

Regent University School of Law Festival of Legal Learning
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Family Law Practice:
**Marriage & What Lawyers Can Do
To Serve Clients in Family Preservation through Marital Contracting**

Outline

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Introduction

The general public may think that family law lawyers are often only interested in pursuing divorce and divorce related concerns for their clients. We disagree wholeheartedly, as we know that family law lawyers care deeply about families, and particularly about those they serve. This CLE proves that thesis by focusing on what lawyers can do to help families be stabilized, strengthened, and even possibly restored through marital agreements.

Many attorneys, even many marriage counselors, simply see divorce as the best, if not only, solution to marital breakdown. Sometimes this perspective is realistic, but every once in a while there comes along a client who is opposed to divorce, who has a spouse who is also uncertain that divorce is the answer. They may know that staying together is not appealing, but neither is divorce. And they may also know they have a great deal invested in their marriage. They likely want to continue to invest in their children, and they may also be realists about what

a family break up will do to their children. Lawyers who have an understanding of the economic theories at play in marriage, and have tools ready to serve these clients who want to preserve their family, can make a tremendous difference in being better able to serve their clients with options. Often clients divorce because they and their attorneys believe they should not hold out hope of reconciliation, and that is sound wisdom when appropriate. It might also be helpful, however, if that couple had an attorney to advise them on alternatives. Family preservation or restoration is not the easy path by any means, but it may be the right one for some clients if they can find an attorney who will pursue the legal necessities on their behalf, advising them and guiding them in creating an agreement in which they can claim ownership and live by moving forward. And if that attorney understands the economic principles at play the benefits multiply to clients.

Furthermore, although family courts generally do not apply a family law framework in cases of non-marital cohabitation in most jurisdictions,¹ nonetheless some states have chosen to view cohabitation as a form of quasi-contract rather than a relational status, even if the parties may not have any written or oral agreement to do so, invoking economic partnership theories.² This means that contracting can be a very viable solution for non-marital families as well.

Viewing marriage and families in the context of culture and through the lens of economics can help attorneys gain both skill and understanding in helping families. Marital incentives and disincentives have changed for Americans during the 21st century. This material will explain how these legal changes have impacted marriage and family decisions, as well as marriage and family law, but it also sets out what lawyers can do to be better prepared to serve clients. Marriage and divorce can divide the rich and the poor in new and profound ways creating an income inequality gap, even minimizing or erasing the social desire for marriage as unnecessary. When clients, however, do not want to pursue divorce, but rather wish to seek legal help for their troubled relationships, attorneys need to be equipped and ready to do so.

The primary objective of this CLE is to demonstrate the opportunity for marriage and family contracting in the context of vast social change, and to help increase attorney professional competence and skill in contract drafting to do so. This material is offered against the backdrop of substantial economic principles that are currently at play in marriage decline that will indeed affect marriage and family law practice in even greater ways in the future. Lawyers who wish to understand the interplay between law and economics as that discipline affects the practice of law will gain a sharper focus on judiciousness and foresight in marital contracting. Our goal is to help attorneys understand how they can work to improve the quality of legal services rendered to the public, even in a context of marriage decline, particularly in the form of marital agreements, non-marital agreements, and their integration with issues regarding children, absent the pursuit of divorce.

1 *See, e.g.*, *Floyd v. Floyd*, 436 S.E.2d 457, 459 (Va. Ct. App. 1993) (stating that there is no economic partnership between unmarried cohabitants).

2 *Compare* *Marvin v. Marvin*, 557 P.2d 106, 110, 122–23 (Cal. 1976) (holding that cohabitation yielded a contract in quantum meruit), *with* *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1210–11 (Ill. 1979) (holding that marriage is required for parties to be granted mutually enforceable property rights).

Section I analyzes and explains the current landscape regarding marriage and parenting, examining marriage decline as a socio-legal and economic phenomenon, from an economist's outlook intended for consumption by family law lawyers. Section II then surveys the marital contracting horizon, discussing the numerous types of agreements available for attorneys to utilize in assisting clients in troubled family circumstances who are, however, interested in preserving as much of their family as possible. From marital agreements generally to premarital agreements, to separation agreements, to property settlement agreements, to reconciliation agreements, to restoration agreements, to long distance marriage agreements, to cohabitation agreements and non-marital agreements, this section is designed to equip the family law attorney with myriad options to assist a family desiring to preserve the central relationship of the family. Section III then pulls this information together to help the family law lawyer understand the legal and economic incentives at play in any decision to preserve the family for the best interests of the child, and possibly toward human capital development in the context of parental altruism.

The conclusion simply reinforces that family law attorneys can be healers of human conflict³ with the right tools, which we suggest can largely focus on marital contract lawyering to strengthen families. Contract drafting can be more nuanced than simply dividing assets. It can be a priceless tool in helping clients preserve the most important aspects of their family if their attorney is prepared to offer those alternatives.

I. Introduction: Marriage and Parenting Landscape in 2021

What is happening with marriage decline and what do lawyers need to understand about it? America is experiencing a 40 year trend in steadily declining marriage rates – which has actually been in collapse since 1970. “Even at the height of the Second World War, one of its previous lowest points, the male marriage rate was almost triple what it is today.”⁴ But why should lawyers need to know these facts? Why do lawyers need to understand what's happening with marriage?

Because what happens with marriage affects numerous areas of law – of course family law, what we will discuss here, but also property law, estate distribution, tax law, employment law, public health law, mental health law, tort law, and even criminal law, among others. Marriage phenomena affect marriage certainly, but marriage decline brings a domino effect to society, and to children. “There is no other form of relationship that offers anywhere near the same level of stability in any thriving culture in the whole of human history.”⁵ Furthermore, “marriage rates ... map almost perfectly onto the school achievements of their children.”⁶ While this CLE will not get into all areas of law that are affected by marriage decline, we will focus on aspects of family law that intersect with declining marriage rates, and discuss what lawyers can do to better serve their clients who may want to preserve and stabilize, rather than terminate, their marriage. This section is designed to help family law lawyers understand the economic theory behind what is culturally and legally happening with marriage.

³ Webster's Dictionary, 6th ed., alternative definition of “lawyer.”

⁴ Edward Davies, *Forget race or class, marriage is the big social divide*, THE SPECTATOR, Jun. 23, 2021.

⁵ *Id.* at 2.

⁶ *Id.* at 3 (referring to Census results and comparisons).

Virginia has generally recognized marriage as an economic partnership (see *Aster v. Gross* (Va. App. 1988)). Despite that solid fact, marital incentives and disincentives have changed over the past 40 years, which now are particularly affecting millennials, impacting their economic and family decisions, while also creating a ripple effect in society.⁷ This phenomenon has worked to divide the rich and the poor in new and profound ways, which has come to be known as the marriage income inequality gap.⁸ Prerogative on the high end of the income inequality gap has decreased the incentives of marriage for any other function than personal happiness,⁹ which has in turn decreased the number of couples committing to the permanency of marriage despite their age and available resources.¹⁰ On the lower end of the income inequality gap, childbearing outside of marriage is common,¹¹ and since transactional aspects of marriage have changed dramatically over the generations,¹² greater inequality has been created between women and men,¹³ and the rich and the poor.¹⁴ Evolving social trends have produced highly educated and wealthy women who are marrying and having children much later in life,¹⁵ while concurrently minimizing marriageable men at the lower end of the income inequality gap because of chronic unemployment, a lack of education, incarceration, and substance abuse.¹⁶ This leaves a larger group of women at the high end of the socioeconomic spectrum with a smaller group of comparable men across the board.¹⁷ Predictably, the effects of these associations are impacting the future of family stability in current and future generations.¹⁸

7 See John Fleming, *Gallup Analysis: Millennials, Marriage and Family*, GALLUP (May 19, 2016), <https://news.gallup.com/poll/191462/gallup-analysis-millennials-marriage-family.aspx>.

8 See JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* 1–5 (2014).

9 We do not proffer that anyone should marry without happiness; rather, we illustrate that marriage is important to individuals, families, children, and society in more ways than simply to achieve individual personal happiness.

10 See, e.g., *Marriage Is Declining Rapidly: Does It Matter?*, GOOD MEN PROJECT (Apr. 14, 2017), <https://goodmenproject.com/featured-content/marriage-is-declining-rapidly-does-it-matter-ajrt/>.

