

The American “Covenant Marriage” in the Conflict of Laws

*Peter Hay**

I

The Problem Defined: The Extra-State Effects of Covenant-Marriage Standards

The “covenant marriage,” enacted in Louisiana, Arizona and Arkansas,¹ and introduced in 26 other state legislatures,² is a reaction to the evolution of American family law, especially divorce law, over the past quarter century. This paper explores the extent to which limitations inherent in a covenant marriage are likely to be given effect in non-covenant states and internationally. While beyond the immediate scope of the paper, some of the issues raised also hold implications for other current trends in family law, particularly registered partnerships and same-sex marriages.

In the United States, family law, and with it divorce law, is state law. Federal law governs the recognition of judgments generally³ and, as a result of more recent legislation, questions of jurisdiction and recognition of judgments pertaining to child custody⁴ and support.⁵ Federal statutory⁶ and treaty law⁷ also governs the civil and criminal⁸

* © 2003 by Peter Hay.

L.Q.C. Lamar Professor of Law, Emory University School of Law; *Honorarprofessor*, University of Freiburg (Germany); *Universitätsprofessor* (ret.), Dresden University (Germany); Alumni Distinguished Professor Emeritus, University of Illinois.

¹ Louisiana (1997): La. R.S. 9:272 *et seq.* (West’s Louisiana Statutes Annotated); Arizona: Arizona Statutes Annotated 25-901 *et seq.*; Arkansas: A.C.A. § 9-11-801 *et seq.*

² Alabama, California, Colorado, Georgia, Indiana, Iowa, Kansas, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia. As of August 2003, all Bills had either failed in the states’ senate or a senate committee, or further action was postponed indefinitely, or the matter was withdrawn from schedule.

³ U.S. Constitution Art. IV, § 1 (requiring states to give “Full Faith and Credit” to judgments of sister states); E. Scoles, P. Hay, P. Borchers, S. Symeonides, *Conflict of Laws* § 15.8 (3rd ed. 2000).

⁴ Parental Kidnapping Prevention Act, 28 U.S.C.A. § 1738A, implementing the Constitution’s Full Faith and Credit Clause with respect to custody decrees.

⁵ Full Faith and Credit for Child Support Orders Act of 1994, 28 U.S.C.A. § 1738B.

consequences of child abduction by the non-custodial parent or other party. But *substantive* family law is state law.⁹ This includes marriage: the prerequisites for contracting it (age, degrees of sanguinity, need for formality¹⁰), the conditions for its dissolution (grounds for divorce, waiting periods), and post-marital duties (support for children and the ex-spouse) and rights (custody) of the parties.

Different societies and different ages have varied greatly in their approaches to marriage¹¹ and its dissolution. In Western culture, classical Roman law took a very permissive view of dissolution of marriage.¹² Modern Islamic religious law also readily

⁶ See Parental Kidnapping Prevention Act, *supra* n. 4; Federal Parent Locator Service 42 U.S.C.A. § 653 *et seq.*, as amended; Federal Fugitive Felon Act, 18 U.S.C.A. § 1073, as amended; International Parental Kidnapping Prevention Act of 1993, 18 U.S.C.A. § 1204.

⁷ Hague Convention on the Civil Aspects of International Child Abduction, as implemented by the International Child Abduction Remedies Act, 42 U.S.C.A. § 11601-10.

⁸ Fugitive Felon Act, International Parental Kidnapping Prevention Act, both *supra* n. 6.

⁹ This result follows from the U.S. Supreme Court's decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938): there "... is no such thing as valid general federal law, because the federal government is one of limited legislative powers. [There is therefore also no] general federal common law, because courts acting in a common law capacity possess only as much power as the legislature possesses."

¹⁰ A few states still permit the "common law marriage," which requires no compliance with formalities. Even states that do not permit such marriages will recognize valid out-of-state common law marriages. For the latter, see, e.g., Cal. Fam. Code § 308 (2001).

¹¹ Traditionally, marriage is the formal union, sanctioned by church and state or the state alone, of a man and a woman. More recently, same-sex couples can contract marriage-like civil unions in a number of jurisdictions (e.g., in Denmark, Finland, France, Germany, Hungary, Iceland, the Netherlands, Norway, Portugal, and Sweden, in the United States in California and Vermont, in Canada in Quebec, British Columbia and Nova Scotia). These unions are intended to give the parties rights, security, as well as obligations, but they are not identical with marriage. The merger of the two institutions – by making marriage available to both heterosexual and same-sex partners is the most recent development: Netherlands and Belgian legislation, the 2003 decision of the Supreme Court of Ontario, and a general all-Canada proposal are examples. For the Netherlands, see Johannes Wasmuth, *Eheschließung unter Gleichgeschlechtlichen in den Niederlanden und deutscher ordre public*, in Hilmar Krüger and Heinz-Peter Mansel (eds.), *Liber Amicorum Gerhard Kegel* 237 (2002); for Canada generally, see Jo-Anne Pickel, *Judicial Analysis Frozen in Time: EGALE Canada Inc. v. Canada (Attorney General)*, 65 Sask. L. Rev. 243-268 (2002); for Ontario, see *Halpern v. Canada (Attorney General)*, [2003] O.J. No. 2268, holding that the common-law definition of marriage offends the equality rights of same-sex couples under s. 15(1) of the Canadian Charter of Rights and Freedoms and ordering the granting of marriage licenses to such couples. On July 17th, 2003, the Canadian federal government published a draft bill that would define marriage as "the lawful union of two persons to the exclusion of others." The Government of Canada has asked the Supreme Court of Canada whether the Parliament of Canada has the exclusive legislative authority to enact such a law, and whether the draft is consistent with the Canadian Charter of Rights and Freedoms, see http://www.canada.justice.gc.ca/en/news/nr/2003/doc_30944.html for the press release. The discussion that follows focuses on the traditional heterosexual marriage that "covenant marriage"-legislation seeks to strengthen. In principle, however, much of what is said in connection with party stipulations and undertakings would apply equally in the context of civilly sanctioned same-sex unions or marriages.

¹² "In classical law any marriage ... can be dissolved by agreement of the spouses or by notice given by one of them. Agreements which attempt to exclude or limit divorce are void, nor is it possible to stipulate for a

accommodates dissolution.¹³ When civil law became codified in 19th century Europe, family law established strict preconditions for divorce.¹⁴ These have now given way to some form of divorce without fault (for instance, because of the breakdown of the marriage) in all European countries.¹⁵

Until the 1970's,¹⁶ American divorce law was predominantly fault-oriented;¹⁷ when it was not, long waiting periods guarded against a state's becoming a divorce haven.¹⁸ But

penalty to be paid in case of divorce." Fritz Schulz, *Classical Roman Law* 132 (1951). See also *id.*, at 134-35.

¹³ In March 2002, a wife from India received a *talaq* or divorce electronically (via email) from her Pakistani husband. Shortly thereafter, she remarried. <http://www.rediff.com/netguide/2002/apr/08sadia.htm>. According to an Australian newspaper (The Daily Telegraph, <http://www.dailytelegraph.news.com.au>, story posted July 29th, 2003), Muslim men in Kuala Lumpur may use text messages on mobile phones to divorce their wives.

¹⁴ Under the original French Code Civil, only fault was a ground, restricted to adultery and violent and repeatedly abusive behavior. In 1945, serious offense or neglect of marital duties so as to make continued marital community intolerable were added. Since 1976, the law is as follows: fault (as before), alternatively: 1) breakdown of the marriage and living separately for six years [unilateral application by one spouse], Arts. 237-239; or 2) consensual divorce: both agree or one proposes and the other accepts. The second option is not available during the first 6 months of marriage. After application and conference with the judge, there is a three months waiting period until divorce is granted. The parties must submit a draft agreement that provides for the consequences of dissolution: Arts. 230-232 Code civil, as amended by Loi no. 75-617 of July 11, 1975, effective January 1, 1976.

Germany also followed the fault principle. The original version of the Civil Code (effective January 1, 1900) included, among other grounds, adultery, bigamy, attempted homicide, abandonment, and the breakdown of the marriage if caused by a grave neglect of marital duties or immoral behavior. §§ 1564-1576 Bürgerliches Gesetzbuch (German Civil Code). The 1938 Ehegesetz ("Marriage Act"), separating the divorce rules from the Civil Code, added the breakdown of the marriage and living separately for three years. However, the court had discretion to deny the divorce, if the plaintiff was responsible for the breakdown. Effective July 1, 1977, the divorce rules were (re-)incorporated into the Civil Code, now based on the sole ground of the breakdown of the marriage. There is an irrebuttable presumption for the breakdown if both parties have lived separately for a year and both consent, otherwise if they have lived separately for three years. § 1566 German Civil Code. In the German Democratic Republic, the breakdown principle had already been introduced as early as 1965 and was in force until reunification in 1990.

