for divorce.¹⁸³ This five-year limitation carries with it added significance in the context of divorce limited to extreme marital misconduct. Therefore, courts may not consider actual physical abuse that occurred more than five years prior to a threat of more abuse in granting a divorce from a covenant marriage.

An action for judicial separation within a covenant marriage may take place in any court competent to preside over divorce proceedings so long as one or both of the spouses are domiciled in the state and the ground justifying the action was committed or occurred in the state, or while the matrimonial domicile was in the state.¹⁸⁴ The domicile requirement, which is not present for divorce, seems to be in recognition of the continuing role of the court after granting the order to facilitate reconciliation or to consider the merits of a subsequent divorce. The action for judicial separation may be brought if the ground occurred elsewhere while either or both of the spouses

178. *Id.* § 9-11-809(b)(1).

179. *See id.* § 9-12-307(a)–(b) (LEXIS Repl. 2002). The statute provides:

The word "residence" as used in subsection (a) of this section is defined to mean actual presence and upon proof of that the party alleging and offering the proof shall be considered domiciled in the state, and this is declared to be the legislative intent and public policy of the State of Arkansas.

Id. § 9-12-307(b).

180. *Id.* § 9-12-307(a). The Arkansas statute merely requires residence in the state by either the plaintiff or the defendant for sixty days prior to the commencement of the proceedings.

181. *See Feigenbaum v. Feigenbaum*, 210 Ark. 186, 190, 194 S.W.2d 1012, 1013 (1946). Although no mention is made in the covenant marriage statute of the effect of both parties leaving the state, the Arkansas Supreme Court has always held that jurisdiction to determine the validity of the marriage belonged in the state where the marriage was celebrated. *Id.* at 188–90, 194 S.W. at 1012–13.

182. ARK. CODE ANN. § 9-12-307(a)(2).

183. *Id.* § 9-12-307(a)(3).

184. *Id.* § 9-11-809(b) (LEXIS Repl. 2002).

were domiciled elsewhere, so long as the person obtaining the judicial separation was domiciled in the state of Arkansas prior to the time the cause of action accrued and is domiciled at the time the action is filed.¹⁸⁵ This provision seems to allow an Arkansas court to order judicial separation based upon out-of-state conduct when a couple enters into a covenant marriage in the state, they move elsewhere, and then either party returns to the state as a domiciliary.

VIII. ANNULMENT OF A COVENANT MARRIAGE

None of the covenant marriage laws enacted to date specifically mention annulment, and there appears to be no variance from the procedure for setting aside traditional marriages.¹⁸⁶ Because covenant marriages make divorce more restrictive, it may be anticipated that a covenant partner who wishes to avoid the long waiting period may seek to annul the marriage for one of the several causes set forth in the statute. Certainly a union based upon a misrepresentation of a material fact that goes to the essentials of marriage may be set aside for fraud.¹⁸⁷ When a party induces another to enter into a covenant marriage based upon strong religious convictions that are not in fact held, and when upon discovery of the fact the other party repudiates the marriage, a court may grant an annulment if the petitioner can sufficiently prove to the court continuation of the marriage is impossible.¹⁸⁸ An annulment under these circumstances would avoid the usually required two-year separation for divorce.

Like other marriages, covenant marriages may be set aside when one or both of the parties are below the statutorily mandated age of consent, with or without parental consent.¹⁸⁹ Such marriages may be annulled by the underage party or his or her parents during the period of minority.¹⁹⁰ Covenant marriage laws permit marriages between underage parties with parental consent.¹⁹¹ Presumably parents must consent to both the marriage and the covenant. Parental involvement in all the steps necessary to create a covenant marriage, including counseling, appears essential. The failure to comply with the covenant marriage law in this fashion may inhibit enforcement

185. *Id.* § 9-11-809(b)(1)(B).

186. *See, e.g., id.* § 9-12-202 (LEXIS Repl. 2002).

187. *See* Shatford v. Shatford, 214 Ark. 612, 616, 217 S.W.2d 917, 920 (1949).

188. *See, e.g.,* Bilowit v. Dolitsky, 304 A.2d 774 (N.J. Super. Ch. Div. 1973) (allowing an annulment based upon fraud for the misrepresentation of his religious beliefs).

189. *See* ARK. CODE ANN. § 9-11-104 (LEXIS Repl. 2002).