11 See KATHRYN EDIN & MARIA KEFALAS, *PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE* 2 (2005); see also Victor Tan Chen, *America, Home of the Transactional Marriage*, ATLANTIC (Aug. 20, 2017), <https://www.theatlantic.com/business/archive/2017/08/marriage-rates-education/536913>.

12 See, e.g., Chen, *supra* note 11 (“Over the last several decades, the proportion of Americans who get married has greatly diminished—a development known as well to those who lament marriage’s decline as those who take issue with it as an institution. But a development that’s much newer is that the demographic now leading the shift away from tradition is Americans without college degrees—who just a few decades ago were much more likely to be married by the age of 30 than college graduates were.”).

13 See Drake Baer, *Economic Forces Making US Men Less Appealing Partners, Researchers Say*, CABLE NEWS NETWORK (Sept. 28, 2017, 4:28 AM), <https://www.cnn.com/2017/09/28/health/american-men-less-marriageable-partner/index.html>.

14 Gillian B. White, *Inequality Between America’s Rich and Poor Is at a 30 Year High*, ATLANTIC (Dec. 18, 2014), <https://www.theatlantic.com/business/archive/2014/12/inequality-between-americas-rich-and-americas-poor-at-30-year-high/383866/>.

15 Gretchen Livingston, *For Most Highly Educated Women Motherhood Doesn’t Start Until the 30s*, PEW RES. CTR. (Jan. 15, 2015), <http://www.pewresearch.org/fact-tank/2015/01/15/for-most-highly-educated-women-motherhood-doesnt-start-until-the-30s/>.

16 See CARBONE, *supra* note 8, at 75 (noting some of these particulars).

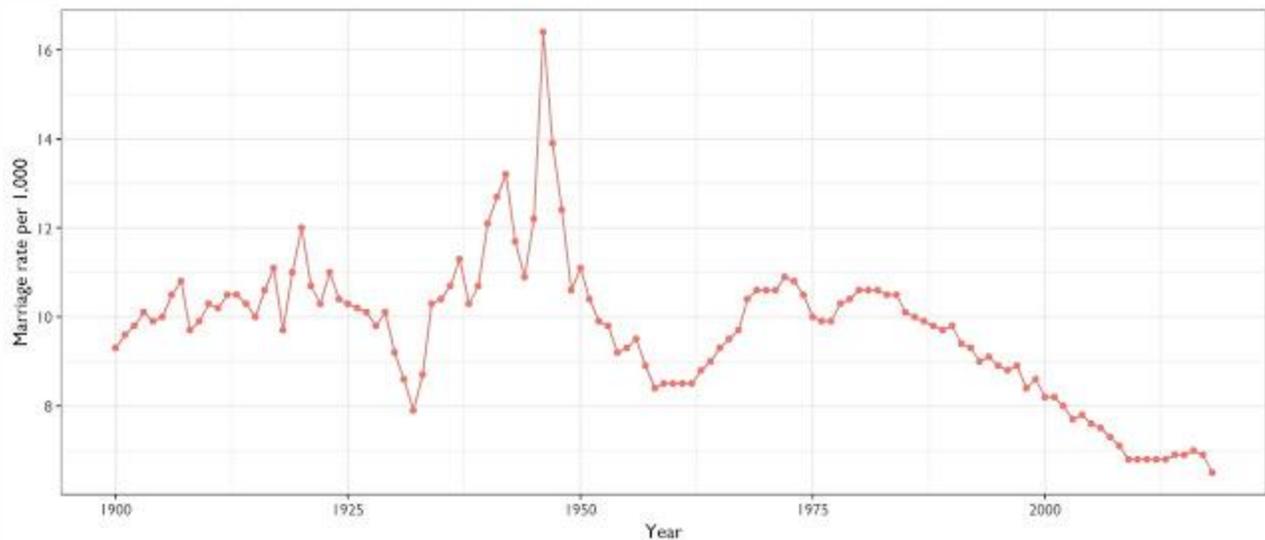
17 See, e.g., Katrin Bennhold, *Equality and the End of Marrying Up*, N.Y. TIMES (June 12, 2012), <http://www.nytimes.com/2012/06/13/world/europe/13iht-letter13.html?mcubz=0>.

18 CARLE C. ZIMMERMAN & LUCIUS F. CERVANTES, *SUCCESSFUL AMERICAN FAMILIES* 207 (1960) [hereinafter *SUCCESSFUL*] (discussing basic social changes to the family that began in the twentieth century). In 1956, Zimmerman noted the great need for review of our family system, but recognized that academic institutions even then had “been loath to give this study a footing in the curriculum or a share of research funds Law schools, bar associations, and intellectuals everywhere are beginning to ask what this family crisis means.” CARLE C.

The millennial longing for a solid economic foundation seems key in decision-making, particularly toward marriageability,¹⁹ even though as “marriage has lost much of its social allure ... it remains a desired milestone for about 70 percent of millennials.”²⁰ The *National Center for Health Statistics* reported that marriage rates in the United States are at record lows, as indicated by the chart below. Recent statistics show “that adults in the United States are increasingly postponing marriage and that a record number of current youth and young adults are projected to forego marriage altogether.” Since 1900, marriage rates peaked at a rate of 16.4 (per 1,000 population) and have fluctuated in an overall decline since then, reaching a minimum of just 6.5 from 2017 to 2018.

United States marriage rate, 1900-2018

Rate per 1,000 population Source: CDC/NCHS, National Vital Statistics System



While this study does not explicitly say that a declining marriage rate could have negative individual or societal consequences, the *National Center for Health Statistics* goes so far as to say, “Marriage has been shown to be correlated with positive health outcomes and longevity, and

ZIMMERMAN & LUCIUS F. CERVANTES, *MARRIAGE AND THE FAMILY: A TEXT FOR MODERNS* 32 (1956) [hereinafter *MARRIAGE AND THE FAMILY*]. See generally ROBERT L. LERMAN & W. BRADFORD WILCOX, FOR RICHER, FOR POORER – HOW FAMILY STRUCTURES ECONOMIC SUCCESS IN AMERICA, <https://ifstudies.org/ifs-admin/resources/for-richer-or-poorer-hep-2014.pdf> (explaining the current study that proves Zimmerman’s predicted points).

19 See Meg Murphy, *NowUKnow: Why Millennials Refuse to Get Married*, BENTLEY U., <https://www.bentley.edu/impact/articles/nowuknow-why-millennials-refuse-get-married> (Nov. 10, 2018).

20 *Id.*; see also Catherine Rampell, *Many Life Milestones Are out of Millennials’ Reach*, WASH. POST (Sept. 15, 2014), https://www.washingtonpost.com/opinions/catherine-rampell-many-life-milestones-are-out-of-millennials-reach/2014/09/15/4947ce34-3d12-11e4-b0ea-8141703bbf6f_story.html?noredirect=on&utm_term=.f14e6ab3a0a0. See also Michelle Singletary, *Being Married Has a Lot to Do with Economic Success, Scholars Say*, WASH. POST (Oct. 28, 2014), http://www.washingtonpost.com/business/get-there/being-married-has-a-lot-to-do-with-economic-success-scholars-say/2014/10/28/fdf7d11e-5eda-11e4-8b9e-2ccdac31a031_story.html.

a recent report showed that age-adjusted death rates for both males and females are lowest for those who were married at the time of death.”²¹

Current marriage patterns, however, are diverging to reveal an increasing divide between those who are married with means, and those who are single, of generally low-income, and possibly reliant on entitlement programs and social safety nets.²² While this gap may reflect differing concerns, both groups nonetheless evidence basic rules of assortative mating.²³ Assortative mating is the notion that market participants match with like participants, a concept that economist Dr. Gary Becker explained maximizes utility and efficiency in love and intimate relationship connections. Therefore, love provides a means by which greater utility and efficiency is attained within the bounds of marriage, according to Becker.²⁴ Assortative mating mechanisms also spill over to the family relationship; Dr. Carle Zimmerman recognized this concept of assortative mating as a sort of “marriage self-protection system,” where not only like individuals connect, but like families connect as well.²⁵ Zimmerman further noted that this “is due in part to extreme strain which has been placed upon it by the cultural developments and changes of our age.”²⁶ All these things matter in marital contracting, in thinking through what clients need to consider.