¹⁵ No-fault divorces are available in, e.g., Austria, Bulgaria, the Czech Republic, Denmark, England, Finland, France, Germany, Greece, Hungary, Ireland, Italy, The Netherlands, Norway, Poland, Portugal, Russia, Scotland, Spain, Sweden. See the country reports in Katharina Boele-Woelki, Bente Braat and Ian Summer (eds.) *European Family Law in Action Vol. I: Grounds for Divorce* (European Family Law Series, 2), Antwerpen, Intersentia, 2003, the reports are also available online from the Commission on European Family Law (CEFL), <http://www.law.uu.nl/priv/cefl>.

¹⁶ Homer H. Clark, Jr., *Domestic Relations* § 13.6 (2nd ed. 1988); Joyce Hens Green, John V. Long, Roberta L. Murawski, *Dissolution of Marriage* (1986) 61 (claiming it was not California in 1969, but Kentucky (1850), Wisconsin (1866), and Rhode Island (1893) that first enacted statutes making it possible to obtain a divorce on no-fault grounds), citing William E. McCurdy, 9 Vand. L.Rev. 685, 701 (1956) for the aforementioned statutes.

¹⁷ Until 1967, adultery was the only ground for divorce in New York. N.Y. Dom. Rel. Law § 170 (Supp.1967); see Michael L. McCarthy, *Retroactive Application of new Grounds for Divorce under § 170 Domestic Relations Law*, 17 Buff.L.Rev. 902 (1968). This encouraged spouses to seek a divorce abroad. See *infra* n. 21.

¹⁸ See *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975).

then state law turned from fault-based divorce to no-fault divorce.¹⁹ However, waiting periods differ widely:²⁰ In addition, some states recognize virtually instant consensual foreign-country divorces, others do not.²¹ Nevertheless, in the United States a divorce granted by a court of a sister-state with sufficient jurisdiction,²² or judicially recognized by such a state,²³ is entitled to recognition in all other states, including in the original state of celebration. If expense is no consideration, the parties – or even only one of them (*ex parte*) – therefore can obtain a valid divorce in the state with the “easiest” requirements.

States may wish to resist the trend toward easy divorce. They can do so by retaining more traditional, stricter standards applicable to all. Or they can give those wishing to marry the alternative to opt out of easy dissolution and to bind themselves even more fundamentally – to do more than to enter into the *status* of marriage but to *covenant* to keep it that way except for well-defined reasons and in observance of particular procedures.²⁴

“Covenant” has both religious and secular law connotations. It expresses commitment, devotion, perhaps acknowledgment of divine command, but it also reminds of contract – the undertaking to do or not to do something. The dichotomy between the religious and the civil aspects of marriage has been more apparent in Continental law than in the United States. In Europe, marriage generally requires a civil ceremony; a religious one is

¹⁹ Michael L. McCarthy, Retroactive Application of New Grounds for Divorce under § 170 Domestic Relations Law, 17 Buff.L.Rev. 902 (1968), Lawrence Friedman, Rights of Passage: Divorce Law in Historical Perspective, 63 Or. L. Rev. 649, 667 (1984).

²⁰ Nevada: 6 weeks, N.R.S. 125.020; 1 year: Iowa, I.C.A. § 598.6; Nebraska, Neb.Rev.St. § 42-349.

²¹ See, e.g., *Rosenstiel v. Rosenstiel*, 16 N.Y.2d 64, 262 N.Y.S.2d 86, 209 N.E.2d 709 (1965). For discussion of “easy” Haitian and Dominican Republic divorces and their recognition, see E. Scoles, P. Hay, P. Borchers, S. Symeonides, *supra* n. 3, at §§ 15.20-15.22.

²² *Id.* at §§ 15.6-15.14.

²³ For such “domestication” of migratory divorces, see *id.* at § 15.14.

²⁴ “As evidence mounts of the social destruction in the wake of surging divorce rates and current surging cohabitation rates, action is required to restore and protect the institution of marriage – the foundation upon which the family is built.” Katherine Shaw Spaht and Symeon C. Symeonides, *Covenant Marriage and the Law of Conflicts [sic] of Laws*, 32 Creighton L. Rev. 1085, 1091 (1999). This statement echoes concerns of earlier times: “It is this unlimited and illimitable freedom of divorce [in Roman law] which seemed so highly objectionable to modern moralists and lawyers and so obviously a sign of Roman decadence.” Schulz, *supra* n. 12, loc. cit.

optional;²⁵ each has its own prerequisites (e.g., the publication of banns).²⁶ In the United States, the civil and religious aspects merge when the marriage ceremony is performed by religious authority.²⁷ “Marriage” is easy; so is divorce in a no-fault state.²⁸ Hence the option, offered by the Louisiana legislation, to enter into something intended to be more lasting, more secure, less vulnerable: the *covenant marriage*.²⁹ Louisiana’s version includes the following features that distinguish such a marriage from the traditional form: mandatory premarital counseling to impress the seriousness of marriage upon the couple,³⁰ the signing of a “Declaration of Intent” by which the couple promises to take all reasonable efforts to preserve the marriage and stipulates for the application of Louisiana law,³¹ specified fault-based grounds for divorce as well as no-fault divorce, the latter

²⁵ See, e.g., German Civil Code (BGB) § 1310(1). See also *infra* n. 27. On the “secularization” of family law and the spread of European secular notions to other parts of the world, see Rheinstein, *The Law of Family and Succession*, in: A.N. Yiannopoulos (ed.), *Civil Law in the Modern World* 27, 28 *et seq.* (1965).

²⁶ France: posting of marriage banns at town hall required no less than ten working days before the date of marriage. Italy: If one of the parties is an Italian citizen or resident, the marriage announcement has to be posted for two consecutive Sundays at the city hall. This kind of prerequisite also exists in America: Ontario Family Act, R.S.O. 1990, c.M.3, s. 27(2): marriage may not take place until 5 days after publication of banns.

²⁷ In several, predominantly Catholic countries, civil law and authority will recognize religious marriages, but still require civil registration. This is true, for instance, in Spain with respect to Catholic and Protestant marriages. See Agreement with the Holy See of 3 January 1975, at VI(1-2) and Law 24/1992 of November 10, 1992, at 7(1). Stricter requirements apply to the recognition of Jewish ceremonies: Law 25/1992, of November 10, 1992, Annex, at 7(1),(3),(4). All of the foregoing reprinted in Alberto de la Hera and Rosa María Martínez de Codes (eds.), *Spanish Legislation on Religious Affairs* (Ministry of Justice, 1998) at pp. 54, 79, 92, respectively.

²⁸ The foregoing and previous comments assume that, in the United States, marriage and divorce are governed by the *lex fori*. For further, more detailed discussion, see *infra* at n. 44 *et seq.*

²⁹ See generally, Katherine Shaw Spaht, *Louisiana’s Covenant Marriage: Social Analysis and Legal Implications*, 59 *La. L. Rev.* 63 (1998).

³⁰ In keeping with American practice of permitting members of the clergy to perform statutory functions in the creation of a marriage, the prescribed counseling may be given by state-provided counselors or, at the couple’s option, by a member of the clergy. But, as the drafter of the Louisiana law (Professor Spaht) notes, the provision also serves to “invite ... religion back into the public square for the purpose of performing a function for which religion is uniquely qualified: preparing for and preserving marriage.” Spaht and Symeonides, *supra* n. 24, at 1091 n. 28. The contrast to Europe (*supra* at n. 25), where there is generally far more commingling of “church and state,” yet not in this area, is startling.

³¹ The choice-of-law clause is a contract that other states may or may not honor. For discussion, see *infra* at n. 76. If a divorce action is brought in Louisiana, it does not add anything to current practice that applies the *lex fori*. See *infra* at nn. 42-44.

The promise to use “all reasonable efforts to preserve the marriage, including marriage counseling” (La. Rev. Stat. 9: 273(A)(1), West’s Louisiana Statutes Annotated) is said to be “a legally binding contract permitted and sanctioned by the state as a limited exception to the fundamental principle that the personal obligations of the marriage contract may not be altered by the parties.” Spaht and Symeonides, *supra* n. 24, n. 22 at 1090. However, it bears emphasis that the parties may indeed contract with each other concerning ownership rights in property, the modification or elimination of spousal support, the making of wills, and the law applicable to their agreement. See Uniform Premarital Agreement Act, Sec. 3, in force in 27 jurisdictions. (26 states and the District of Columbia are listed at the Website of the Uniform Law Commissioners, <http://www.nccusl.org>, New Jersey enacted a similar section, see

conditioned, however, on a longer period of separation (2 years). With respect to dissolution – although not with respect to formation – a covenant marriage is remarkably similar to contemporary substantive European divorce law: a combination of fault grounds and a no-fault possibility, with no-fault divorce made more difficult.³²

When parties have contracted a covenant marriage in a covenant-marriage state and one of them later seeks its dissolution there, he or she will be held to the standards applicable to such marriages. But what if one of them changes his or her domicile (which is one of the traditional bases for divorce jurisdiction) to a traditional, non-covenant state (Forum State No. 2, = F-2) and there seeks a divorce: will the new state of domicile recognize the first state's (Forum State No. 1, = F-1) conditions for dissolution? Put differently: can covenant marriage legislation effectively assure observance of its stricter standards nationwide? What if, secondly, the parties, or one of them, are foreign nationals and one of them seeks a divorce abroad: will the result depend on whether the petitioner is a national of F-2 (here: the foreign country where the divorce is sought) or of the American covenant state, on the nationality of the respondent, and/or on the present or previous domicile of one or both of the parties?