190. *See* Hood v. Hood, 206 Ark. 1057, 1062, 178 S.W.2d 670, 673 (1944).

191. *See, e.g.,* ARK. CODE ANN. § 9-11-804(a)(3)(B) (LEXIS Repl. 2002) ("If one (1) or both of the parties are minors, the written consent or authorization of those persons required under this chapter to consent to or authorize the marriage of minors.").

of the covenant, but the marriage itself could remain intact.¹⁹² Further complicating the matter is the fact that underage marriages that are not set aside during minority may not be attacked by anyone.¹⁹³ The covenant, however, could theoretically be challenged at any time based upon a lack of understanding or coercion existing at the time of the formation of the marital contract.

IX. RESCINDING THE COVENANT

Covenant marriage laws generally provide no means by which a couple can vitiate the covenant while leaving the marriage intact. Despite the fact that such laws permit parties to traditional marriages to convert their marriages to a covenant marriage, with the exception of the Arizona law cited earlier, no consideration is given to a process by which the parties to a covenant marriage may bilaterally abandon the covenant. The severability of the covenant from the marriage may arise when parties to a covenant marriage acknowledge their dissatisfaction with the arrangement and mutually wish to rescind the covenant so that their marriage may adhere to principles embodied in traditional marriage. Perhaps they were too young to understand the full implications of covenant marriage, or perhaps they were pressured or persuaded by others. In any event, the decision may be considered irrevocable.

The nonmodifiable character of covenant marriage accentuates the fact that the state is not only an indispensable party to the marriage, it has a direct stake in enforcement of the covenant, even under circumstances when the parties are unwilling. What may have begun as a private, personal, or religious decision has in effect become an imposition by the state that binds a couple to a choice that upon reflection was ill-conceived or ill-advised.

X. SUPPLEMENTING THE COVENANT

Although these statutes are silent regarding the relationship that other agreements may have to a covenant marriage, there seems to be room for premarital negotiation. Prior to entering a covenant marriage, a couple may wish to execute a premarital agreement which may strengthen the covenant by providing economic or other relief in the event of a breach. As pointed out earlier, covenant marriage merely postpones divorce, and eventually the parties may have to deal with issues of property division, alimony, and child support. By addressing these matters in a marriage contract that imposes harsh penalties for unilateral separation or marital misconduct, the parties

192. See Spaht, *supra* note 12, at 94.

193. See CLARK, *supra* note 71, at 95-96.

can effectively close some of the loopholes that are evident in such marriages.

Premarital agreements may be particularly useful to covenant marriage partners who wish to stipulate in advance the consequences of physical or legal separation. A couple may wish to designate in advance the person who will conduct marital counseling when needed. They may also want to establish a procedure for mediation and dispute resolution. Because divorce may not occur until years after the parties physically separate, an agreement could resolve important legal disputes during the interim.

As stated earlier in the context of divorce, the terms of the premarital agreement may be designed to actually deter separation. For example, the agreement may provide for the forfeiture of marital property by a spouse who, without good cause, abandons the marital home. A provision of this nature would not only discourage abandonment, but also impose a severe penalty upon a spouse attempting to satisfy the statutory period for living separate and apart. Such a provision would also create an obstacle for a spouse who attempts to procure a divorce in another state.

Finally, parties may desire to execute a premarital agreement that will allow them to set aside the covenant when they mutually agree to do so. As stated earlier, the Arkansas Covenant Marriage Act does not provide for rescission of covenant marriage, and a court may find such a provision void as against public policy. Allowing a couple to avoid voluntarily sought, but state-imposed obligations through agreement may be viewed as undermining legislative authority.

XI. PORTABILITY OF THE COVENANT

One question that frequently arises in the context of covenant marriage is whether another state is obligated to restrict access to divorce to a party who is a participant in a covenant marriage. The Full Faith and Credit Clause of the United States Constitution demands recognition of a judgment or order of another state even though the law upon which the judgment was founded is inconsistent with the laws or public policy of the forum.¹⁹⁴ While a divorce decree rendered in a sister state is entitled to the full faith and credit of the Constitution, the decision to recognize a marriage brings into play a choice of law question that emphasizes an examination of competing state interests.¹⁹⁵ In determining the validity of a marriage, courts will generally look to the law of the state where the marriage was celebrated.¹⁹⁶

194. Mark Strasser, *Baker and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 *BROOK. L. REV.* 307, 321 (1998).

195. *Id.* at 330.