Societal ‘strain’ and ‘internal decay’ within the family relationship largely present the lion share of family law practice work for attorneys, and present problems for legal and economics experts alike.²⁷ Even with an awareness of the negative effects of assortative mating, the obvious results are difficult to avoid because individuals who share common interests and social station tend to connect with each other. When attorneys grasp these principles, their emotional intelligence in client service can rise in important ways.

Two economic effects underlie the impact of changing incentives: the substitution effect and the income effect. Economists define the substitution effect as follows: when the price of a good changes, the rate at which an individual can exchange one good for another changes, and the total purchasing power of that individual’s income is altered.²⁸ For example, if one good becomes cheaper, an individual will have to give up less of another good to purchase the cheaper good. Similarly, women have seen a substitution effect with respect to their careers, as increased fertility control methods have decreased the cost of being in a relationship and being in the workforce, causing a delay of motherhood.²⁹

21 *United States Marriage Rates, 1900-2018*, National Center for Health Statistics, CDC/NCHS (2020).

22 Murphy, *supra* note 19 (citing an internal Urban Institute report).

23 See GARY S. BECKER, *A TREATISE ON THE FAMILY* 108–23 (1993).

24 See *id.*, at 277–83.

25 Zimmerman, *MARRIAGE AND THE FAMILY*, *supra* note 18, at 91. Though Zimmerman’s work is dated, he was a sociologist looking to the future, making his work extremely relevant to our understanding of what we face today.

26 *Id.* See also CARLE C. ZIMMERMAN, *THE FAMILY OF TOMORROW: THE CULTURAL CRISIS AND THE WAY OUT* 247–50 (1949) [hereinafter *FAMILY OF TOMORROW*].

27 See Zimmerman, *MARRIAGE AND THE FAMILY*, *supra* note 18, at 17.

28 HAL R. VARIAN, *INTERMEDIATE MICROECONOMICS: A MODERN APPROACH* 137 (Jack Repcheck ed., 8th ed. 2010).

29 Cf. Gretchen Livingston, *They’re Waiting Longer, but U.S. Women Today More Likely to Have Children than a Decade Ago*, PEW RES. CTR. (Jan. 18, 2018), <http://www.pewsocialtrends.org/2018/01/18/theyre-waiting-longer-but-u-s-women-today-more-likely-to-have-children-than-a-decade-ago/> (demonstrating how women are delaying motherhood, a trend noticeable across races and ethnicities). *Id.*

The substitution effect reflects changes in demand due to changes in the rate of exchange between goods, such as demand to work more and have children later in life.³⁰ In a situation where the price of one good decreases, a consumer is left with more purchasing power, which means that the amount of overall goods purchased will increase; this change in demand due to increased purchasing power is known as the income effect.³¹ These two economic effects on demand underlie the changing marriage incentives relative to previous generations.³² While parties cannot necessarily contract regarding timing of child bearing in an enforceable manner, they can discuss these concerns in the context of considering premarital issues. Incentives have changed for marriage compared to previous generations due to increased assortative mating affecting economic inequality,³³ in addition to the massive effects of instant social media,³⁴ as “online dating seems to have further complicated the already mysterious process of falling in love.”³⁵ All of these factors have altered incentives for marriage, and hence may alter motivation and decision making in marital contracting. In sharp decline, marriage projections suggest an American population dominated by singles could be imminent.³⁶ These are key facts for the demographic projections of divorce attorneys and family law lawyers, both for those who rely on divorce as market share, but also to be prepared to represent singles in their own non-marital family legal needs.

For many, marriage has lost much of its social allure,³⁷ but it nonetheless remains a desired milestone.³⁸ Research suggests that marriage is “more prevalent among those with higher incomes and more education,” and may be economically out of reach for many.³⁹ Even while the data suggests strong individualism among the millennial generation, they also highly value children, especially their own.⁴⁰

30 VARIAN, *supra* note 28.

31 *Id.*

32 *Cf.* Roni Caryn Rabin, *Put a Ring on It? Millennial Couples Are in No Hurry*, N.Y. TIMES (May 29, 2018), <https://www.nytimes.com/2018/05/29/well/mind/millennials-love-marriage-sex-relationships-dating.html>; Michael Greenstone & Adam Looney, *The Marriage Gap: The Impact of Economic and Technological Changes on Marriage Rates*, BROOKINGS (Feb. 3, 2012), <https://www.brookings.edu/blog/jobs/2012/02/03/the-marriage-gap-the-impact-of-economic-and-technological-change-on-marriage-rates/> (discussing how numerous arguments for why marriage rates are declining ignores the changes in demand for marriage).

33 *See* Tyler Cowen, *The Marriage of Power Couples Reinforce Income Inequality*, N.Y. TIMES (Dec. 24, 2015), <https://www.nytimes.com/2015/12/27/upshot/marriages-of-power-couples-reinforce-income-inequality.html>.

34 *See* Elisabeth Sherman, *Inside the Awkward World of Millennial Dating*, ROLLING STONE (Nov. 16, 2016), <https://www.rollingstone.com/culture/culture-features/inside-the-awkward-world-world-of-millennial-dating-108651/>.

35 *Id.*

36 STEVEN P. MARTIN, NAN MARIE ASTONE & H. ELIZABETH PETERS, URBAN INST., FEWER MARRIAGES, MORE DIVERGENCE: MARRIAGE PROJECTIONS FOR MILLENNIALS TO AGE 40, at 1 (2014), <https://www.urban.org/sites/default/files/publication/22586/413110-Fewer-Marriages-More-Divergence-Marriage-Projections-for-Millennials-to-Age-PDF>.

37 *See* Lawrence M. Friedman & Robert V. Percival, *Who Sues for Divorce? From Fault Through Fiction to Freedom*, 5 J. LEGAL STUD. 61, 80–81 (1976); *see also* Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 79 (1991).

38 Murphy, *supra* note 19 (suggesting that marriage is desired but economically out of reach for many).

39 *Id.*

40 *See* WENDY WANG & PAUL TAYLOR, FOR MILLENNIALS, PARENTHOOD TRUMPS MARRIAGE, PEW RES. CTR. 1 (2011), <http://assets.pewresearch.org/wp-content/uploads/sites/3/2011/03/millennials-marriage.pdf>.

By understanding the 21st century mindset a bit through this research, attorneys can better comprehend and analyze those effects in the context of competent legal representation in a fast-changing horizon. The next section will focus on how this information can aid and assist in marital and non-marital contracting.

II. Marriage, Non-marriage, and Divorce Contracting

Marriage is both “a status founded on contract and established by law. It constitutes an institution involving the highest interests of society and is therefore subject to state regulation based upon the general welfare of the people of the state.”⁴¹ This of course means that marriage can be contracted in various ways under legal regulation. The general social decline of marriage opens opportunities for both marital and non-marital agreements.

Understanding the backdrop outlined in the previous section with which clients come to attorneys to create a marital agreement to accomplish their purposes can help good lawyers perform better and more nuanced drafting.

This section considers various contracts or agreements that can arise in marriage, non-marriage, or divorce, their basic elements, and how they can be most effectively used to serve client directives.

a. Marital Agreements Generally

Some states have public policy exceptions that prohibit individuals from entering into marital agreements, but these policies effectively thwart marriages that might otherwise be society stabilizers.⁴² Most states, however, advance marital stability as preferring marriage over non-marriage, and upholding marital agreements that work to stabilize and strengthen marriage.⁴³ Virginia not only recognizes, but supports written agreements between parties married (i.e. ante-nuptial agreements), intending to marry (i.e. pre-nuptial agreements), separated (i.e. separation agreement), intending divorce (i.e. post-nuptial agreements).⁴⁴ While contracting is often used to settle individual rights and deconstruct marriage, the rule of law in marital contracting can also work to foster stronger and more stable marriages, and thus stronger more stable families if clients so desire. This truth creates an opening for lawyers to participate in and offer solutions to couples in troubled marriages – possibly even, in the right circumstances, restoration – as the client directs.