II

U.S. Interstate Recognition of Covenant-Marriage Standards Upon Divorce

A. A Second State's Divorce Jurisdiction

N.J.S.A. 37:2-34, legislation is pending in Mississippi and West Virginia). Limitations derive from considerations of public policy. See Sec. 6. What the parties may not change by contract thus relates to the status itself, i.e., how it is created and dissolved.

³² See, e.g., Germany: There is an irrebuttable presumption that the marriage has broken down (and that a divorce is to be granted), if the spouses have lived apart for one year and *both* join in the divorce petition. Civil Code § 1566(1). If only one spouse seeks the divorce, the presumption arises after a separation of three years. Despite of these waiting periods, German and American divorce rates (before the introduction of covenant marriages) were quite similar: in 1995, the U.S. divorce rate (divorces vs. marriages in that year) stood at 50%, the German at 39.4%. By 2001, the German rate had risen to 50.7%, numbers for the U.S. were not available as of August 2003. For the U.S., see U.S. Census Bureau, Statistical Abstract of the United States: 2002, chart No. 111, available also at <http://www.census.gov>. The U.S. rate is an estimation because some states, including Louisiana, do not report the number of divorces; for Germany, see Federal Statistical Office, <http://www.destatis.de> (English version has an English search engine).

The stricter standards of the covenant-marriage state are in issue when divorce is sought in a non-covenant state. The second state's court (F-2) must have jurisdiction – personal and subject matter jurisdiction – in order to entertain the action. If it does, what law does it apply? Subsection (B) addresses the second question: as will be seen, in American law, jurisdiction and applicable law merge.

In the first *Williams* decision, the U.S. Supreme Court held that the petitioner's domicile was a sufficient basis for the assertion of divorce jurisdiction.³³ It did not hold that domicile was required or the only basis; that question was not before it.³⁴ For a divorce with both parties before the court, whether by appearance or as a result of the court's personal jurisdiction over the respondent, the jurisdictional issue becomes *res judicata* for purposes of a collateral proceeding.³⁵ Domicile as a basis for divorce jurisdiction is therefore relevant only when petitioner sought the divorce *ex parte* and it was granted upon respondent's default. In these circumstances, another forum (F-1 or yet another state, F-3) may question F-2's jurisdiction for lack of petitioner's domicile there.³⁶

The F-2 court must also have subject matter jurisdiction: it must have power to grant a divorce, to dissolve a marriage. It is upon this ground that a Connecticut court declined to entertain a petition for the dissolution of a Vermont civil union.³⁷ Vermont, in response to a Vermont Supreme Court decision holding Vermont's marriage laws unconstitutional when they denied marriage to same-sex couples, had chosen to establish the legal form of a civil union for such couples.³⁸ By not extending its marriage laws to same-sex couples, the Connecticut court reasoned, Vermont obviously treated a civil union as something

³³ 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279 (1942). This conclusion with respect to divorce jurisdiction has old historical roots. In *Pennoyer v. Neff*, 95 U.S. 714, 732 (1878), the Court recognized, in dictum, the right of "every State ... to determine the civil status and capabilities of all its inhabitants."

³⁴ For detailed discussion, see E. Scoles, P. Hay, P. Borchers, S. Symeonides, *supra* n. 3, at § 15.6 *et seq.*

³⁵ *Sherrer v. Sherrer*, 334 U.S. 343, 68 S.Ct. 1087, 92 L.Ed. 1429 (1948).

³⁶ See *Williams v. North Carolina (II)*, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577 (1945). However, "since an appeal to the Full Faith and Credit Clause raises questions under the Constitution ..., the proper criteria for ascertaining domicile [jurisdiction of the first court], should these be in dispute, become matters for federal determination." *Id.*, 325 U.S. at 231 n. 7.

³⁷ *Rosengarten v. Downes*, 802 A.2d 170 (Conn. App. 2002), certification for appeal granted, 261 Conn. 936, 806 A.2d 1066 (2002).

³⁸ Vt. St. ch. 23. The decision is *Baker v. State of Vermont*, 744 A.2d 864 (1999). For civil unions or registered partnerships elsewhere, see also *supra* n. 11. With the adoption and amendment of Domestic Partnership legislation by California (West's Ann.Cal.Fam.Code § 297 *et seq.*), the same issues now arise in relation to such California partnerships.

other than marriage.³⁹ Connecticut, however, only conferred power upon its courts to dissolve marriages, not other types of unions, unknown to Connecticut law. The court lacked subject matter jurisdiction.

It is most unlikely that this reasoning would extend to covenant marriages. They are intended as *marriages*, between heterosexuals, by the state of their creation. Apart from the almost universal choice-of-law rule that a marriage valid where celebrated will be recognized as valid elsewhere,⁴⁰ an attempt to differentiate between F-2's type of marriage and the marital status conferred by F-1 would probably be unconstitutional.⁴¹

It thus seems quite clear that, for interstate purposes, the second court would have personal jurisdiction if the petitioner is domiciled there or both parties are before it, whether domiciled there in fact or not. It would also unquestionably have subject matter jurisdiction.

³⁹ Similarly, the Court of Justice of the European Community rejected a Community employee's claim for the family allowance supplement to his pay because the civil union in which he lived, while formally valid and sanctioned by Swedish law, was regarded by that law as an alternative to marriage, not identical with it. Joined Cases C-122/99 P and C-125/99 P, D and Kingdom of Sweden v. Council of the European Union, [2001] ECR I-4319.

In contrast, when forum law also recognizes a civil union or other form of same-sex partnership, the forum is likely to recognize the foreign partnership. See, e.g., German Conflicts Statute (EGBGB) Art. 17b(1): the creation of a registered partnership and its effects, including property rights of the partners, are governed by the law of the state where the partnership is registered. Limitation: the effects of a registered partnership contracted abroad do not extend beyond those provided by the German Civil Code or the Law on Registered Partnerships ([2001] Bundesgesetzblatt I, 266, as amended by [2001] Bundesgesetzblatt I, 3513). Art. 17b(4) EGBGB.

⁴⁰ Restatement (Second) of Conflict of Laws § 283(1). Exceptions concern cases where the foreign marriage may violate local public policy, for instance in cases of incest or polygamy. See E. Scoles, P. Hay, P. Borchers, S. Symeonides, *supra* n. 3, at § 13.5 *et seq.* What happens to this traditional rule with the appearance of same-sex *marriages*? In states that have adopted legislation in response to, and as authorized by the Defense of Marriage Act (DOMA), 28 U.S.C. § 1738C, foreign-country same-sex marriages are unlikely to be recognized: the local public policy, as expressed in DOMA-legislation, would overcome the choice-of-law reference. See *Burns v. Burns*, 560 S.E.2d 47, 49 (Ga. App. 2002, cert. denied: "What constitutes a marriage in ... Georgia is a legislative function, not a judicial one ... " (dictum). In the interstate context, there are no indications that the problem will arise in the near future. However, with more foreign countries facilitating same-sex *marriage* (*supra* n. 11), American courts may be expected to have to face the question that the courts in *Rosengarten* (*supra* n. 37) and in *Burns* (this n.) could avoid. Opposition to partnership forms unknown to the forum thus may require some rethinking. For the recognition of same-sex unions in Europe, see *supra* n. 39 and Kurt Siehr, *Das Internationale Privatrecht der Schweiz 67-79* (2002), with extensive bibliography at 64. For same-sex marriage, see Casswell, *Moving Toward Same-Sex Marriage*, 80 Can. Bar Rev. 810 (2001).

⁴¹ Compare *Hughes v. Fetter*, 341 U.S. 609, 71 S.Ct. 980, 95 L.Ed. 1212 (1951), and *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 73 S.Ct. 856, 97 L.Ed. 1211 (1953).

B. Applicable Law

1. Current Law: *Lex Fori*

The emphasis on domicile as a jurisdictional requirement in the older case law⁴² at once assumed and justified the application of local substantive law (the *lex fori*) to the divorce petition. Because of the assumption, a close connection to the forum was required for it to be entitled to exercise jurisdiction: otherwise, the forum would be interfering impermissibly with the societal interests of the actual domicile, the home state. It is in part on this ground that the appellate court in *Alton v. Alton*⁴³ agreed that the trial court lacked jurisdiction to grant the divorce that both parties wanted. The close connection brought the status before the court, as it were: the status, like a thing – a *res* – now had a location, and, as a matter of traditional choice of law, local law (the *lex fori* as the *lex rei sitae*) applies to local “things.”⁴⁴ In these circumstances, an F-2 (divorcing) court does not ask whether the petitioner could have obtained a divorce in the state where the marriage was celebrated or even in which it was lived until the breakup. Its concern is only with its jurisdiction and the rules of its own substantive law. Applied to covenant marriages this means that, without more, covenant-state standards for divorce have no effect on the F-2 decision.