196. *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 283 (1969).

Only when the marriage is contrary to the law of the domicile of the parties and offends some strong public policy should a court refuse to recognize its validity.¹⁹⁷

Because covenant marriage carries significant legal consequences for divorce, the real controversy arises regarding grounds and jurisdiction for marital dissolution. As stated earlier, each state is free to adopt its own grounds for divorce based upon what it perceives as its important interests. A state that does not wish to recognize divorce restrictions for covenant marriages cannot be compelled to do so. Because divorces are permitted to be ex parte proceedings, a party to a covenant marriage may merely flee to another jurisdiction and obtain a no-fault divorce. The foreign divorce decree would then, assuming domicile had been established, be entitled to full faith and credit, even in the state in which the covenant marriage was celebrated.¹⁹⁸

A couple domiciled in Texas, a state that does not provide for covenant marriage, may procure such a marriage in Arkansas, and such a marriage will be valid everywhere. Although the marriage itself will be recognized, the covenant aspect of the relationship should apply only in Arkansas, or possibly in another state that recognizes covenant marriage. Of course if a party seeks a divorce in Louisiana, the question remains whether a Louisiana covenant marriage is the same as an Arkansas covenant marriage. Because grounds for divorce differ in the two states, it is clear that any understanding of the implications of covenant marriage that existed at the time of the marriage would no longer be applicable.

XII. ARGUMENTS FAVORING COVENANT MARRIAGE

Advocates of covenant marriage identify as its principal goal the strengthening of marriage in the interest of children.¹⁹⁹ By imposing specific obligations to seek premarital counseling, requiring the parties to execute a legally enforceable agreement to make reasonable efforts to resolve marital disputes that threaten the marriage, and limiting divorce to instances of serious misconduct or prolonged separation, it is felt that marriage has its best chance to succeed.²⁰⁰ Placing couples in an adversarial position ran contrary to the states' interest in stable families, and "requiring one parent to put the other on trial unnecessarily harmed the children" of the marriage.²⁰¹ This argument presumes that too many marriages fail because couples contem-

197. *Id.*

198. *Williams v. North Carolina*, 325 U.S. 226, 229 (1945).

199. *See Spaht, supra* note 12, at 74.

200. *Id.* at 75.

201. Kurt X. Metzmeier, *The Power of an Incompetent Adult To Petition for Divorce Through a Guardian or Next Friend*, 33 U. LOUISVILLE J. FAM. L. 949, 953 (1995).

plating marriage fail to fully comprehend the magnitude of the commitment they are about to make. It also assumes that couples all too often fail to take steps to preserve rocky marriages and act in haste to obtain a divorce, leaving children as the principal victims. Finally, this position considers grounds for divorce that allow speedy dissolution without full consideration of marital fault as being an impediment to long-term family stability.

Proponents of covenant marriage also point to the revival of religious influence as a positive force in promoting and preserving marriage.²⁰² The expertise that can be provided by clergy of various faiths has been largely ignored by states wishing to stem the tide of rising divorce rates. These individuals have the time and ability to provide premarital counseling and assist in out-of-court dispute resolution through services that can be provided at minimal cost to the parties and to the state.²⁰³ Religious leaders are said to provide the moral authority necessary for a full understanding of marital rights and responsibilities, as well as a calming influence upon the parties that may not be available when acting through secular authorities.²⁰⁴

Finally, covenant marriage is seen as an opportunity to protect and reward non-divorcing spouses as the individuals who have been loyal to the relationship by placing in their hands the decision as to when a divorce is appropriate.²⁰⁵ It fosters acceptable marital behavior by not offering divorce as a way out for those who ignore the responsibilities of the status.²⁰⁶ A spouse who has committed adultery or engaged in physical or sexual abuse is denied divorce until the statutory period of separation has expired, thus elevating the negotiating position of the innocent spouse.

To supporters, the heart of covenant marriage is its voluntary character. An individual agrees to participate in covenant marriage for reasons that may be quite personal and that have little to do with state sponsorship. The state is viewed as merely a means by which the private interests and wishes of the parties may be enforced. Covenant marriage allows a couple to more truly believe the vows they make at the altar.

