

Findings



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Covenant Marriage

Divorce Reform Louisiana-Style

By Stephanie Mansur, J.D.



One year ago, a new law took effect in the state of Louisiana which changed the standard “I do” in a marriage vow to a choice of “I do” or “I really, really do.”

Louisiana became the first state to approve a new and more binding matrimonial contract aimed at lowering the divorce rate. Louisiana couples opting for a “Covenant Marriage” legally agree to get premarital counseling, predivorce counseling, and accept a two- year period before obtaining a no-fault divorce.¹

Louisiana’s marriage covenant law is the first legislative success in a nationwide movement to strengthen marriage and repopularize the idea of commitment. The concept is not new. At least 22 states have tried to pass similar laws during the past few years.² Arizona recently became the second state to pass its own version of a Covenant Marriage law. Do these new laws represent the start of a new divorce reform movement? How did Louisiana succeed where other efforts to reform no-fault divorce have stalled? Is Louisiana’s new “choice of marriage” the possible antidote to America’s marriage problems or will it usher in more problems than it will actually solve.

Since its passage, the Covenant Marriage Act has raised considerable debate over its effectiveness – and its constitutionality. This paper will take a closer look at Louisiana’s new marriage law, its goals, its strengths and its weaknesses to determine what role it might have on much-needed divorce reform in our country today.

Louisiana Covenant Marriage Act

The Covenant Marriage Act has been praised by many as a bold challenge to the

epidemic of divorce, and an expression of our country’s values. The law’s chief author, Louisiana State Representative Tony Perkins, said “the law is not about making divorce more difficult; but making marriage more successful.”³ Under Louisiana’s new law, an engaged couple who chooses to enter into a Covenant Marriage agrees to the following:

- A marriage is an agreement to live together as husband and wife forever;
- The parties have chosen each other carefully and disclosed to each other “everything which could adversely affect” the decision to marry;
- The parties have received premarital counseling;
- A commitment that if the parties experience marital difficulties they commit to take all reasonable efforts to preserve their marriage, including marital counseling; and
- The couple must sign, together with an attestation by the counselor, an affidavit that they have fulfilled the counseling requirements.

Divorce Requirements for Louisiana’s Covenant Marriage

A marriage that is not a Covenant Marriage may be ended by divorce more easily than a Covenant Marriage. Under current Louisiana law, a divorce can be obtained after a couple has lived apart for six months, or immediately if one spouse is guilty of adultery or has been sentenced to prison or death for a felony. The Covenant Marriage would grant a divorce only after the couple has lived apart for at least two years, or with proof that one spouse has committed adultery, been sentenced to prison for a felony, abandoned the matrimonial home for at least one year, or physically or sexually abused the other spouse or a child. A divorce in a Covenant Marriage could also be granted if the couple has been

legally separated for at least 12 months, or for 18 months if the marriage has produced a minor child.

Covenant Marriage for Presently Married Couples

Couples who are already married may execute a declaration of intent to designate their marriage a Covenant Marriage. After receiving counseling, the couples must sign a recitation and an affidavit similar to those signed by betrothed couples. If the couple was married outside of Louisiana, a copy of their marriage certificate, with the declaration of intent, shall be filed with the officer who issues marriage licenses in the parish of the couples domicile.⁴

“We have become a culture of divorce, and we have lost our understanding of what commitment is. What we have to do is break the cycle of divorce.”

A Step to Strengthen Marriage

Advocates of the Covenant Marriage Act say that mandating premarital education and counseling is long overdue. Too many couples rush into marriage, they claim, and fail to assess the strength of their commitment or to discuss key relationship issues that lie ahead, such as children, finances, and gender roles. “If engaged couples find they disagree on these big points, the relationship may end and a weak marriage might be prevented,” notes Representative Perkins.⁵

Judge Luke Lavergne of Baton Rouge agrees that the premarital counseling requirement is a good one. He states that when most young couples get married they are not considering what it will be like 10 or

15 years down the road. “I don’t think the young folks today have that kind of commitment inculcated into them. This measure, however, may speed the maturation process along. Simply discussing the covenant-marriage option will force couples to consider more seriously the vows they are about to take as well as their compatibility.”⁶ Judge LaVergne says he plans to take his wife of 37 years to get a covenant marriage just to underscore his commitment.