The pertinent statutes regarding marital agreements between spouses are contained in Virginia Code Title 20, incorporating by reference the law in Virginia regarding premarital

⁴¹ CECKA, DIEHL, AND COTTRELL, VIRGINIA PRACTICE SERIES, FAMILY LAW: THEORY, PRACTICE, AND FORMS (2020), at sec. 1:1 (citing *Maynard v. Hill*, 125 U.S. 190 (1888), and a host of other key Supreme Court family law decisions).

⁴² See e.g. Natasha Wasil, *Ohio's Love-Hate Relationship with Marital Agreements: Why Ohio Should Lift Its Prohibition on Postnuptial Agreements*, 69 CLEVELAND ST. L. REV. 511 (2021).

⁴³ See generally Jessica Dickler, *Before Saying 'I Do,' More Millennials Say 'Prenup,'* CNBC (Nov. 25, 2016, 9:00 AM), <https://www.cnbc.com/2016/11/25/before-saying-i-do-more-millennials-say-prenup.html>; See also Susan Shain, *The Rise of the Millennial Prenup*, N.Y. (Nov. 25, 2016).

⁴⁴ CECKA, *supra* note 41, at Chapter 3.

agreements (discussed below). Any marital agreement is governed by §§147-154 and is effective immediately upon execution. That agreement may, however, be rendered unenforceable under § 20-151 if found to be unconscionable at the time of application of the agreement. Furthermore, any marital agreement may be amended or revoked by another signed written agreement according to §20-153.

While litigation to deconstruct a marriage and its family rights and responsibilities will include several different aspects, a marital agreement can contain provisions to cover all these areas and work to avert lengthy and costly litigation. An agreement can cover issues surrounding the marriage itself, recognition or not of the reasons for its demise, the incidents of the marriage including property settlement, spousal support, child custody, child visitation, and child support, and anything else pertinent to the situation that the parties wish to include. Provisions to cover each of these areas can be included in any of the agreements discussed below.

b. Premarital Agreements

Often referred to as prenuptial agreements, a premarital agreement is an enforceable written contract between two individuals intending to marry which is entered into voluntarily, without fraud or duress, and with full disclosure of all relevant facts and assets.⁴⁵ Virginia has adopted the Premarital Agreement Act at § 20-149, which outlines the requirements for a valid premarital agreement. Such an agreement, however, also (like any marital agreement) may be rendered unenforceable under § 20-151 if it is found to be unconscionable at the time of application of the agreement. A premarital agreement may be amended or revoked only by another signed written agreement, according to §20-153.

Although the general sentiment surrounding prenuptial agreements is one of securing legal protections for individual parties to the marriage,⁴⁶ these agreements can nonetheless be drafted to value and stabilize the future marriage, and set a foundation of trust between the parties with its various provisions. “The parties can broadly contract in the premarital agreement regarding a host of matters.”⁴⁷

c. Separation Agreements

Governed by the same rules as set forth for basic marital agreements, separation agreements are often referred to as Property Settlement Agreements (PSA) in Virginia. Sometimes these terms are laid out in contract form, or sometimes simply contained in a court order endorsed by counsel and the parties, or recorded and transcribed by a court reporter and affirmed by parties on the record personally.⁴⁸

These documents are drafted to solve the pending issues surrounding marital breakdown and distribution of the marital estate. Reconciliation of the parties after signing a separation

⁴⁵ See generally *id.*, at sec. 3:4 and following.

⁴⁶ See *id.* at sec. 16:3 for a sample premarital agreement.

⁴⁷ For a thorough list of those matters see *id.*, at sec 3:4.

⁴⁸ *Id.* at sec. 3:5 and following.

agreement or a PSA generally abrogates that agreement unless otherwise expressly stated. “Today, separation agreements are favored by the law, thus allowing the parties to a marriage, with the help of their respective attorneys, to contractually agree upon a division of their marital property and other assets, spousal and child support, child custody matters, pension and retirement plans, insurance coverage, tax planning and many other important issues prior to divorce.”⁴⁹ All family law lawyers tend to be fairly familiar with these types of agreements.

d. Reconciliation Agreements

A reconciliation agreement in Virginia is a term generally referring to a withdrawal of a divorce proceeding, where the parties agree to terminate the pending divorce suit, and resume marital relations.

This agreement not only withdraws the pending divorce suit, but also terminates any prior separation agreement, voiding those provisions.⁵⁰ Should the parties wish to preserve any of those prior commitments a new contract meeting the same requirements for a marital agreement is necessary.

e. Restoration Agreements

At common law, any reconciliation or attempt toward reconciliation between the parties would render any prior agreement ineffective (as noted above), operating much the same as reconciliation would when asserted as a defense to a fault-based divorce, or when a reconciliation agreement is made to withdraw a divorce.

Some case law backed by statute, however, has somewhat affected the use of such an agreement to allow protections to remain in place unless revoked by a written agreement signed by the parties. In *Smith v. Smith* the appeals court plainly stated why a reconciliation agreement may remain valid even after the resumption of marital relations.⁵¹

We previously held that a property settlement agreement is not abrogated by a later reconciliation of the parties where the agreement provides otherwise. *Jennings v. Jennings*, 12 Va. App. 1187, 1198, 409 S.E.2d 8, 15 (1991). The wife argues that *Jennings* does not apply to this case, because the agreement in *Jennings* was entered into in anticipation of reconciliation in order to protect the wife's rights in the event the reconciliation failed. The agreement in this case, she contends, was entered into in anticipation of a separation. However, the decision in *Jennings* was not based on the fact that the agreement was entered into in anticipation of separation. Instead, the Court in *Jennings* relied on the express language of the agreement. *See id.* Any uncertainty on this question has been resolved by the General Assembly. The Premarital Agreement Act provides that such an agreement ‘may be

⁴⁹ *Id.*, citing VA. CODE ANN. Sec 20-109.1.

⁵⁰ CECKA, *supra* note 41, at sec. 16:5, et al.

⁵¹ *Smith v. Smith*, 19 Va. App. 155 (1994) (citing *Jennings v. Jennings*, 12 Va. App. 1187 (1991), Va. Code §20-153, and VA. CODE §20-155).

amended or revoked only by a written agreement signed by the parties.’ This provision applies also to agreements entered into by married persons ‘for the purpose of settling the rights and obligations of either or both of them, to the same extent, with the same effect, and subject to the same conditions ... as ... agreements between prospective spouses.’⁵²

Because this is a unique and possibly unfamiliar type of marital agreement, the Appendix herein contains sample restoration agreements. These agreements provide sample clauses, provisions, and opportunities to hold spouses to their legal obligations in a way that can work to strengthen and stabilize the marriage, rather than purely present the sole option of divorce. They are drafted to focus on marital restoration, yet still generally contain duties and obligations of the parties to reestablish trust in the marital relationship.

f. Living Apart Together: Long Distance Marriage Agreements

Some adults are “living apart together”⁵³ -- in committed relationships but living under separate roofs—or are in relationships marked by some measure of intimacy or dependency.⁵⁴ Legal and law reform responses to these relationships differ, and scholars from various disciplines are studying different approaches to persons in nonmarital relationships, such as polyamorous arrangements and other communities of choice, including those who elect to remain single. The Uniform Law Commission is developing a new proposal for uniformity in the area of economic rights of cohabitants.⁵⁵

Marital agreements can be drafted for parties that will strengthen trust and demonstrate the duties and obligations of the parties and their value for the marriage, even when physically separated by distance due to responsibilities or opportunities elsewhere.

g. Divorce Alternative: Common Law Separate Maintenance

Similar to the doctrine of necessities, common law separate maintenance is an action recognized in Virginia at § 20-107 where a wife may seek maintenance and support from her husband while living separate and apart from him without being divorced,⁵⁶ For example see *Heflin v. Heflin*, 177 Va. 385 (1941) and *Williams v. Williams* (Va. 1948) where courts have ruled that the wife must show that her conduct is without fault, that she is unoffending, and not seeking divorce, and where the husband’s conduct amounts to mistreatment or cruelty to the wife which renders marital status unendurable.

While not requiring a marital agreement, this remedy may not seem like it necessarily strengthens marriage, but it is a remedy for spouse who is in need of support but does not wish to

⁵² *Id.*

⁵³ Sam Edwards, *Living Apart Together*, NBC News (May 11, 2018) (citing Kaiser Health News), <https://www.nbcnews.com/health/aging/living-apart-together-new-option-older-adults-n873496>.