XIII. CRITICISM OF COVENANT MARRIAGE

Ostensibly there seems to be little objection to a couple's willingness to express a lifelong commitment to their marriage, but there are those who see covenant marriage as a threat to individual freedom and an entangle-

202. Spaht, *supra* note 12, at 75.

203. *Id.* at 76.

204. *Id.*

205. *Id.* at 78.

206. *Id.* at 79.

ment of government in religion.²⁰⁷ By primarily focusing upon limiting divorce, covenant marriage rejects many of the assumptions which form the foundation of no-fault divorce. Among the more prominent of these assumptions is the notion that the enforced continuation of a marriage in which either party views reconciliation as impossible will serve neither the state nor the parties well. In fact, prolonging marriage in which divorce is inevitable likely exacerbates the discord thereby leading to a more contentious divorce and complicated settlement negotiations.²⁰⁸ Further, postponing divorce may lead to uncertainty for the parties and children of the household. Neither party to the failed marriage can immediately pursue a new, stronger relationship that could be in the best interest of all concerned.

Because the decision to enter into a covenant marriage is made at a time when love is at its apex and marital misconduct that might lead to divorce seems incomprehensible, there is some concern that such a decision can never be considered an arm's length transaction.²⁰⁹ Unlike premarital agreements that are favored because they remove obstacles to marriage, a declaration of intent to enter into a covenant marriage is sometimes seen as merely redundant to the matrimonial vows every couple makes.²¹⁰ Any marriage can be viewed as a covenant, and the law merely creates a more restrictive covenant. The parties utilize the covenant marriage law in anticipation of a possible breach of the covenant. This hardly seems consistent with the mutual understanding of marriage as a lifelong relationship.

By sanctioning covenant marriage, the state has in effect established two distinct categories of marriage, which may lead to the false impression that couples who enter one form are somehow "more married," and thus entitled to greater protection than those who enter into traditional marriage.²¹¹ Rather than being enabling, covenant marriage creates disabilities which deny its participants the full range of customary marital prerogatives. By restricting divorce to circumstances involving the most serious forms of marital and moral misconduct, a victim spouse must endure substantial abuse before there is recognition that the marriage has failed.²¹² The two-

207. See Adam Pertman, *Making Breaking up Harder To Do: States Attempt To Cut Rates of Divorce and Its Many Social Costs*, BOSTON GLOBE, Mar. 11, 2001, at E2.

208. See H.J. Cummins, *Are Covenant Marriages Going To Keep More Couples Together?*, STUART NEWS/PORT ST. LUCIE NEWS, Jan. 16, 2000, at F9; see also Jason Andrew Macke, *Of Covenants and Conflicts: When "I Do" Means More Than It Used To, but Less Than You Thought*, 59 OHIO ST. L.J. 1377, 1387 (1998).

209. See Silbaugh, *supra* note 24, at 111.

210. Macke, *supra* note 208, at 1388.

211. See Courtenay Edelhart, *A Call to Matrimony: Efforts Focus on Promoting Lifetime Commitment*, INDIANAPOLIS STAR, Feb. 10, 2002, at 1J.

212. See Marilyn Werber Serafini, *Get Hitched, Stay Hitched*, 34 NAT'L J. 694 (2002).

year period of living separate and apart before a divorce is obtained may also produce economic and psychological hardship.²¹³

Covenant marriage is also viewed by some as state enforcement of religious vows.²¹⁴ Although the law clearly does not limit covenant marriages to religious ceremonies performed under the auspices of a church, it is clear that much of the impetus for the law came from clergy and parishioners who sought legal support for religious beliefs.²¹⁵ A clear indication of the role of the church in the new law is demonstrated in provisions regarding premarital and pre-divorce counseling requirements. Specifically identifying clergy as appropriate counselors for couples contemplating covenant marriage, the law makes the church an active participant in many couples' marriage choice.²¹⁶ It is feared that the heavy weight of moral influence by religious counselors will not serve the function of an independent, objective influence in the covenant marriage decision.