Like Perkins and LaVergne, public officials supporting the law insist that they are not overstepping their boundaries. “Sometimes the government has to lead,” says Tom Hoppe, a Missouri state legislator backing one of the approximately 10 pre-marital-counseling bills under discussion in the United States. “You’re required to demonstrate certain skills before getting a driver’s license. What’s wrong with having some requirements for marriage?”⁷

How Louisiana Succeeded in Reforming “No-Fault” Divorce

Louisiana’s action is emblematic of an increasing nationwide revolt over no-fault divorce and “revolving-door marriages.”⁸ During the last several years nearly two dozen states have attempted to rewrite or repeal their no-fault divorce laws, which they say have helped lead to escalating divorce rates and the disintegration of families. The divorce rate jumped by 34 percent between 1970 and 1990, the period when no-fault divorce became the norm in every state. Nearly half of all marriages now end in divorce, compared with about a third in 1970.⁹

Recent surveys reveal that 50 percent of Americans thought that it should be harder than it is now for married couples to get a divorce, a significant increase from a decade ago. That figure rose for couples with young children – 61 percent thought it should be tougher. When asked whether “the government” should make it more difficult, however, 59 percent said no. Society, it seems, wants greater marital fidelity – but not at the expense of forced reductions in personal freedom. This ambivalence helps explain why various movements to roll back America’s no-fault divorce laws have hit roadblocks.

Louisiana’s new law, rather than mandating a single standard on all couples, gives them a choice between the existing no-fault system and Covenant Marriage, which reinstates fault-based divorce. Louisiana’s law sidesteps the issue of trying

to repeal no-fault divorce laws. Representative Perkins, when asked how Louisiana succeeded in moving toward no-fault divorce, responded, “Part of the answer is choice, of course.”

However, another main reason Louisiana reformers succeeded was because “they managed to switch the conversation from our dislike of no-fault divorce to our desire for enduring marriage.” Covenant marriage focuses on a new set of questions: What do we mean by marriage? How can the law support our vows, ultimately helping us to achieve our goal of a happy family and enduring love?¹⁰

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“This is about choice,” says law professor Katherine Spaht of Louisiana State University, who helped draft the new law. “For over a generation people have not been able to marry for life. Now they have the option of a more permanent covenant. They can still get married under the no-fault divorce law. But if they want to marry for life, now they can.”¹¹ Louisiana’s new law attempts to provide a “legal harbor for a choice” that many couples actually want to make. One of the problems with protecting a law that allows people to make and break all important personal commitments is that it actually eliminates a right that many people want – the right to make a permanent commitment that the law will respect.¹² Maggie Gallagher, author of the book *The Abolition of Marriage* says, “A covenant marriage gives couples the choice in making strong, public, legal commitment. Right now, you have the situation where the law gives all the power to the spouse who wants out of the marriage and won’t even listen to the spouse who believes the marriage is worth fighting for,” she said.¹³

Concerns of Pro-Family Advocates

The Marriage Covenant Act has been met with resounding cheers from divorce reform advocates as an “historic development” and the first step in “rolling back the no-fault revolution.”¹⁴ However, even among the ranks of the pro-family conservatives, major concerns about the law have been raised.¹⁵

Some divorce-reform advocates worry that Louisiana’s “choice of marriage” would

redefine and open the door to the idea of further redefining by an act of the will.¹⁶ Although the purpose of “choice” in Louisiana’s new law is to encourage the return of commitment to marriage, it may also give non-traditionalists a basis to argue for a dozen other choice-based innovations in family law. David M. Wagner, former director of legal policy at the Family Research Council, and currently senior writer at *Insight* magazine, says, “Because marriage in Louisiana now has two tiers, there is no reason why more tiers may not be added – if not in Louisiana then perhaps elsewhere.”¹⁷ He argues, “A law that allows both ‘standard marriage’ and ‘covenant marriage,’ with no grounds in principle for selecting one type over the other, may in turn have no grounds in principle for disallowing the creation of ‘trial marriage,’ ‘plural marriage,’ or same-sex marriage.”¹⁸

Wagner offers another possible criticism of the multitiered approach. “It undervalues the public aspect of the marital declaration. Traditionally, a marrying couple said in effect to the community: We want to enter into what you recognize as marriage. Allowing couples to choose their own marital law regime moves toward a state in which they will say: We want to enter into only what *we* call marriage.”¹⁹

Other reformers say that it is a bit early to charge that Louisiana’s two-tier system will privatize marriage. They contend that even though more legal options do increase private discretion, as long as the list of options is relatively short – and more importantly, as long as all the options have a legal definition in the codebook – true privatization would not occur. “theoretically, as long as the marital options have been defined in the public law, marital laws have not been privatized. More tiers could theoretically be added, but the introduction of each new one would raise particular issues that would then be debated on merit.”²⁰