⁵⁴ *Id.*

⁵⁵ See “Economic Rights of Unmarried Cohabitants,” Uniform Law Commission (2021), <https://www.uniformlaws.org/committees/community-home?CommunityKey=5f044999-b4b3-458a-b6d4-d984885d913b>.

⁵⁶ CECKA, *supra* note 41, at sec. 4:8.

pursue divorce. Once obtained by a court order as indicated above, an agreement between the parties for spousal support may be helpful, nonetheless, to add strength to the reciprocal duty to mutual spousal support during marriage.

h. Divorce Litigation Alternatives

Alternative Dispute Resolution (ADR) includes many areas of family law that can assist lawyers in problem solving for clients, and many ultimately include marital contraction.⁵⁷

Divorce Mediation is the process whereby parties to a divorce are assisted by an impartial, professional mediator who aids them in coming to an agreement on the divorce. When the mediator is an attorney, Virginia Legal Ethics Opinions agree that the lawyer may give both parties legal information, but may not offer legal advice to either party, as the attorney is serving as an impartial third party mediator. That attorney is also precluded from later representing either party in a divorce. The attorney mediator's duty to impartiality and fairness also requires him or her to suspend or terminate mediation when continuing would harm or prejudice one or more of the participant(s). Nonetheless, a third party neutral attorney can assist the parties in coming to a solution. This method is completed by a separation agreement.

Binding Arbitration resembles the adversarial judicial process as another method of ADR where a single arbitrator, or a panel of arbitrators, chosen by the parties or designated by a third party serves the parties by rendering the final judgment regarding the deconstruction of the family, generally without any family agreement.

Collaborative Law, one of the fastest growing methods of ADR, does not involve use of third party neutrals, but rather allows each party to be represented by a lawyer trained in collaborative law who will serve to help the client engage in direct problem solving negotiations. As with all marital agreements, the process relies on voluntary disclosure by parties of relevant facts and information. Furthermore, both parties must sign with their lawyers a disqualification agreement that each of the attorneys must represent only their clients in the collaborative process, and cannot represent those clients in any subsequent litigation against the other party. For more information see the outlines and CLEs on Collaborative Family Law from VA CLE.⁵⁸ This form of ADR is generally also completed by an agreement.

i. Marriage Alternatives: Cohabitation Agreements and Non-Marital Agreements

Contractual and partnership rights of persons who are not married can be protected by law in agreements as well. "Although marital property and support rights are based upon a legally recognized marital relationship, legally binding nonmarital economic rights and

⁵⁷ For information on ADR in Virginia and available resources see *VBA Joint ADR Committee*, https://www.vba.org/page/joint_adr (2021).

⁵⁸ See also Kimberly P. Faus, Cheryl W. Smith and Peter V. Chiusano, *Collaborative Practice: Solving Family Disputes Outside of Court*, VIRGINIA LAWYER (Feb. 2007), at https://vacollaborativepractice.com/wp-content/uploads/2020/11/Fauss_Solving_Family_Disputes_Outside_of_Court_Virginia_Lawyer_02-2007_family-law-section.pdf.

obligations may also be created when the parties decide to cohabit without the formalities of marriage.”⁵⁹ These cohabitation agreements are enforceable if non-meretricious, even though the parties share no relational legal status.

The key case supporting non-marital contracting remains *Marvin v. Marvin* (Cal. 1976) holding that a cohabiting party may sue the other on an express contract, or on an implied contract for consideration, rendered pursuant to the agreement proven between the parties. When not expressly written and signed, the party claiming that an agreement exists has the burden of proof to provide evidence of the agreement.⁶⁰ See also *Cooper v. Spencer* (Va 1977) holding the existence of evidence of implied partnership agreement between unmarried parties.

Cohabitation is one of the most popular forms of economic advantage in minimizing living costs, and maximizing utility or happiness, and it seems to be a very rational choice until a breakup occurs and there is no compensation for those lost benefits.⁶¹ Concurrently, having a sexual partner that one is not attached to by law may seem to increase the benefits of cohabitation over marriage, and reduce the costs discussed above should divorce occur, although it actually can work to somewhat stifle long-term economic benefits.⁶² Contracting in advance can become effective problem solving in these circumstances.

Agreements between cohabiting unmarried parties can also serve to problem-solve for the parties regarding significant economic and property issues involved in the relationship, as well as regarding the best interests of children from that non-marital relationship with whom the parties share parentage, custody, and support.⁶³ A non-marital agreement can cover issues surrounding the relationship itself, but it can also cover the incidents of the relationship including property settlement, partner support, child custody, child visitation, and child support, and anything else pertinent to the situation that the parties wish to include.

While every family law lawyer knows that this type of agreement can help settle the differences between the parties, this type of agreement can also be used to help to preserve the non-marital family as the parties wish. Marital economic partnership theories do not apply in cases of non-marital cohabitation in most jurisdictions,⁶⁴ though some states have chosen to view cohabitation as a form of quasi-contract rather than a relational status, even if the parties may not have any written or oral agreement to do so.⁶⁵ These agreements will not be governed by family law code and case law in most jurisdictions, but they are nonetheless useful and valuable as upheld under basic contract principles and rules.

⁵⁹ CECKA, *supra* note 41, at sec. 3:2.

⁶⁰ *See id.*

⁶¹ *See* Lynne Marie Kohm & Karen M. Groen, *Cohabitation and the Future of Marriage*, 47 REGENT U. L. REV. 261, 273–74 (2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3160275.

⁶² *See id.*

⁶³ An excellent sample of a non-marital agreement can be found at Cecka, *supra* note 41, at sec. 16:2.

⁶⁴ *See, e.g.*, *Floyd v. Floyd*, 436 S.E.2d 457, 459 (Va. Ct. App. 1993) (stating that there is no economic partnership between unmarried cohabitants).

⁶⁵ *Compare* *Marvin v. Marvin*, 557 P.2d 106, 110, 122–23 (Cal. 1976) (holding that cohabitation yielded a contract in quantum meruit), *with* *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1210–11 (Ill. 1979) (holding that marriage is required for parties to be granted mutually enforceable property rights).

III. Marriage and Parenthood: Understanding the Incentives

a. Legal Incentives

There are both incentives and disincentives for marriage under the laws surrounding this intimate relationship.⁶⁶ Between spouses, every family law lawyer knows that marriage requires a mutual duty of support for food, shelter, clothing, medical needs, etc.⁶⁷ The legal and economic incentives that connect intimate associations and economic success are key to this discussion on marriage. While millennials have participated to a high degree in ushering in new forms of human romantic connection, from social media to online dating,⁶⁸ marriage is still a transactional affair,⁶⁹ and as a bargained for exchange, marriage has its incentives, as well as its disincentives, and both are largely legal and economic.⁷⁰ Marriage is a legal relationship which has a lot to do with economic success,⁷¹ which may or may not seem like a valid reason to keep a family together, but that is up to the client. The lawyer can simply be ready to serve clients who do wish to preserve their marriage.

Legal incentives in support abound. Under the doctrine of necessities, everything that a married person legitimately needs is required by law as a spousal provision.⁷² Marriage advances property sharing and joint ownership of both real and personal property gained during the marriage.⁷³ Marriage also contains within itself a special confidential aspect of communication between spouses known as the marital privilege, which encourages and empowers spouses to protect each other, their privacy together, and their private confidential communications.⁷⁴ These principles originated in common law and have been codified in state domestic relations laws.⁷⁵ The joint ownership and care of income and other marital property assets creates strong momentum in building wealth, making marriage one of the best investments ever made by two people.⁷⁶ These are just the chief ways that marriage provides positive legal incentives. Conversely, these same obligations in marriage create duties in divorce, such as a requirement for spousal support for a needy spouse, or an equitable or equal share of property gained during the marriage.⁷⁷ These disincentives may have become a strong scapegoat for a

66 BRIAN H. BIX, FAMILY LAW 153 (2013).

67 LYNN D. WARDLE, MARK A. STRASSER, LYNNE MARIE KOHM & TANYA M. WASHINGTON, FAMILY LAW FROM MULTIPLE PERSPECTIVES Second Ed. 384 (2019).