2. Choice of Law Alternatives

a. The Choice-of-Law Clause in the Marriage Contract (Party Autonomy)

In general, all legal systems seek to apply a closely connected law, a home law, to status questions. They differ in how they define that – as the law of the parties’ nationality, their domicile, their marital residence. American courts, as described, opt for domicile and, by combining the choice-of-law question with the jurisdictional inquiry, thereby come to the *lex fori*. Other legal systems separate these questions. If, under such an approach, the applicable law does not follow from the exercise of jurisdiction, the obvious question

⁴² See E. Scoles, P. Hay, P. Borchers, S. Symeonides, *supra* n. 3, at § 15.4 for a review of the older cases.

⁴³ 207 F.2d 667 (3rd Cir. 1953). For discussion, see *infra* at n. 57.

⁴⁴ Occasional decisions now depart from this rule in property law matters. See *Saunders v. Saunders*, 796 So.2d 1253 (Fla. App. 2001)(Colorado domiciliary law applied to decedent’s Florida real property). But this development has had no effect on choice of law in divorce as yet.

arises whether the parties may stipulate it themselves. In a Louisiana covenant marriage, the parties stipulate the application of Louisiana law in their “Declaration of Intent.”

Parties are generally free to choose the law applicable to their contracts. A choice-of-law clause (in itself a contract) need not even relate to a contractual obligation but, especially in Europe, may concern claims in tort⁴⁵ and marital property rights.⁴⁶ Increasingly, and contrary to earlier practice, the chosen law need not have a particular relationship to the claim or the parties.⁴⁷ However, everywhere there are limits. They are designed to protect public interests (for instance, currency regulations) and – particularly important in the present context – the “weaker party.” Modern codifications thus limit party autonomy in consumer and employment contracts,⁴⁸ and courts guard against unfair terms or conditions on the basis of fundamental values that may be grounded in notions of due process and public policy.⁴⁹ Whether any such considerations militate against acceptance of a party stipulation away from the otherwise applicable *lex fori* and in favor of the *lex celebrationis* in the present context will be explored further below after review of other choice-of-law approaches.

b. Full Faith and Credit to the *Lex Celebrationis*?

⁴⁵ See German Conflicts Statute (EGBGB) Art. 42; European Community, Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations (ROME II) Art. 10, COM(2003) 427 final.

⁴⁶ For the United States, see *supra* n. 31 (Uniform Premarital Agreements Act) and E. Scoles, P. Hay, P. Borchers, S. Symeonides, *supra* n. 3, at § 14.4. For Germany, see Art. 15 II EGBGB. See generally, K. Siehr, Domestic Relations in Europe, 30 Am.J.Comp.L. 37, 51 (1982). *But see infra* n. 49.

⁴⁷ See UCC 1-301; Art. 3 (Rome) Convention on the Law Applicable to Contractual Obligations (in force among member states of the European Union). Even if a connection were required, the choice of the law of celebration (Louisiana in the example) would satisfy the requirement.

⁴⁸ See, e.g., Rome Convention, *supra* n. 47, Arts. 5 (consumer contracts), 6 (individual employment contracts), 7 (mandatory rules of forum or another country’s law).

⁴⁹ See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C.Cir. 1965) (cross-collateralization clause in installment purchase agreement); *Stobaugh v. Norwegian Cruise Line Ltd.*, 5 S.W.3d 232 (Tex.App.-Hous. 14 Dist. 1999)(burdensome forum selection clause in a cruise contract). See also two decisions by the German Constitutional Court holding prenuptial agreements about post-divorce support and matrimonial property to be unconstitutional (by placing disproportionate burdens on the weaker spouse): Decisions of Feb. 6 and March 29, 2001, [2001] FamRZ 343 and 985, respectively. All of the limitations on the spouses’ freedom to enter into premarital agreements, *supra* n. 31, are designed to protect the weaker party against overreaching (Sec. 6(a)) or to protect the public interest (Sec. 6(b)).

The U.S. Constitution requires states to give “full faith and credit” to the judgments, records, and “public acts” of other states of the union.⁵⁰ Statutes are public acts. Must F-2 therefore honor F-1’s covenant-marriage statute, quite apart from the spouses’ choice of it, including the statute’s limitations on divorce?

Some older decisions did require the forum to apply the statutory law of another state.⁵¹ The last decision to do so, however, may also be explained on other grounds.⁵² In modern times, the issue arose in the context of worker compensation statutes: may a second state (state of employment, of the injury, or home state of the injured employee) grant an additional or different recovery than permitted under the law under which the claimant has already received an award? The answer has been uniformly “yes,” at first because recognition might offend F-2’s public policy,⁵³ later because F-2 should not be forced always to apply another state’s law and never its own,⁵⁴ and finally because, F-2 – virtually – can do what it wants to.⁵⁵

The last statement overstates. The forum cannot apply forum law – or any other law – just because it wants to do so. *Allstate Ins. Co. v. Hague*⁵⁶ teaches that the forum must have a “significant contact” or contacts that are significant in aggregation before it may apply its law. This limitation derives from the Due Process Clause: the defendant should not be subject to forum law with which he or she and the case have no connection. But if the forum does have the requisite contact so that Due Process is satisfied, the Full Faith and Credit Clause is no longer a bar to the application of the *lex fori*.

In the case of a petition for the dissolution of a covenant marriage celebrated in F-1, the forum (F-2) does have the requisite contact: the very facts that entitle it to exercise

⁵⁰ *Supra* n. 3.

⁵¹ For a review of the case law, see E. Scoles, P. Hay, P. Borchers, S. Symeonides, *supra* n. 3, at §§ 3.24-3.25, 3.30.

⁵² *Id.*, at § 3.25 n. 18, concerning *Order of Commercial Travelers of America v. Wolfe*, 331 U.S. 586, 67 S.Ct. 1355, 91 L.Ed. 1687 (1947).

⁵³ *Bradford Electric Light Co., Inc. v. Clapper*, 286 U.S. 145, 52 S.Ct. 571, 76 L.Ed. 1026 (1932).

⁵⁴ *Pacific Employers Insurance Co. v. Industrial Accident Commission*, 306 U.S. 493, 59 S.Ct. 629, 83 L.Ed. 940 (1939).

⁵⁵ *Carroll v. Lanza*, 349 U.S. 408, 75 S.Ct. 804, 99 L.Ed. 1183 (1955).

⁵⁶ 449 U.S. 302, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985).

jurisdiction – domicile (or other close connection) of the petitioner in the case of an *ex parte* divorce or the presence and participation of both parties (bilateral divorce) – are contacts permitting the choice of the *lex fori* as the *applicable law*. Application of the *lex celebrationis* would be a matter of choice, not of constitutional requirement.

c. The Choice of “Home Law” in Family Matters

In *Alton v. Alton*, mentioned earlier,⁵⁷ the appellate court affirmed the trial court’s denial of relief for lack of jurisdiction: the parties did not have the requisite contact with the Virgin Islands forum and application of forum law would therefore undermine the societal concerns of their home state. Application of forum law was assumed as a given. Judge Hastie, in dissent, thought that the concerns of the home state could be safeguarded by application of its law in circumstances when the forum’s own connection is too slight.⁵⁸ This thought anticipated by many years what the decision in *Allstate Ins. Co. v. Hague*, discussed above,⁵⁹ today requires in other contexts. That this is still not the rule in divorce results from two facts: in the uncontested bilateral divorce, jurisdiction and the substantive result are not open to collateral attack; in an *ex parte* divorce, the jurisdictional facts furnish the required nexus that justifies the application of local law. It is in the *contested* bilateral divorce where Judge Hastie’s thoughts, in combination with the rule of the *Allstate* decision, could have currency, especially in the context of covenant marriages. This assumes, however, that the divorce petition is brought in a wholly unconnected forum. That is unlikely to be the case: the petitioner will bring the action in the state of his or her new home, furnishing domicile as a jurisdictional fact additional to the participation of the other spouse and, with it, the freedom for the forum to apply its own law.

This is not to say that, whenever different divorce laws may be applicable (as now with the emergence of covenant-marriage legislation), the forum *should* apply its law and ignore the other. Judge Hastie’s dissent suggests that there are policy reasons to defer to “home law.” That law, incidentally – and as discussed in the next section –, need not be

⁵⁷ *Supra* n. 43.

⁵⁸ Justice Jackson, in *Williams I*, *supra* n. 33, had also emphasized the concerns of the home state.

⁵⁹ *Supra* n. 56.

the *lex celebrationis* but could be another law with a close connection to the marriage, such as the law of the last matrimonial domicile.

European law has long taken a much more differentiated approach to choice of law for marriage dissolution and has separated that inquiry from the assertion of jurisdiction. With “nationality” as the principal personal connecting factor in older European conflicts law (in contrast to the common law’s use of domicile),⁶⁰ the law of the parties’ common nationality was thought to have greatest concern, express the most relevant societal interests, and that the forum should safeguard these even though it had jurisdiction. Alternative references apply when there is no common nationality, such as the parties’ last common habitual residence.⁶¹ The European approach to divorce is thus not basically⁶² *lex fori*-oriented, but rather reflects Judge Hastie’s concerns. American case law, however, continues to adhere to its traditional approach.

d. Generalizing the Choice-of-Law Principles of the Restatement Second?