Perhaps the strongest criticism of covenant marriage is that it is a reflection of the state's unwillingness or lack of fortitude regarding serious divorce reform.²¹⁷ The concerns that marriage is no longer taken seriously and that divorce is too easily obtained have justified adoption of this new form of marriage, which subverts the need for meaningful divorce reform.²¹⁸ Rather than acknowledging disenchantment with no-fault divorce and returning to longer waiting periods for all divorces, a few states have elected

213. See Mark O'Keefe, *Now Armed with Research, Governments Take Another Crack at Murphy Brown*, NEWHOUSE NEWS SERV., July 26, 2001, available at LEXIS, News Library, Newhouse News Service File.

214. See Lawton, *supra* note 107, at 2508.

The American Civil Liberties Union ("ACLU") takes another liberal view, arguing that covenant marriage laws are an impermissible joinder of church and state insofar as the legislation incorporates Christian values into law. The ACLU asserts that the term "covenant" has biblical connotations and promotes marriages found in the Bible, complete with a dominant husband and submissive wife. Indeed, the original legislation was proposed by a Promise Keeper, and graduate of Liberty University. In addition, leaders of certain faiths in Louisiana have encouraged covenant over standard marriages, with some having announced plans to refuse to hold non-covenant marriages in their churches or to preside over standard marriages if held elsewhere.

Id.

215. *Id.*

216. See Macke, *supra* note 208, at 1389.

217. Nichols, *supra* note 66, at 442.

In most states, bills seeking simply to return to some sort of fault requirement for divorce were swiftly defeated or stalled in committee hearings. Round one of the divorce counterrevolution had failed. The positive law was not truthful. If a society's values must be accurately reflected by positive family law, then any return to a fault-based system was doomed to fail.

Id.

218. See *id.* at 441-42.

to shift the responsibility to couples at a time when they are most naive and vulnerable to marital ideals rather than marital reality.²¹⁹ Covenant marriage has therefore been used as a way to politically accommodate religious groups that are calling for a return to traditional family values without upsetting those who fear a return to an era of marital enslavement.²²⁰

As stated earlier, covenant marriage is designed to curb divorce by reinstating fault as the preferred basis by which marriages are dissolved. Some argue that those who choose covenant marriage are among the lowest risk for divorce in the first place.²²¹ Even if this alternative becomes popular, covenant marriage may not accomplish its intended purpose. Divorce rates in this country began to climb long before the adoption of no-fault.²²² Nationally, statistical data indicates that divorce rates have been stable or declining since 1981.²²³ Any real growth in the popularity of divorce may be more attributable to changes in cultural norms, which may include the disintegration of the stigma associated with divorce, the economic independence of women, and the general notion that a couple should be free to define the terms of their own relationship.²²⁴ It is ironic that the same freedoms that have led to an increased number of divorces are now at the heart of arguments for covenant marriage.

XIV. A HYPOTHETICAL CASE

John and Jane, two Arkansas residents, were devoutly religious members of the Church of Eternal Bliss. They had grown up in the church together and had little social contact outside of their religious community. When they both had reached the age of eighteen, they informed the minister of the church of their desire to marry. He emphasized the rigid teachings of the church, which did not condone divorce in any fashion, and pointed out to the couple that marriage within the church is considered a sacrament to God and a lifelong commitment to one another. He further indicated that he would be unwilling to perform any marriage ceremony unless the couple demonstrated their commitment through covenant marriage. Realizing that they must choose covenant marriage to remain in good standing with the church, their families, and their friends, the couple proceeded in accordance

219. See John Greiner, *Covenant Marriage Plan Faulted, State Senator Called "Anti-family,"* DAILY OKLAHOMAN, Feb. 20, 2002, available at LEXIS, News Library, The Daily Oklahoman File.

220. See Amy L. Stewart, *Covenant Marriage: Legislating Family Values*, 32 IND. L. REV. 509, 514 (1999).

221. See Gashler, *supra* note 105, at C1.

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

223. *Id.* at 4.

224. *Id.* at 5-6.

with the covenant marriage law. Their minister signed the appropriate form as the couple's authorized counselor.

Ten years and two children later John has left the Church of Eternal Bliss and is now a member of the Church of the Here and Now. Economic hardship and constant arguments have caused marital strain that is having an adverse effect on the children. John drinks heavily, and Jane constantly nags him about being a drunk and a failure in life. Although the parties constantly exchange threats, neither party has yet physically carried out such threats. It has become apparent to both that the marriage is no longer capable of being saved, but neither party understands what might be done, in light of their covenant marriage.