68 Cf. Andrew Perrin, *Social Media Usage: 2005-2015*, Pew Res. Ctr. 3 (2015), http://www.pewresearch.org/wp-content/uploads/sites/9/2015/10/PI_2015-10-08_Social-Networking-Usage-2005-2015_FINAL.pdf (showing that 90% of young adults use social media).

69 See, e.g., Chen, *supra* note 11; see generally Kathleen Knudsen, *Would Jane Austen be on eHarmony? How Changes in Women's Legal Status Have Influenced the Choice of a Spouse* (June 2, 2016) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2788753 (providing a 300-year overview of how the marriage bargain has changed for women).

70 BIX, *supra* note 66.

71 *Id.*

72 *Id.*

73 See *id.* at 153, 156.

74 See James Joseph Duane, *The Bizarre Drafting Errors in the Virginia Statute on Privileged Marital Communications*, 12 REGENT L. REV. 91, 91-92 (1999).

75 WARDLE, *supra* note 67, at 383-4.

76 LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE 109, at 123 (2000).

77 BIX, *supra* note 66, at 171-73 (offering as a justification for alimony the obligation to support a needy spouse after divorce); See also CECKA, *supra* note 41, at §§ 9.1, 11.1 (explaining the two theories of marital property systems used by all fifty states).

desire to not enter into marriage at all,⁷⁸ but they nonetheless may also serve as reasons for clients to want to persevere in their marriage.

The law treats marriage as an economic partnership.⁷⁹ This is particularly evident in how married couples take title to property, as tenants by the entirety, with a full right of survivorship interest, meaning each spouse owns a one-half undivided interest in the property in life and by law passes it all to the surviving spouse in death.⁸⁰ This is also evident in marital contracting, as previously indicated in Section II herein. While these theories of economic partnership do not apply in cases of non-marital cohabitation in most jurisdictions under a family law framework,⁸¹ some states have chosen to view cohabitation as a form of quasi-contract rather than a relational status, even if the parties may not have any written or oral agreement to do so.⁸² These legal incentives and disincentives tend to create family strength and stability over time, with or without marriage.

b. Economic Incentives

Within marriage, spouses are equal not only legally but also economically.⁸³ This and the benefits of marriage are sometimes referred to as the “marriage premium,” a concept revealed in research demonstrating that marriage increases earnings for men, creates better economic stability for children, and can help lift individuals out of poverty.⁸⁴ Marriage can have a positive financial impact on earnings, for example, due to “the presence of positive female influences, happiness at home and ending discrimination by employers against unmarried men.”⁸⁵ Thus, strengthening marriage and its rights and responsibilities with a contract is a very valued practice for attorneys.

Household specialization is a particular benefit to the marriage premium. Although cohabitation may be replacing marriage for many,⁸⁶ the benefits of specialization can be achieved in the short term under such arrangements.⁸⁷ Thus, the greater benefits of living

78 Cf. Fleming, *supra* note 4 (discussing millennials’ hesitance to marry).

79 CECKA, *supra* note 41, § 4.1.

80 41 AM. JUR. 2D *Husband and Wife* § 18, Westlaw (database updated Aug. 2018). *But cf.* 41 AM. JUR. 2D *Husband and Wife* § 20, Westlaw (database updated Aug. 2018) (explaining that tenancy by the entirety is not an available estate in all jurisdictions).

81 *See, e.g.*, Floyd, 436 S.E.2d 457, 459 (Va. Ct. App. 1993) (stating that there is no economic partnership between unmarried cohabitants).

82 Again, *compare* Marvin, 557 P.2d 106, 110, 122–23 (Cal. 1976) (holding that cohabitation yielded a contract in quantum meruit), *with* Hewitt, 394 N.E.2d 1204, 1210–11 (Ill. 1979) (holding that marriage is required for parties to be granted mutually enforceable property rights).

83 *See* 41 AM. JUR. 2D *Husband and Wife* § 18 (database updated Aug. 2018); 41 AM. JUR. 2D *Husband and Wife* § 140 (database updated Aug. 2018).

84 Serena Elavia, *Is the ‘Marriage Premium’ Fact or Fiction?*, FOX BUS. (Dec. 10, 2015), <https://www.foxbusiness.com/features/is-the-marriage-premium-fact-or-fiction>.

85 *Id.*

86 RICHARD FRY & D’VERA COHN, LIVING TOGETHER: THE ECONOMICS OF COHABITATION; PREVALENCE AND GROWTH OF COHABITATION, PEW RES. CTR. 7 (2011), <http://www.pewresearch.org/wp-content/uploads/sites/3/2011/06/pew-social-trends-cohabitation-06-2011.pdf>.

87 *Id.*

together gained in marriage are not fully realized,⁸⁸ but what has been achieved can be preserved if the clients wish to do so and their attorney is prepared to give that type of legal assistance.

Additional economic benefits of marriage can include tax incentives, but those can be both bonuses and penalties. A married couple receives a marriage tax bonus if they pay fewer taxes filing jointly than they would if they were single, but a married couple might incur a marriage tax penalty if filing jointly they pay more income taxes than they would pay if they were single or divorced and filing as individuals.⁸⁹

Married couples enjoy each other's mutual financial support.⁹⁰ Though that support is required by family law code,⁹¹ it also creates an economic safety net for each partner.⁹² In other words, if one career spouse has job or employment difficulties, he or she has a marriage partner to fall back on.⁹³ On the other hand, this could create a "free riding" problem, as economists call it, if the needy spouse takes lengthy advantage of that support.⁹⁴ Fully analyzing out this concept, one can see that a spouse who does not have a career can economically exacerbate this problem.⁹⁵ That mutual support, nonetheless, is generally an economic advantage of marriage.⁹⁶ These imbalances can be solved in good marital contracting.

c. Social Incentives

Studies seem to show that one of the most significant problems with marriage decline is the impact it has on children and long-term economics.⁹⁷ Social scientists have found:

Just when new legal and social freedoms, technological advances, and economic opportunities have given American women immense control over when (and if) they marry and when (and if) they choose to bear a child, social scientists have come to a troubling conclusion: children seem to benefit when parents get married and stay that way.

88 See THE TAX POLICY BRIEFING BOOK: A CITIZENS' GUIDE TO THE TAX SYSTEM AND TAX POLICY 176 (2016), https://www.taxpolicycenter.org/sites/default/files/briefing-book/tpc-briefing-book_0.pdf (examining marriage tax "penalties" and "bonuses").

89 *Id.*

90 See Richard Satran, *Marriage Benefit: Couples' Money Secrets Everyone Can Use*, U.S. NEWS & WORLD REP. (Sept. 20, 2013, 2:25 PM), <https://money.usnews.com/money/personal-finance/articles/2013/09/20/marriage-benefit-couples-money-secrets-everyone-can-use>.

91 CECKA, *supra* note 41, § 4.7.

92 See BIX, *supra* note 66, at 171–73 (explaining this foundational understanding, as reflecting "our society's ideas about what the function of marriage is, what obligations spouses have to one another, the connection between those obligations and marital (mis-)behavior, and so forth").

93 Cf. VARIAN, *supra* note 28, at 705–06 (showing that, unlike married partners who do not need to make the same analysis, people often decide how much of their "private good" to contribute towards the public good based on how much others are contributing).

94 See *id.* Free riding occurs in the case of a public good. See *id.* at 705–07. In the context of spousal support, one partner has turned his or her income (originally a private good) into a public good to be shared with his or her partner through the institution of marriage. Cf. *id.* at 706. Because of this, a free riding problem is created and, according to Varian, "the provision of a public good by any one person will tend to reduce the other peoples' provision." *Id.* at 707. "Thus in general there will be too little of the public good supplied in a voluntary equilibrium, relative to an efficient provision of the public good." *Id.* See also Satran, *supra* note 90.

95 See VARIAN, *supra* note 28, at 706.

96 Sandra Alcaide & Lynne Marie Kohm, *Obergefell: A Game-Changer for Women*, 14 AVE MARIA L. REV. 99, 106 (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2873827.