American conflicts law – mainly for contracts and torts – has departed from the rule-orientation of the older law; it seeks to apply the law that is appropriate for the case, the parties, even for a particular issue (*dépeçage*). While several approaches have been suggested and applied, the Restatement (Second) of Conflict of Laws (1971) represents perhaps the overarching statement: in the absence of a valid choice of law by the parties,⁶³ it calls for the application, in contract and tort, of the law of the “most

⁶⁰ See, e.g., for France, H. Battifol & P. Lagarde, 2 Droit international privé 79 (7th ed. 1981); for Germany, Art. 17(1), 1st sentence, in combination with Art. 14(1), No. 1 EGBGB; for Italy, Art. 31 Conflicts Statute.

⁶¹ E.g., Germany: Art. 17(1), 1st sentence, in combination with Art. 14(1), No. 2 EGBGB. European Community law has adopted the spouses’ common habitual residence as the principal jurisdictional basis for divorce. Art. 2(1)(a), Council Regulation 1347/2000, [2000] Official Journal L 160/19. Effective July 1, 2004, Regulation 1347/2000 will be repealed and this provision will become Art. 5(1)(a) of the then amended Council Regulation 44/2001 if the Council formally adopts the proposal COM(2002)222 (final) at its October 2003 meeting. Bulletin EU 6-2003, point 1.4.19.

⁶² Exceptions apply if the law of common nationality does not permit divorce, but the petitioner is also a citizen of the forum: forum law applies. See, e.g., Swiss Conflicts Statute Art. 61(3). German law generalizes this rule to apply to all otherwise applicable jurisdictional bases: Art. 17(1), 2nd sentence EGBGB. In Swiss law, the *lex fori* is the default rule when there is no law of common nationality or even when both spouses reside in Switzerland: Art. 61(1) and (2).

⁶³ For the effect of the parties’ choice in a covenant marriage, see *supra* at n. 45 *et seq.* and the evaluative comments at n. 76 *infra*.

significant relationship” to the parties or the issue.⁶⁴ It has been suggested that the Restatement approach become the standard for choice of law in divorce and that its application would lead to deference to the law of the covenant-marriage state as the most significantly related or the state whose policies would be most undermined by non-application of its law.⁶⁵

The Restatement Second-test is wider than Judge Hastie’s suggestion and the rules of European law. He focused on “home law” – in the context of the case before him, on the law of the state from which the parties came (where there were last domiciled) and which law would be evaded by application of the Virgin Islands’ *lex fori*. The European rules, not formulated with regard to a concrete case, come closer to the Restatement’s goal – identification of the most significantly related legal system. However, the Restatement Second is wider still: it contains no presumptions⁶⁶ and the general principles of its Section 6 accommodate a number of orientations, including a forum bias.⁶⁷ Its pervasive focus on individual issues (*dépeçage*) is unlikely to work in the covenant-marriage context: should a court defer to the covenant-marriage state’s law for some issues (e.g., grounds), but not for others (e.g., length of a waiting period)? It is difficult to see, even if *dépeçage* were not practiced (because impracticable), how the Restatement Second

⁶⁴ The principal provisions are §§ 145 (tort) and 188 (contract). Subsection 2, which lists a number of contacts to be considered, incorporates by reference the general principles of § 6. They are discussed below at n. 67. Subsection 2 also provides that the contacts listed (and others that may be relevant, for the list is non-exclusive) should be evaluated according to their “relative” importance to the issue. No further guidance is provided. In addition to the general provision of § 145, the significant relationship test is also invoked for particular tort issues. See §§ 156-173.

⁶⁵ Spaht & Symeonides, *supra* n. 24, at 1113. This suggestion echoes the “comparative impairment” approach to choice of law which, with Professor Symeonides as principal draftsman, became part of Louisiana’s conflicts codification and now has been adopted in Oregon’s as well: La. Civil Code Art. 3537; O.R.S. § 81.130.

⁶⁶ By way of comparison, the Rome Convention, *supra* n. 47, states a presumption, in Art. 4, for the determination of the most closely connected law for contract cases. The European Community’s proposed regulation on choice of law in tort likewise starts with fixed references, to be displaced, exceptionally by a more closely connected law.

⁶⁷ When the Restatement (Second) calls for the application of the most significantly related law, it makes that determination subject to the general principles of § 6. The principles are not stated in any order of priority, a court should consider, in fact it can pick and choose. Sec. 6(2)(c) counsels consideration of “the relevant policies of other interested states,” e.g. of the covenant marriage state. However, Sec. 6(2)(b) refers to “the relevant policies of the forum,” while (g) considers the “ease in the determination and application of the law.” When Sec. 6(2)(f) refers to “...uniformity of result,” it is unclear in the present context whether interstate or intrastate uniformity of divorce is the more desirable. On the Restatement’s “general principles,” see Hay, *Flexibility versus Predictability and Uniformity in Choice of Law*, Hague Academy, 226 *Collected Courses* 281, 371-74 (1991-I).

approach would lead – as a rule, rather than only exceptionally (which would not be much help) – to the law of the covenant-marriage state, rather than to local law or the law of a third state (not a covenant-marriage state), such as the state of the last common domicile. Even if objectively much may speak in favor of the covenant-marriage state – as the *lex celebrationis* and because of the parties’ choice of its law and mutual undertakings of best efforts –, the principles of Section 6, as mentioned, permit a forum bias. As subsection (f), below, will address in additional detail, it seems more likely than not that the forum will opt for local law, given the petitioner’s close connection to it.

e. Change of Characterization from Family Law to Contract: Impairment of Contract?

The previous subsections explored alternatives to the application of the *lex fori* from the perspective of choice of law in family law. In a covenant marriage, however, the traditional notion of “contracting marriage” has a meaning beyond entering the *status* of marriage, with the content and consequences determined by law. It is also, perhaps predominantly, a *contract*, of special solemnity, in which – it is said⁶⁸ – the undertaking to use best efforts toward the maintenance of the marriage is to represent a legal obligation. The express choice of a validating law (namely, the law of the covenant-marriage state) underlines the parties’ commitment.

If the question at issue – giving effect to the parameters of a covenant marriage in another state – thus presents questions of contract law as much as of family law, would the application of the *lex fori* by F-2, overriding these parameters, be an unconstitutional impairment of contract? The answer, quite clearly, must be “no.” A sizeable jurisprudence permits the forum to disregard contractual limitations, valid where made, when contacts to the forum give it a regulatory interest.⁶⁹ It is generally thought that the parties may not, by contract, modify the nature of the marital status, and the Louisiana rule to the contrary is considered an exception even there.⁷⁰ The contacts to the forum

⁶⁸ See Spaht & Symeonides, *supra* n. 24, at 1093.

⁶⁹ See E. Scoles, P. Hay, P. Borchers, S. Symeonides, *supra* n. 3, at §§ 3.26-3.29, with references to case law.

⁷⁰ *Supra* n. 31.

that give it jurisdiction also give it a regulatory interest in the marriage that is now before it. Limitations contracted by the parties and valid elsewhere do not diminish the forum's freedom to apply its own law.

It is free, but it does not have to apply the *lex fori*. Characterizing the limitations as contract issues, immediately and quite directly again implicates the Restatement's choice-of-law rules. Perhaps these contract issues are more significantly related to the state where the obligations were undertaken and, at the time, were to be performed than to the forum. But even so, what is the result? By seeking dissolution in F-2 without observing the contractual limitations, the petitioner may be in breach (if the applicable law is indeed that of the covenant state, F-1): the ordinary contract remedy would be money damages (under F-1, possibly also under F-2 law), but not enforcement. Unlike in arbitration, no law requires dismissal or abstention so that the agreed method of settlement can run its course. Absent such a requirement, a court *may* of course dismiss for other reasons, for instance, because a forum-selection clause chooses a different court, or for reasons of *forum non conveniens*, or because it is unable to give a remedy.⁷¹ The first of these may require a reading of the choice-of-law clause as incorporating a choice of forum. This is not American law.⁷² The last of the reasons for dismissal has a parallel in the existence of equitable relief when the relief at law is inadequate, and money damages for the breach of undertakings in the covenant may indeed be inadequate: proceeding with the divorce, leaves the respondent with an empty contract claim.⁷³

Of the three reasons for dismissal, only the first – an implied choice of forum – would effectuate the (original) intent of both parties. The other two represent a court-closing, as far as the petitioner is concerned. All three of the procedural aspects will be the subject of subsection (g) below. For present purposes suffice it to conclude that, while a court may wish to give effect to the contractual undertakings of the parties in some form, its application of local law would not be a forbidden impairment of contract.

⁷¹ See, in the earlier law, *Slater v. Mexican National R. Co.*, 194 U.S. 120, 24 S.Ct. 581, 48 L.Ed. 900 (1904).

⁷² See *infra* at nn. 86-87.