David Wagner says that we must keep in mind that the proponents of “same-sex marriage” did not get their concept from the Louisiana Covenant Marriage movement. “To the extent that covenant marriage advocates rested their case on pure choice, arguing that their bill merely facilitates the choices of some Louisianans, they may have to face later on the argument that other Louisianans want to make other choices. They are however, free to reply that not all choices are equal. Not all human choices are good just because they are choices. That’s why we have criminal laws.”²¹

Although counseling tops the list of

most divorce reform advocates, The Marriage Covenant Law makes some a bit uncomfortable. Louisiana's new law allows any counseling that "emphasizes the nature and purposes of marriage and the responsibility thereof" for purposes of premarital separation.²² This open approach could allow counseling quite contrary to the state's goal of protecting marriage to be received in fulfillment of the legal requirement. Pro-reform legislators in Louisiana have expressed concern about this and have discussed making the counseling sections of the new law more strict.

David Wagner agrees that the law does not spell out what kind of counseling is legally adequate, but worries about tightening the law. He warns, "The state could be so narrow in its definitions and directive in its approach that it would encroach on the professional freedom of counselors, and also on constitutionally protected religious freedom in case of clergy and religiously-based counselors."²³

Opposition to Covenant Marriage

The Louisiana law passed the State House 98-0, and the Senate 37-1. The ACLU (American Civil Liberties Union) being the only opposition, voiced five major objections to the bill; and since its' passage most opponents of the law echo these same criticisms. The ACLU argued that Marriage Covenant: breaches the wall of separation of church and state; is not in the best interest of women and children; require longer waiting periods for spouses with children; forces couples to make a choice; and creates an additional burden of expense – especially for women.²⁴

Joe Cook, executive director of the ACLU's Louisiana chapter, states that the Marriage Covenant Law "caters to the religious right-wing agenda of doing damage to the Constitution and to women and children trapped in abusive and neglectful family situations." He claims that the original bill proposed by Perkins included only adultery and abandonment as grounds for divorce – grounds that are biblical in origin. He says, "The motivation for this bill came from the people who are adherents of fundamentalist Christian doctrines. This means that they were attempting to have the state enforce their particular religious doctrines. That violates the First Amendment and comparable provisions of the state constitution's ban on establishment on religion. It breached the wall of separation between church and state."²⁵

Civil libertarians also argue that while

divorce is often too easy, it is often times the right answer. They contend that "not all marriages deserve to be saved and that divorce has redeemed more human spirits than it has doomed."²⁶ A Covenant Marriage, the ACLU claims, will hurt women and children who get trapped in abusive and/or neglectful situations that harm them more than does the trauma of divorce. In cases where only one spouse is ready to divorce, that spouse must prove his or her partner guilty of any of several terrible things: abuse, infidelity, alcoholism, drug addiction. One person's disinterest or loneliness would become insufficient to justify divorce.

A third argument against the law is that there is a longer waiting period of 18 months after a legal separation for spouses with children as opposed to 12 months for those without. The ACLU contends that if grounds for divorce exist, courts should grant it for both classes within the same time frame.²⁷ Some critics of the Louisiana law argue that slowing down divorce is poor public policy because children are better off when feuding couples break up; they are no longer subject to incessant conflict or hostile silence.

A fourth point raised against the law imposes new constraints on marrying couples because they are compelled to make a choice between the old no-fault and the new covenant marriage. Randy Fueret of the Louisiana State Bar Association states that "some people have described the difference between covenant marriage and regular marriage as 'high octane' and 'low octane,' with high-octane marriage being a way of proving love for one another and God."²⁸ Forcing couples to make this decision could be as sensitive as asking for a prenuptial agreement.

The opposition's final objection to Covenant Marriage is "an additional burden of expense for both parties and its negative impact on miring our already crowded courts in lengthy, messy, and acrimonious divorces."²⁹ They argue the expense element will impact women most, especially those who do not work outside the home. They claim that women usually have less control over family finances and make less money, on average, than men.³⁰

Responses to Marriage Covenant Criticism

Representative Perkins states that the Marriage Covenant "certainly does not enforce religions doctrine" nor does it force or coerce Louisiana's couples into a particular marriage vow. "This deals with

the civil contract aspect of marriage."³¹ Perkins also points out that the law does not limit divorce on just so-called "biblical grounds" of adultery and abandonment; but also includes physical or sexual abuse and commission of a felony. "Domestic violence for the first time is being recognized in Louisiana law as serious of a breach as adultery."³²

Supporter of the law, Amitai Etzioni of the *New York Times*, defends Perkins' statement with his article, "Marriage With No Easy Outs." He concludes, "Most people would agree that allowing individuals to make choices is the exact opposite of coercion or force. The Louisiana legislation provides a model of how a state can foster what it considers a virtue – in this case, stronger marriages – by giving people the opportunity to be virtuous, not penalizing them if they choose not to."³³ Louisiana couples that are in a hurry to marry or for any other reason opt to bypass counseling will not have to elope to another state; they will still be able to marry the old fashioned, no-fault way. It's not coercion; it's freedom to choose.