97 See GOOD MEN PROJECT, *supra* note 10.

Though many single mothers are admirable parents, it remains true that, on average, children raised outside of marriage typically learn less in school, are more likely to have children while they are teens, are less likely to graduate from high school and enroll in college, and have more trouble finding jobs as adults.⁹⁸

These social incentives relate to the marriage market. Understanding that concept can help with problem solving by contract as well. Generally marriageable individuals with certain desired qualities will command a higher price in the marriage market, as increased demand apart from increased supply results in higher prices.⁹⁹ Transactions between an individual with few preferred qualities are constrained by what he or she could offer to a spouse, finding it difficult to marry an individual with many such preferred qualities. The result is highly preferred individuals end up marrying other highly preferred individuals and vice versa, thereby dramatically increasing the economic inequality gap, the natural effects of assortative mating discussed previously.¹⁰⁰ This effect is exacerbated by the fact that individuals are marrying later in life due to the desire to be self-sufficient, and maybe even having enough wealth to be desirable to another—or at least not undesirable.¹⁰¹

A. Best Interests of the Child and Parenthood

The link between marriage and parenthood is weakening. Data is revealing that “[t]oday’s 18- to 29-year-olds value parenthood far more than marriage.”¹⁰² While “the overall incidence of parenthood in young adults has declined[,]” just over half or 51% “of all births among [m]illennials in 2008 were to unwed” parents.¹⁰³ Young men are much less likely to live with their children than are young women.¹⁰⁴ Additionally, the Pew Research Center has illustrated that the more marriage has been legally diluted by divorce, and economically supplanted by cohabitation, the more non-marriage has seemed to outweigh marriage,¹⁰⁵ yet “being a good parent is one of the most important things in life.”¹⁰⁶ The law requires parents to accommodate the best interests of their children, and will always make judicial decisions based on this legal standard when parents are in conflict.¹⁰⁷

Parenthood may or may not be a central factor incentivizing marriage today, but perceived costs of marriage, career sacrifice, lifelong permanence, and monogamy may be less

98 EDIN, *supra* note 11, at 2–3.

99 *Cf.* VARIAN, *supra* note 28, at 3 (“Prices adjust until the amount that people demand of something is equal to the amount supplied.”).

100 BECKER, *supra* note 23, at 108.

101 Rachel Arocho & Claire M. Dush Kamp, *Distant Horizons: Marital Expectations May Be Dampened by Economic Circumstances*, 7 *COUPLE & FAM. PSYCHOL.* 1, 8 (2018).

102 WANG, *supra* note 39 (citing another Pew Research Center analysis of attitudinal surveys).

103 *Id.* at 2.

104 *Id.* at 6.

105 *Cf.* WANG, *supra* note 40, at 6 tbl.2 (revealing more similarity between these categories).

106 *Id.* at 7–8 (“[T]his is the case regardless of their parents’ marital status.”). It is here that I remember one of my (Kohm) millennial students remark that her mother told her “spouses come and go, but children are forever,” foreshadowing how divorce may be one of the key factors in this millennial attitude on children, though that notion is more anecdotal than the result of scientific research.

¹⁰⁷ See Lynne Marie Kohm, [Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence](#), 10 *J. L. FAM. STUD.* 337(2008).

than the benefits of being a good parent and the reward of successful children.¹⁰⁸ In the midst of a growing class divide between who gets and stays married in the United States, there is virtually no divide in the aspiration to have children or to marry.¹⁰⁹ According to marriage researcher Bradford Wilcox: “It doesn’t matter if you’re rich, poor, white, black, Hispanic. Most Americans are married or would like to marry. The challenge . . . facing the United States is bridging the gap between the nearly universal aspiration to marry and the growing inability of poor and working-class Americans to access marriage.”¹¹⁰ Understanding economics helps law to get the incentives right.¹¹¹ Proper application of the right incentives can make all the difference, and that can occur in marital contracting.¹¹² Lawyers can help balance incentives using good marital contract tools. Understanding that norms and economic motives work together and reinforce each other, researchers also argue that “although laws and norms may affect behavior, they rarely evolve and are maintained if personal incentives are very weak to uphold them.”¹¹³ An awareness of these aspects can help to form the right incentives, and help attorneys be better problem solvers for clients.

B. Human Capital and Parental Altruism in Family Law

A driver of labor productivity is human capital.¹¹⁴ Human capital can be defined as an investment in people toward wealth creation.¹¹⁵ This includes all the knowledge and skills acquired in education, for example, plus everything a person has apart from physical assets, including his or her physical, mental, and emotional skill sets.¹¹⁶

Human capital starts with parental investment in children. Parents with higher education and more human capital tend to invest more in their children’s human capital, while parents with lower levels of human capital behave just the opposite, creating a cycle in either direction. Parents who underinvest in children’s human capital leave them with debt burden to make up, and parents can underinvest because investment in a child’s human capital means lower investment on other things, including themselves. These principles are sometimes apparent to family law attorneys.

Human capital is not only dependent on parents, but upon the entire family, social circle, and community surrounding children as well. Economists claim that any rational investment in capital should have a return rate, and parental return on investment in his or her child’s human capital can be altruistic (e.g. joy in seeing children succeed) or practical (e.g. successful children mean care for parents later in life).¹¹⁷ “[H]uman capital is a multidimensional object with . . . various constituents[,]” including health, cognitive ability, social ability, etc.¹¹⁸

108 *See id.*, at 3–5, 7–9, 11–12.

109 Murphy, *supra* note 19.

110 *Id.*

111 *See* CHARLES WHEELAN, *NAKED ECONOMICS: UNDRRESSING THE DISMAL SCIENCE* 33 (2002).

112 *See id.*

113 *Id.* at 4; *see also* Murphy, *supra* note 19.

114 *See* WHEELAN, *supra* note 111, at 33.

115 *See id.*

116 Kathleen E. Akers and Lynne Marie Kohm, *Solving Millennial Marriage Evolution*, 48 U. BAL. L. REV. 1 (2018).

117 *See id generally.*

118 Oazio Attanasio, Costas Meghir, Emily Nix & Francesca Salvati, *Human Capital Growth and Poverty: Evidence from Ethiopia and Peru*, 25 REV. ECON. DYNAMICS 234, 234–35 (2017).

Human capital policy has in the past rightly focused on education,¹¹⁹ as early family factors seemed to indicate that education tuition assistance for poor families was the solution, but the importance of cognitive and noncognitive skills formed early in life have a larger impact than tuition funding assistance for college and high school, particularly in closing the income inequality gap.¹²⁰ This can be key in separation agreement contracting for the education of children of all ages.

There is more to this problem, however, than simply throwing additional funding into the mix. The relationship between parents and their children's education seems to be a more significant factor for increasing the human capital of children.¹²¹ While education is still a key factor, quality parenting rather than financial subsidies seem to be the solution, as human capital in children increases most under married parents.¹²² It appears that the perceived costs of marriage—career, permanency, monogamy, etc.—are worth the risk to gain the benefits that being a good parent offers in the reward of successful children.¹²³ This notion of building successful children is central to the concept of developing human capital,¹²⁴ and keeping these principles in mind can be extremely helpful in marital contracting as well when lawyers understand this important connection and can advise clients accordingly.

Developing human capital in children, however, has its opportunity costs,¹²⁵ which should also be considered in family contracting. A study of American children under age six showed increased preparation for school by parental involvement made a tremendous difference in child development.¹²⁶ The accumulation of skill prior to school entry resulted in higher scores on achievement tests.¹²⁷ To develop human capital in children, parents need to be involved with their children and their children's education.¹²⁸ This can be agreed to by parents in detail via contract.

Furthermore, a tremendous additional advantage of building human capital became ostensible in a study that showed parental benefits of a child's improved education included better parental health and increased longevity.¹²⁹ Expending effort toward building human

119 See BECKER, *supra* note 23, at 29.

120 Pedro Carneiro & James J. Heckman, *Human Capital Policy* 1 (Inst. for the Study of Labor, Working Paper No. 821, 2003), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=434544.

121 Juan Carlos Campaña, J. Ignacio Gimenez-Nadal & Jose Alberto Molina, *Increasing the Human Capital of Children in Latin American Countries: The Role of Parents' Time in Childcare*, 53 J. DEV. STUD. 805, 813, 819–21 (2016) (finding that “the time devoted to educational childcare by parents is positively related” in Mexico, Peru, Ecuador, and Colombia).