⁷³ See also *infra* at nn.106-109.

f. The Choice-of-Law Alternatives Evaluated

As discussed earlier, the parties are generally free to choose the applicable law. Limitations on this freedom protect the weaker party, such as in consumer transactions. These limitations are grounded in considerations of public policy. In family law, parties generally cannot, by contract, redefine marriage or the consequences of its possible breakdown.⁷⁴ It follows that what they cannot do by express stipulation, they cannot do by means of a choice-of-law clause: the second court, if it has the requisite contact with the party or parties, will make its own choice of law. The case with a choice-of-law clause thus does not differ, for these purposes, from one without one. Ignoring the parties' choice of law or their express stipulation does not impair their contract, inasmuch as they could not make a contract in this regard. Nor does the Full Faith and Credit Clause command application of the *lex celebrationis*.

In these circumstances, the second forum has traditionally applied local law to decide a petition for dissolution. It bears additional discussion whether a state that has embraced the Restatement Second is likely, in the context of covenant marriages, to depart from the traditional rule or to adhere to it (as the Restatement's forum-orientation in Section 6(2)(b) would also permit).⁷⁵

In an *ex parte* divorce, the petitioner will be a local domiciliary. Equal treatment with other local domiciliaries may require application of local law. Even if a distinction based on the place of marriage formation is constitutionally permissible, public policy considerations favor helping a locally domiciled petitioner. Even legal systems that do not apply local law as a matter of course, but apply the law of the parties' common nationality or last habitual residence, will make an exception in favor of their own

⁷⁴ See also *supra* at nn. 49, 62. For the extent that parties can contract concerning the economic consequences of dissolution, see *supra* n. 31.

⁷⁵ Section 6(2) provides that "the factors relevant to the choice of the applicable rule of law include ... (b) the relevant policies of the forum." Other considerations listed in § 6(2) point in both directions. Thus, (c) "relevant policies of other interested states" and (d) "protection of justified expectations" point to covenant-state law, which (e), "basic policies underlying the particular field of law," (f) "...uniformity," and (g) "ease in the determination and application of the law" may once again point to forum law.

nationals: local law applies if it would permit divorce when the foreign law would not.⁷⁶ The same result may be expected in an American forum for which “domicile” takes on the same meaning as the relevant connecting factor as “nationality” does in the civil law.⁷⁷ The answer may be different if an *ex parte* divorce can be granted on jurisdictional grounds less than domicile or habitual residence: the petitioner would no longer be suing “at home.” Additionally, *Allstate Ins. Co. v. Hague*⁷⁸ would then require a determination whether the quality of forum contacts permits the application of its law.

If the divorce is bilateral, *uncontested*, and the parties perhaps not even domiciled in the forum, the forum does not have the same reason to be protective of them: it *could* engage in Restatement Second analysis and apply “home law.” But why should it deny a divorce to parties who consensually want it (and, by not suing at home but in the forum, may even be said to have made an implied choice of law⁷⁹), when it would grant an *ex parte* divorce (above) with one party *not* consenting (at least not expressly)? If the parties do not want “home law” protection, F-2 would be most unlikely, it seems, to effectuate the (now abstract) societal interests of F-1.

In a *contested* bilateral divorce, there obviously is no room to assume an implied choice of forum law. However, and in contrast to uncontested, consensual divorce, jurisdiction will be part of the contest. If the petitioner satisfies the jurisdictional requirement, the case then does not differ from the *ex parte* divorce discussed above: forum law will be protective of his or her interests. It is only in the case that a non-resident petitioner brings the action at the respondent’s domicile (in a covenant state⁸⁰) that the forum’s protective policies would apply: the petitioner cannot claim them and the respondent does not want them but instead invokes the policies of the covenant state’s law. In this case, the forum has the sufficient nexus to permit it to apply forum law, but arguably might choose not to do so in order to protect, in Restatement language, the respondent’s “justified

⁷⁶ *Supra* n. 62.

⁷⁷ See *supra* at n. 60.

⁷⁸ *Supra* n. 56.

⁷⁹ See *infra* at nn. 86-87.

⁸⁰ If the respondent is still domiciled in the covenant state, the *lex-fori* approach of current law would result in the application of its law.

expectations.”⁸¹ Concern for the uniform administration and exercise of its divorce jurisdiction, however, may still lead the forum to apply the *lex fori*.

Finally, the non-resident petitioner may seek a contested bilateral divorce against an equally non-resident respondent. In this constellation, both jurisdiction and the applicable law are in issue. Depending on whether domicile is or is not required,⁸² respondent may or may not succeed with a motion to dismiss. If the case goes forward,⁸³ the lack of a genuine nexus to the forum may now indeed preclude the application of forum law.⁸⁴ This may be the chosen (covenant-state) law or the law of another, closely connected state (e.g., that of the last common domicile).

The impairment-of-contract suggestion similarly will not lead to the enforcement of covenant-marriage state’s standards. In Louisiana, the contractual limitation assumed by the parties is seen as an exception to their general inability to affect matrimonial law by contract.⁸⁵ The public policy arguments outlined above also support F-2’s refusal not to recognize such an exception with respect to its own law. Even if, contrary to the development of F-2 law, recognition were generally due to the public acts of F-1, public policy would overcome it. What remains is (at best) a contract that is valid where made, unenforceable in F-2 with respect to counseling requirements and waiting periods, and possibly breached with respect to the “best effort” part: The last might support an action for breach: seeking what relief? Not injunctive relief for the public policy reasons stated, hence only for damages: compensatory damages will be hard to prove and anything else (pain and suffering, punitive damages) would support enforcement and will therefore not be granted.

g. Changing the Applicable Law Through Changing Courts

⁸¹ *Supra* n. 75.

⁸² See *supra* n. 33-36.

⁸³ The exercise of jurisdiction must be challenged by appeal. Lack of jurisdiction cannot be raised collaterally thereafter: the matter has become *res judicata*. *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 60 S.Ct. 44, 84 L.Ed. 85 (1939).

⁸⁴ *Supra* n. 56.

⁸⁵ *Spaht & Symeonides, supra* n. 24, at 1090 n. 22.

Unless the approach to choice of law in divorce were to change substantially, the American forum court will apply local law. If the forum state is not a covenant-marriage state, the only way to have covenant marriage law apply then lies in a change of courts. As mentioned above in subsection (e), a change of courts could occur if the parties have chosen a covenant-state court and the forum honors the choice or if the forum court were to dismiss for lack of an appropriate remedy or for reasons of *forum non conveniens*, whereby the latter two obviously overlap.

The parties may have made an express selection of a forum for future disputes. Covenant marriage legislation concerning the “Declaration of Intent” does not require this and it is not very likely that the parties will augment the standard document. The question must then be whether, from all the circumstances, it should be concluded that they have made an implied forum selection.

In England, the choice of English law may encompass a choice of forum.⁸⁶ This is generally not the case in the United States.⁸⁷ The choice of the forum is separate from that of the applicable law and, while both may occur as a result of implied intent, such intent must appear clearly from the circumstances.⁸⁸ In the present case, there may be argument either way. On the one hand, parties who live in the covenant state and sign a choice-of-law clause in its favor may have assumed that any dispute would be resolved there. On the other hand, it may be stretching this to suppose that parties, who have never addressed the question expressly, intend to bind themselves to return to the covenant state to seek a divorce regardless of where, years after marrying, they may now find

⁸⁶ See Order 11, rule 1(1)(d)(iii) of the Supreme Court of Judicature of England providing for jurisdiction over a nonresident defendant for claims arising out of a contract which was to be “governed by English law.” For an application, see *Egon Oldendruff v. Liberia Corporations*, [1996] Lloyd’s Rep. 380 (QB Div., Commercial Court, 1995).

⁸⁷ Cf. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 482, 105 S.Ct. 2174, 2187, 85 L.Ed.2d 528 (1985): “Although [a choice-of-law] provision standing alone would be insufficient to confer jurisdiction, we believe that, when combined with the 20-year interdependent relationship Rudzewicz established with Burger King’s Miami headquarters, it reinforced his deliberate affiliation with the forum State and the reasonable foreseeability of possible litigation there.”

⁸⁸ Cf. R. Weintraub, *Commentary on the Conflict of Laws* 445, at n. 22 (4th ed. 2001). In the European Community, a forum selection must be “in writing or evidenced in writing,” or be “in a form that accords with the practices of the parties,” or accords with international usage. Council Regulation (EC) No. 44/2001, [2001] Official Journal L 12/1, Art. 23. Additionally, jurisdiction lies in the courts of the stipulated performance of the contract. Art. 5. The legislation on jurisdiction in matrimonial matters, *supra* n. 61 and *infra* n. 89, does not provide on a forum selection by the parties at all.

themselves. Additionally, the choice-of-law clause extends not only to questions relating to dissolution but also to the obligation to make all efforts to preserve the marriage. The latter is plainly compatible with jurisdiction elsewhere.

But none of this probably matters. The second forum, it was seen, exercises divorce jurisdiction and applies its own law because of the close nexus the petitioner has to it (usually domicile). Concern for the local petitioner will not be undone by sending him or her to a forum where he or she no longer wants to be. Hence, even if the parties initially made an implied choice of the covenant state as the future forum, that choice will unlikely force the petitioner, who, admittedly, breaches that undertaking, to sue there.