The apparent solution seems to be a judicial separation initiated by one of the parties. Such an action could not take place until after the parties had physically separated, and it would have to be preceded by marital counseling. But who is to perform the counseling? Must both parties participate? Who should be required to pay the costs associated with such counseling? What proof will a court require to verify good faith effort to preserve the marriage? Once the court is satisfied that such effort has been made by the parties a judicial separation can be granted if the court concludes that statutory grounds exist.

In Jane's case, if she could convince a court that John had been habitually drunk for a year or had offered indignities which would render her situation intolerable, she may be entitled to the judicial separation. On the other hand, if John were able to convince a court that Jane's persistent harassment constituted general indignities, he would prevail in the matter of a judicial separation. In its decision to grant a judicial separation, the court would have to consider the applicability of common law defenses and the impact of the order on the children.

Once a court has issued an order of judicial separation the couple may not obtain a divorce until at least two years and six months have elapsed. If during this period of time the couple conjugally cohabit, the opportunity for divorce based on living separate and apart is postponed until the mandated period of separation has been met. On the other hand, if either party engages in sex with someone else, an immediate divorce is available to the innocent spouse based on adultery. The statute makes it clear that the judicial separation does not end the covenant marriage, but merely ends conjugal relations and common concerns of the parties.

In addition to the order of judicial separation, the court may award a spouse any relief that may be granted in a divorce, including spousal support, contributions to education, child custody or visitation, child support, injunctive relief, and possession and use of the family residence. The statute makes no mention of the court's ability to make an appropriate division of marital property. It does appear that property acquired after a judicial separa-

ration that leads to divorce will be excluded from the definition of marital property in the same manner as occurs in a divorce from bed and board.

For John and Jane, irony rests in the fact that they envisioned none of the consequences when they contracted covenant marriage. Religion, which served as the foundation for their mutual expectations at the time of the marriage, plays no role in the state's enforcement of the agreement. Circumstances have changed, and the couple lacks the flexibility to address those changes. The parties are bound by a contract which they may now regret.

XV. AN ALTERNATIVE TO COVENANT MARRIAGE

The central theme in covenant marriage is self-determination. Parties should be able to express their mutual lifelong commitment through a binding contract that the state will recognize and enforce. The critical flaw in the current covenant marriage scheme is that it discounts the contractual aspect of this commitment and places too much emphasis in redesigning and redefining the civil status of marriage. By viewing the covenant merely as a contract that is subject to all the remedies usually associated with enforcement of other contracts, excluding specific performance, the state can honor the wishes of the parties and preserve the integrity of marriage.

States like Arkansas which have adopted the Uniform Premarital Agreement Act offer a couple contemplating marriage the opportunity to negotiate in advance a broad range of marital and post-marital issues.²²⁵ This statute allows parties to a premarital agreement to contract with respect to such matters as property rights, debts and legal obligations, spousal support, and the choice of law governing the agreement.²²⁶ In addition to the enumerated matters which may be included in such agreements, the parties may contract with respect to "any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty."²²⁷ The breadth of this provision seems certainly to allow the parties contractually to protect the lifelong character of their relationship.

A provision in a premarital agreement that prohibits divorce under all circumstances may be considered unenforceable or contrary to public policy.²²⁸ Such a contract would probably encourage adultery, physical abuse,

225. See, e.g., ARK. CODE ANN. § 9-11-401 (LEXIS Repl. 2002).

226. *Id.* § 9-11-403 (LEXIS Repl. 2002).

227. See *id.* § 9-11-403(a)(8).

228. See, e.g., *Hosmer v. Hosmer*, 611 S.W.2d 32, 38 (Mo. 1980).

There is in every marriage at least an implied agreement not to seek a divorce and in the usual marriage ceremony the parties exchange pledges to remain man and wife "until death do us part." The fact is, however, that divorce terminates marriages almost as frequently as death. It is unnecessary to express an opinion

and other conduct deemed unacceptable within the state's perception of marriage.²²⁹ But to the extent the agreement limits divorce to serious misconduct and merely attempts to preserve a marriage that does not offend critical state interests, there appears to be no reason why it should not be enforced. In essence, such a provision in a premarital agreement may be considered a "covenant not to divorce." Like its counterpart in tort, the covenant not to sue, this provision would not preclude the other party from filing for divorce when statutory grounds permitted, but the agreement may allow for the recovery of monetary damages or equitable relief for any breach. For example, the party injured may recover attorney's fees and court costs associated with divorce proceedings. Breach of the covenant may also result in the forfeiture of spousal support or property rights under permissible circumstances. Courts may also use the agreement as a basis to delay the proceedings until contractually stipulated mediation takes place.²³⁰