“Simply discussing the covenant-marriage option will force couples to consider more seriously the vows they are about to take as well as their compatibility.”

Perkins insist that the law does not trap women and children but "provides every avenue of escape and puts the person who's been offended in the 'driver's seat.' They're the ones that will be able to make the decision, not the person who is the abuser but the one who is abused. And certainly if a woman has enough evidence to get a restraining order currently to protect herself, she certainly has enough evidence to get a legal separation or divorce under this law."³⁴

An interesting and surprising rebuttal to the ACLU's objection of the extended waiting period when children are involved comes from Louisiana-born Democrat commentator, James Carville. He states that "any honest bill that makes couples with children think longer and harder about getting a divorce will have my eager support. It used to be downright fashionable to say that kids could do just fine with one parent. Not anymore. The weight of evidence – from scholars associated with both the left and the right – is overwhelming."³⁵

A 1997 study conducted by the UCLA Psychology Department found that only 30 percent of to-be-divorced families were high in conflict; the remaining 70 percent were low in conflict and were judged by the study “to be acceptably conducive to normal child development.”³⁶ If this were true, then it stands to reason that in a majority of cases, children would benefit more from an intact family than divorce.

Carville concluded that if he had written the Covenant Marriage bill it would have been more dramatic. “I say, forget voluntary. I think every marriage ought to become a covenant marriage the moment the couple has any kids. That’s the point when the state begins to have a compelling interest in making it difficult for a couple to simply call it quits. That’s when a state could make a real social difference.”³⁷

The ACLU’s contention that Louisiana’s new law will create an additional burden of expense, especially on women, is weak. Since the implementation of no-fault divorce in the 1970’s, its’ proponents have been defending accusations that no-fault divorces have proved economically disastrous for the women and children they were designed to benefit.

Lenore Weitzman’s study on no-fault’s impact on women shows that men’s standards of living rose 42 percent one year after divorce, while women’s fell by 73 percent. She argues that “no-fault sought to treat men and women equally but in fact ended up hurting women and, consequently, their children badly.”³⁸ Weitzman argues that no-fault divorce has been harmful to women because it takes away the “bargaining chip” that fault-based divorce often provides to an innocent wife.³⁹

Conclusion

Despite criticisms, many people in Louisiana believe that Covenant Marriage will be a popular choice among couples. They believe this new “choice in marriage” law is a step toward strengthening the family unit. Recently, the congregations representing a variety of denominations showed their support of the law by participating in Covenant Marriage Weekend February 14-15. Nearly 500 couples renewed their vows Covenant-style.⁴⁰

How many betrothed couples choose the

Covenant option; and how many already-married couples will follow the lead of the couples at the Covenant Marriage Weekend and convert to a Covenant Marriage? No one really knows what the results of the Louisiana law will be. David Wagner says that in order for divorce reform to be effective it must pass two tests. It must be enacted, and then, once it is law, it has to “contribute to the fading of the divorce culture and the restoration or creation of a marriage culture.” Louisiana surprised the country by passing the first test, and only time will reveal if the new marriage law will pass the second? If Covenant Marriages turn out to be popular, and demonstrate a substantially lower divorce rate, then the divorce culture itself will lose strength and the way may open for even stronger reforms later on. Even if this does not occur, a lower divorce rate is a commendable goal in itself.⁴¹

William Galston, professor at the University of Maryland’s School of Public Affairs, offers sound wisdom on the subject of Louisiana’s new marriage statute. Galston states that because we cannot predict the effects of the Marriage Covenant Law with confidence, “we should take advantage of the fact that Louisiana is willing to serve a ‘laboratory of democracy.’ Rather than criticizing this experiment prematurely, it makes more sense to watch carefully and learn from its results.”⁴²

As both Louisiana and Arizona monitor “marriage success” with Covenant Marriage, states will have to evaluate different public policies that encourage families to stay together. ¶

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