III. International Recognition of Covenant-Marriage Standards

Previous discussion assumed that the spouses, after contracting a covenant marriage, later find themselves in one or two other states and one of them there seeks the dissolution of the marriage. The conclusion reached was that such a state would apply its own law and, if different, not honor the restrictions of the covenant-marriage state. What if the issue arises abroad? The following addresses the question from the limited perspective of some Western European legal systems.

A. Jurisdiction

In the European Union, except Denmark, divorce jurisdiction is governed by European Community Regulation No. 1347/2000.⁸⁹ According to Art. 2(1)(a), a court has jurisdiction when both spouses are habitually resident in the state, had their last common habitual residence in the state and one of them still does, or if the respondent is habitually

⁸⁹ See Art.1(1)(a) Council Regulation (EC) No. 1347/2000 on Jurisdiction and Recognition of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses, [2000] Official Journal L 160/19. Legislative competence in this area was conferred upon the Community by the Treaty on European Union and the Treaty establishing the European Community (“Maastricht Treaty”) of 1999. Arts. 2 and 3 of the Protocol to the Treaty authorize Denmark, Ireland, and the United Kingdom not to participate in such new measures. With respect to Regulation 1347/2000, Denmark invoked the reservation and chose to opt out. It is therefore not bound by it nor subject to its application. Preamble point (25) and Art.1(3) Council Regulation (EC) No. 1347/2000.

resident there. In these circumstances, both parties or at least the respondent have a nexus to the forum. What if the application is *ex parte* and the respondent does not have such a nexus. In these cases, jurisdiction may be based on petitioner's "habitual residence" which, for these purposes,⁹⁰ is defined as twelve-months' residence before filing or six-months' residence when the applicant is also a national of the state.⁹¹ These rules thus require a nexus (habitual residence of one or both spouses) to the forum: since the court will examine its jurisdiction *ex officio*, jurisdiction cannot be conferred consensually by mere appearance of the spouses. In this respect, the rules are stricter than in the United States. Indeed, the durational residence requirement in the case of the *ex parte* divorce (especially if sought by a non-national) may be stricter than the American domicile standard. In one other respect, however, the rules are potentially troublesome: if no court in the European Union has jurisdiction under these rules, national law determines jurisdiction and, if it provides for jurisdiction over a non-resident, non-national respondent, any national of a member state, habitually resident in that or another member state, may avail himself or herself of that jurisdictional basis.⁹²

B. Applicable Law

1. General Rule: Home Law

Unlike American law, European legal systems do not only look for a nexus to the parties for the assertion of jurisdiction but also seek to apply a law that has a nexus to the

⁹⁰ The statutory definition is part of this jurisdictional rule and does not, by its terms, apply to the term as used in the three situations previously given. It is unlikely, however, that divergent definitions of national law would apply.

⁹¹ In the case of Ireland and the United Kingdom, nationality is replaced by "domicile", as defined by Irish and English law, respectively. Art. 2(2).

⁹² Art. 8. The provision calls this "Residual jurisdiction." Its second paragraph – generalizing local bases of jurisdiction – in favor of all Community residents and against the outside world – parallels Art. 4(2) of Council Regulation (EC) No. 44/2001, [2001] Official Journal L 12/1, which replaced the Brussels Convention on Jurisdiction and Recognition of Judgments in Civil and Commercial Matters. Art. 4(2) has been criticized as asserting "exorbitant jurisdiction." See Nadelmann, Jurisdictionally Improper Fora, in: XXth Century Comparative and Conflicts Law, Legal Essays in Honor of Hessel E. Yntema 321 (1961); Nadelmann, Jurisdictionally Improper Fora in Treaties on Recognition of Judgments: The Common Market Draft, 67 Colum. L. Rev. 995 (1967). The same may be said for Art. 8(2).

marriage.⁹³ In traditional European conflicts law, it is the law of the parties' common nationality, at the time the divorce application is made, that applies,⁹⁴ even if one of them is now habitually resident in the forum state. Since there is no national "American" law of divorce, the reference must be particularized further. A U.S. citizen is also a citizen of the state in which he or she "resides."⁹⁵ the applicable law is the law of the common state "citizenship." This may be the state where the covenant marriage was contracted – and its standards therefore applicable – or a U.S. state to which the parties had moved subsequently: in the latter case, the new state's law would apply, quite possibly not incorporating covenant-state standards. If only one spouse had moved, covenant-state standards might still apply as the law of the spouses last *common* citizenship, as provided by most of the laws.

Once *both* parties have acquired a common habitual residence in the European forum state, European systems differ. Some – for instance, the Austrian, German, and Italian – still apply home law, whatever that may be in the case of Americans as just discussed, if one of the parties is still subject to it.⁹⁶ In contrast, French and Swiss law limit the application of home law to the cases stated: hence, if both parties are now habitually in the forum, the *lex fori* applies.⁹⁷ Systems other than the French and Swiss will also ultimately reach forum law, for instance, when there is neither a present common

⁹³ See the suggestion, for American law, that the court should adopt the "most significant relationship"-methodology for the choice of the applicable law in divorce, *supra* n. 65 *et seq.* As discussed, this is not current American law.

⁹⁴ See, e.g., for Austria: § 20, in combination with § 18 Austrian IPRG; France: Art. 310 Code civil; Germany: Art. 17 in combination with Art. 14 German EGBGB; Italy: Art. 31 (1), Law No. 218 of May 31, 1995, revising Italian Private International Law; Spain: Art. 107, Law No. 18/1990 of Dec. 17, 1990, amending the Civil Code on matters concerning nationality; Switzerland: Art. 61, 2nd para., Swiss IPRG.

⁹⁵ U.S. Const. Amend. XIV, Sec. 1. Residence, in this context, may be akin to "habitual residence" in European understanding. Thus, the use of "domicile" in European Community legislation on jurisdiction and judgment recognition (*supra* nn. 88, 92) presented difficulty in relation to England, given that concept's stricter meaning in English law. Section 41 of the English Jurisdiction and Judgments Act therefore now provides, for purposes of Community law, that a person is domiciled in England if he or she resides there and "the nature of [the] residence indicate ... a substantial connection with the United Kingdom." European Community matrimonial legislation (*supra* nn. 62, 89) now employs the term "habitual residence."

⁹⁶ What is the state citizenship, *supra* at 95, of an American who has moved abroad? His or her *last* state "citizenship." Austrian law provides for a reference to a more significantly related third-country law (Art. 18(2), 2nd sentence, Austrian IPRG) when a marriage, celebrated among foreigners, was intended to have its main effects in Austria.

⁹⁷ France: Art. 310, Code civil; Switzerland: Art., 61, para. 1 in combination with para. 2, Swiss IPRG.

connection to the law of common nationality or habitual residence or least maintenance of such by one of the parties.⁹⁸

Covenant-state standards thus may find application in European dissolution proceedings, but this regularly only so long as the nexus to the covenant state continues for both, or at least for one of the parties.

2. Exception: Forum Law as the Result of “Hidden Renvoi”

Renvoi describes the practice of considering the applicable foreign law’s conflicts rules and, if these should refer back to the forum or onward to a third legal system, to follow that reference. Example: the forum (A), where administration of an estate is pending, refers to the law of the decedent’s nationality at death (B), the latter to his or her domicile at death (C). Of course, it is also possible that B or C in the example refer back to A. The question for A is whether to follow B’s reference to C, or, as in the second example, back to itself. American courts generally do not engage in *renvoi* and would apply B substantive law in the example.⁹⁹ Many European courts would consider B’s conflicts rule and apply C law.¹⁰⁰

⁹⁸ See, e.g., for Germany, Art. 14 German EGBGB; P. Hay, *Internationales Privatrecht* no. 188, 189, 195 (2nd ed. 2002). See also, for Switzerland, A. Heini, M. Keller, K. Siehr, F. Vischer, P. Voelken et al., *Kommentar zum Bundesgesetz über das internationale Privatrecht (IPRG)*, Anno. 7 to Art. 61 (1993).

⁹⁹ See generally, E. Scoles, P. Hay, P. Borchers, S. Symeonides, *Conflict of Laws* §§ 3.13-3.14 (3rd ed. 2000). As the next sentence in the text shows, in European practice A, B and C reach the same result, while in American practice A’s approach does not bring about such uniformity. Occasional American decisions now engage in *renvoi*, but without calling it such: they see in B’s conflicts rule an expression of disinterest to have B law applied which, if that rule refers back to A, then permits the application of forum law. See, e.g., *American Motorists Ins. Co. v. ARTRA Group, Inc.*, 338 Md. 560, 659 A.2d 1295 (1995).

¹⁰⁰ The European trend is to limit *renvoi*: the Rome Convention on the Law Applicable to Contractual Obligations, [1998] Official Journal C 27/34, in force in the European Union, excludes it for contract (Art. 15) and a pending proposal of a European Community regulation the law applicable to non-contractual obligations would exclude it for tort. National law, however, continues to be the applicable substantive law in matrimonial and decedents’ estates matters, i.e. for divorce. Some new conflicts codifications, for instance in Eastern Europe, now generally exclude *renvoi*, except when the applicable foreign law refers back to the forum in matters of status. See, e.g., Russian Federation, *Civil Code (Part VI, Private International Law)* Art. 1190, *Sobranie zakonodatel’sstva Rossijskoj Federacii* 201, No. 49, Pos. 4552, German translation in 67 *RebelsZ* 341, 342 (2003) with commentary by Oleg Sadikov, id. 318, at 328; Azerbaijan: Art. 3, *Law on Private International Law* of June 6, 2000, German translation [2003] *IPRax* 386.