Unlike a covenant marriage, which may only exist in the state where the marriage was celebrated, a covenant not to divorce in a premarital agreement may be enforced anywhere. As stated earlier, the parties may designate which state's law will govern the enforcement of the agreement. As is the case with other contracts, a covenant not to divorce can be modified or rescinded through the mutual consent of the parties without state involvement. Such an agreement may specifically address, or need not be concerned with, changes in the divorce laws taking place after execution of the contract. The parties are given the flexibility to connect their assump-

upon the legality of the mutual promises to refrain from seeking dissolution. It is sufficient to state that this court finds that such a mutual undertaking, standing alone or in company with the other provisions of the antenuptial agreement here, does not constitute "a fair consideration under all the circumstances."

Id.

229. Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 *YALE L.J.* 763, 779 (1983). In his article, Kronman states:

An antenuptial agreement waiving the right to sue for divorce can be described as a contract of self-enslavement in just this sense. The parties to a marital contract have considerable freedom to define in advance the nature and extent of their financial responsibilities in the event of a divorce or separation, but neither can give the other the power to compel specific performance by waiving the right to terminate the relationship through divorce. Here, as in the employment context, the right to substitute damages for the actual performance of the contract is inalienable, and any agreement purporting to forfeit this entitlement is invalid as a matter of law.

Id.

230. See, e.g., *Avitzur v. Avitzur*, 446 N.E.2d 136, 139 (N.Y. 1983). In *Avitzur*, New York's highest court upheld the general enforcement of a clause recorded in a ketubah, a document that accompanies a traditional Jewish wedding ceremony. The clause required the married couple to appear before a rabbinic court, or bet din, to comply with Jewish divorce procedures in the event of marital dissolution. *Id.*

tions regarding the longevity of the marriage to other expectations embodied in the terms of the premarital agreement.

XVI. CONCLUSION

Covenant marriage is more about process than it is about the people who enter marriage. It is about the process by which a couple makes the decision to marry, the process by which the marriage takes place, and the process by which the parties separate and divorce. People who enter marriage do so with the expectation that they are entering a union for life, but if, God forbid, disaster occurs, there is a way for them to pick up the pieces of their lives and start anew. Because covenant marriage adds nothing to the expectations of most people contemplating marriage, its primary effect is to limit marriage by defining it restrictively for the parties who contract to do so.

Legislative involvement in covenant marriage reflects the state's inability to distinguish between the consent of the parties to be married and the desire of an individual to stay married. Crucial to a determination of the validity of a marriage is the mental state of the parties at the time of the union, but it is the daily commitment made by marital partners that fosters true benefits to the state. Although each state has an interest in validating a couple's consent to be married, the issue of staying married lies at the foundation of individual liberty.

Divorce is inextricably tied to the state's interest in marriage. Most states tolerate divorce because the state's interest in marriage is not being served. In such cases the state's best interest is met when these bad relationships are dissolved and strong viable ones are formed. Covenant marriage, although well-intended, impedes the state's interest in marriage by prolonging unions that the state, under ordinary circumstances, views as not worth preserving. The sole basis for the impediment is an agreement which may have been executed under circumstances that were clearly not at arm's length.

The state's interest in marriage does not vary from couple to couple, and therefore a single definition of marriage is required. This single definition should include the expectation that all marriages are initially intended to be lifelong relationships, and there can only be one set of rules for dissolving the relationship. When a couple wishes to add features to their marriage that call for greater accountability, greater economic responsibility, or greater flexibility, the state should protect their right to do so through contracts which do not offend important public policies.

Any state weighing the covenant marriage option should consider the ramifications of a marriage alternative that may be more likely to perpetuate discord than rejuvenate relationships. Each state must determine whether the prospect of advancing premarital deliberation justifies returning to a

time when only the most dangerous or reprehensible conduct would justify dissolution of all failed marriages. Finally, states considering covenant marriage should explore less restrictive alternatives that will preserve the integrity and viability of marriage as an institution.