In circumstances when a European court would look to the American home law of the parties to a divorce proceeding before it, as discussed in subsection (1), it might consult the American state's conflicts rules for the law applicable to divorce. It would find none: the *lex fori* applies whenever the American court has jurisdiction.¹⁰¹ To put it differently, the conflicts rule is contained in the jurisdictional rule: whoever has jurisdiction applies local law; if a European court has jurisdiction, American courts would assume that the European court would apply its own law. It is a case, not of an express, but of a "hidden renvoi" (hidden in the jurisdictional rule).¹⁰²

"Hidden" renvoi is accepted doctrine in Austria, Germany, and Switzerland.¹⁰³ A reference to American home law (e.g., of a covenant state) would result in the application of the *lex fori*. In countries that do not use "hidden" renvoi, covenant state law or the law of a successor "home" state would apply.

The inquiry shows that the European court might apply one of three different laws: the covenant state's, that of a subsequent home state (another covenant state's, a non-covenant state's, its own), or its own as a result of "hidden" renvoi. As a practical matter, it may make little difference at present whether European or covenant state substantive law is applied: both require a nexus to the forum for jurisdiction for *ex parte* divorce, both provide for fault-based divorce, and – for no-fault divorce – often provide for waiting periods of similar length.¹⁰⁴ Application of European law, however, would disregard any impediments that might flow from the parties' "Declaration of Intent." Differences may be more significant when a European home-law reference is to the law of an American non-covenant state with lesser requirements for divorce or when potentially applicable European law becomes more liberal in future, as part of the overall

¹⁰¹ *Supra* n. 44.

¹⁰² See P. Hay, Die Anwendung US-amerikanischer jurisdiction-Regeln als Verweisungsnorm bei Scheidung von in Deutschland wohnhaften Amerikanern, 1988 IPRax 265.

¹⁰³ Austria: Decision of the OGH [Supreme Court] of Nov. 8, 2001, 57 Österreichische Juristenzeitung 265 (2002); Decision of the OGH of May 14, 1992, [1993] Zeitschrift für Rechtsvergleichung 164, with annotation by H. Hoyer at 165; F. Schwind, Internationales Privatrecht no. 111 (1998). Germany: G. Kegel & K. Schurig, Internationales Privatrecht 356-59 (8th ed. 2000); Ch. von Bar & P. Mankowski, Internationales Privatrecht, Vol. I, at 687, n. 898 (2003).

¹⁰⁴ *Supra* nn. 15, 32.

rethinking, in Europe, of the law relating to marriage, other forms of partnership, and their respective dissolution.

IV. Other Issues

A. The Contract to Use Best Efforts

In the “Declaration of Intent” the parties undertake to use best efforts to uphold the marriage, an undertaking said to be meant as an actionable contractual obligation.¹⁰⁵ Will this undertaking be an impediment to dissolution, in the sense of calling for dismissal of an application for failure first to have explored all avenues for maintaining the marriage?

In the covenant state itself, there may be argument for an affirmative answer, perhaps not so much as a matter of contract law but as a definition of the subject matter jurisdiction of that state’s courts.¹⁰⁶ In other courts – in non-covenant states or abroad –, the answer must be found in contract law, since the covenant state cannot circumscribe their jurisdiction.

In American non-covenant courts, dismissal would specifically enforce the contractual obligation. But specific performance is not a remedy for this kind of highly personal obligation. The drafters of the legislation themselves see damages as the remedy for breach,¹⁰⁷ even though they do not explain how such damages would be quantified. In the United States, perhaps more importantly, it is difficult to see how a state could deny access to divorce jurisdiction to one group of residents and not to others on the basis of the fact that the marriage was contracted out of state and there subject to impediments to its dissolution.

¹⁰⁵ *Supra* n. 31.

¹⁰⁶ For a parallel, see the first New York *get* statute which withheld the granting of a civil divorce until impediments to remarriage (including “religious restraints,” such as the issuance of a *get*) had been removed. New York, Domestic Relations Law § 253 (McKinney 1986). For discussion, see Michael Broyde, *Marriage, Divorce and the Abandoned Wife in Jewish Law* (2001), particularly at 35 *et seq.* See also Michael Broyde, *Later Jewish Tradition*, in: John Witte, Jr. and Michael Broyde (eds.), *Covenant Marriage in Comparative Perspective* ____ (2004).

¹⁰⁷ Spaht, *supra* at n. 29 at 103 *et seq.*

Foreign legal systems that apply home law will make exceptions when home law precludes dissolution. Mere difficulty, however, is not enough: “there is no basic civil right to divorce.”¹⁰⁸ Moreover, European contract law, contrary to the common law, does not regard the remedy of specific performance as extraordinary. Nonetheless, the action would not be dismissed: to do so would unacceptably allow foreign law to define local subject matter jurisdiction or treat the contract as an implied choice-of-court clause, a reading rejected earlier.¹⁰⁹ Again the remedy will be damages. Their award raises its own conflict-of-laws questions and problems; they will not be pursued further here.

B. Consequences of Dissolution

The dissolution of a marriage raises questions regarding its consequences for other aspects of the relations of the parties, particularly: marital property, child custody, and support. To the extent that these require judicial resolution, this will ordinarily occur at the time of dissolution in a bilateral divorce. Subsequent changes (in child custody and support) as well as the initial determination in an *ex parte* divorce raise separate questions of jurisdiction and applicable law.¹¹⁰ Covenant-marriage legislation does not purport to cover, and the parties’ “Declaration of Intent” does not address, the incidents of marriage and the consequences of dissolution. Existing law remains unaffected.

V. Conclusion

In the United States, the *lex celebrationis* ordinarily¹¹¹ governs the validity of the marriage, the *lex fori* governs divorce. As to divorce, judicial jurisdiction and applicable law converge. In a covenant state, an out-of-state covenant-state marriage will be judged by covenant-state standards but not because the forum adopts the out-of-state standards,

¹⁰⁸ See Staudinger/v.Bar/Mankowski, Kommentar zum EGBGB, Art. 17, no. 106 (13th ed. 1996), with references to German case law.

¹⁰⁹ *Supra*, text following n. 88.

¹¹⁰ For discussion in the American (mainly) interstate setting, see E. Scoles, P. Hay, P. Borchers, S. Symeonides, *supra* n. 3, at § 15.27 *et seq.*

¹¹¹ The statutory exception (Marriage Evasion Laws) is inapplicable here. It provides for non-recognition, by the forum, of a marriage contracted elsewhere by forum domiciliaries in evasion of forum restrictions (e.g., minimum age). The legislation is in force in only a few states. See E. Scoles, P. Hay, P. Borchers, S. Symeonides, *supra* n. 3, at § 15.16.

but because these standards are now also local law. Covenant-marriage standards then become applicable much in the same way that a “uniform” law applies as local law – not as a function of the law of conflict of laws.

If a covenant marriage is sought to be dissolved in a non-covenant state, the stringency or permissiveness of the latter’s substantive law will determine the prerequisites for divorce. The same is generally true abroad. While, in contrast to the United States, many foreign legal systems do apply home law as a matter of conflicts law (and would thus respect covenant-state restrictions when American sister states would not!), this reference to home law is quite limited. “Hidden renvoi,” where it is accepted doctrine, leads to forum law. In other countries, forum law takes over the looser ties to home law because or as a nexus to the forum (such as habitual residence of the parties) in fact now makes the latter the home.

Covenant-marriage legislation seeks to counteract permissiveness and to redefine the bonds of marriage in more traditional terms. Opposite trends in Europe and elsewhere seek to redefine the legal nature of relationships and to revisit the preconditions for the dissolution of traditional marriages. The Netherlands has a single form of marriage for heterosexual and same-sex unions by legislation. Ontario made same-sex marriage possible by judicial decision.¹¹² A great many European countries provide for registered partnerships (as do Vermont and, more recently, California with their institution of “civil unions”) for same-sex couples that, except for the name, provide the same rights and duties as the traditional marriage.

The divide between these trends – nationally and internationally – and covenant-marriage legislation is growing. Despite a traditional home-law orientation in the conflicts law of many civil law countries, a nexus to the forum will lead to forum law. The contract aspect of the “Declaration of Intent” does not change this conclusion: party choice does not change forum policy. If this means no enforcement through dismissal, a damage remedy

¹¹² *Supra* n. 11. The Ontario decision resulted in a surge of application for marriage licenses by same-sex couples – 590 between June 10 and August 25, 2003. N.Y. Times, August 31, 2003, 1, at 6.

for breach will also not be awarded at a level to function as the indirect equivalent to enforcement. Little then remains.

The legal efficacy of covenant marriages is basically restricted to the state in which they are contracted when the issue arises there. Parallel effects in other states will be the result of parallel legislation, in analogy, as stated, to uniform laws.