122 See BECKER, *supra* note 23, at 30–31.

123 See *id.* at 31–37.

124 See WHEELAN, *supra* note 111, at 99–100, 105–06, 111 (discussing how investment in human capital, including children, will produce higher future wealth).

125 See Manisha Shah & Bryce Millett Steinberg, *Drought of Opportunities: Contemporaneous and Long-Term Impacts of Rainfall Shocks on Human Capital*, 125 J. POL. ECON. 527, 554–55 (2017).

126 See Todd E. Elder & Darren H. Lubotsky, *Kindergarten Entrance Age and Children's Achievement: Impacts of State Policies, Family Background, and Peers*, 17–18, 21 (June 2006) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=916533.

127 *Id.* at 5, 29 (noting that this result was especially pronounced among children from upper-income families).

128 See *id.* at 4, 17–18, 21, 30 (discussing positive effects of pre-kindergarten preparation and parental schooling decisions).

129 Petter Lundborg & Kaeh Majlesi, *Intergenerational Transmission of Human Capital: Is It a One-Way Street?*, 57 J. HEALTH ECON. 206, 207 (2018).

capital apparently helps to create the skill and ability to beget future skill and ability, breaking the intergenerational poverty cycle.¹³⁰

Based on the discussion above, incentivizing parental investment in their children is an important goal in any agreement regarding custody, support and care of children. That goal can be achieved by mutual contracting with the best interests of the child in mind. Lawyers who understand how and why policy suggestions can be based on this notion can prove to be very effective in providing legal guidance to their clients individually, understanding these key principles and how and why they work, without reliance on policy.

Conclusion: Marital Contracts and their Incentives Matter

The primary objective of this material has been to demonstrate the opportunity for marriage and family contracting in the context of vast social change, to equip attorneys with tools to help stabilize and strengthen families when clients hold those goals, and to help increase attorney professional competence and skill in contract drafting to do so. This material has been offered in socio-economic context, against the backdrop of substantial economic principles that are currently at play in marriage decline that will indeed affect marriage and family law practice, if they have not already begun to do so. Lawyers who wish to understand the interplay between law and economics as that discipline affects the practice of law gain a sharper focus on better outcomes for clients, judiciousness, and foresight in marital contracting.

Our aim has been to help attorneys understand how they can work to improve the quality of legal services rendered to the public, particularly in the form of marital agreements, non-marital agreements, and their integration with issues regarding children, absent the pursuit of divorce, even in a context of marriage decline. We have outlined and set forth those solutions with individual contracting for families. Contract drafting can be more nuanced than simply dividing assets or separating individual rights. It can be a priceless tool in helping clients preserve the most important aspects of their family if their attorney is prepared to offer those alternatives. This CLE has examined the landscape of marriage and marriage contract law and offered some practical legal solutions to family stabilization and strength, if desired by clients. Its chief objective has been to improve the quality of legal services to the public. Attorneys who offer legal options in marriage decline can make a tremendous difference for their clients, one marriage or one family at a time.

130 *Id.*

APPENDIX: Sample Restoration Agreements

The following sample forms are merely examples, and shall not be relied upon as legal advice by any attorney drafting his or her own agreements, but are intended as examples and example provisions that might be useful for problem solving for clients. To learn more about the important, appropriateness and advantages of drafting restoration agreements *see Understanding and Encouraging Realistic Reconciliation in an Age of Divorce*, 32 VBA J. 8 (June/July 2006). **Identifying and specific information used in these samples is purely fictitious.*

Sample 1

RESTORATION AGREEMENT

This agreement is made and entered into to take effect on this 9th day of October, 2015, between ELIZABETH ASTON (“Elizabeth”), residing at 318 Warren Place, Newport News, Virginia, and BENJAMIN ASTON (“Benjamin”), residing at 131 Main Street, Apartment D, Newport News, Virginia.

RECITALS

WHEREAS, Elizabeth and Benjamin were married on the 14th day of February, 1993, in the city of Newport News, state of Virginia; and,

WHEREAS, unhappy differences have arisen between Elizabeth and Benjamin, in consequence of which the parties are now and have been since the 1st day of September, 2015, living separate and apart; and,

WHEREAS, Elizabeth and Benjamin have two minor children, namely, Sarah Easton, age 16, and Eli Easton, age 14; and,

WHEREAS, the parties have, to the best of their ability, fully and frankly disclosed all assets held by either or both of them to each other; and,

WHEREAS, Elizabeth and Benjamin, having the shared goal of an ultimate reconciliation and renewal of their marriage relationship, being religiously opposed to divorce, and believing that their children can best be raised as part of a family with their mother and father, wish to determine and settle their respective rights and duties arising out of the marriage relationship, and especially to provide for the care of their minor children during this period of separation.

PURPOSE AND TERMINATION

This agreement is intended to govern Elizabeth and Benjamin and to clarify their positions as they seek a renewal of their marriage relationship, and will not terminate upon reconciliation or cohabitation. In the event that reconciliation becomes impossible, the agreement will terminate upon a final decree of divorce being entered by a court of competent jurisdiction. Upon reconciliation, the parties may choose to keep the agreement in force, or may terminate it or portions of it by a writing signed by both parties.

This agreement constitutes the entire agreement between Elizabeth and Benjamin, and shall not be modified except in writing signed by both parties.

AGREEMENT

Now, therefore, for and in consideration of the mutual promises and undertakings herein contained, Elizabeth and Benjamin hereby agree as follows:

Separation and Contracting

Elizabeth and Benjamin may, until such time as they mutually agree to resume cohabitation, continue to live separate and apart from one another, and each party shall have the right to contract and be contracted with without the consent of the other. Neither Elizabeth nor Benjamin may bind the other in a contract to which that other is not a party.

Custody of Sarah and Eli

Sarah and Eli shall be in the joint legal custody of Elizabeth and Benjamin. This means that important parental decisions affecting the children's growth and development shall be made jointly whenever possible. Elizabeth and Benjamin agree to prayerfully consider the children's best interests in making these decisions. They agree regularly to advise one another on all important matters related to the children, with the goal of adopting a harmonious policy regarding the interests of the children that will continue into their reconciliation. They agree to promptly notify and to consult with each other with respect to any medical problems or illness of the children, and with respect to any educational progress, educational problems, and any change of schools or classes of the children.

During the period of reconciliation, Sarah and Eli shall have their principal residence with Elizabeth. They shall spend reasonable amounts of time with Benjamin. In particular, until such time as Elizabeth and Benjamin mutually agree to resume cohabitation, the children shall spend two weekends per month with Benjamin. The parties agree to confer from time to time in order to arrange a mutually convenient advance schedule, which shall be in writing if either parent so requests. Each parent also agrees to give prayerful, thoughtful consideration to any request from the other for a change in the schedule to deal with unanticipated situations.

In the interest of restoring the marriage relationship, to the extent possible and unless Elizabeth and Benjamin agree otherwise, the family will spend holidays and other special days together. Elizabeth and Benjamin agree that it is in the best interests of the children that both have regular and extensive contact with both parents, and that this necessitates both parents living in the state of Virginia. They therefore agree that neither will relocate outside the state of Virginia without the advice and consent of the other party.

Elizabeth and Benjamin agree that it is in the best interests of the children that they be raised according to the principles of the Christian faith. To that end, the family will continue to attend church services together at First Church Ministries, and the children will attend weekly youth group meetings.

Living Arrangements and Vehicles

Elizabeth, with Sarah and Eli, will continue to inhabit the marital residence at 318 Warren Place, Newport News, Virginia. Benjamin will continue to inhabit a separate residence, currently 131 Main Street, Apartment D, Newport News, Virginia. Benjamin agrees to continue paying the mortgage on the marital residence of \$2,200.00 per month.

Elizabeth will have the exclusive use and control of the 2008 Caravan minivan. Benjamin will have the exclusive use and control of the 2007 Ford Expedition. Benjamin agrees to continue paying the loan on the 2008 Caravan minivan of \$300/month.

Support, Maintenance, and Child Support

Benjamin, as the sole wage earner, and desiring to maintain his family in the hope of reconciliation, agrees that beginning on the 1st day of November, 2015, and continuing every month thereafter, he will pay to Elizabeth the sum of \$1,000.00 for her support and maintenance and the sum of \$1,350.00 for the support of Sarah and Eli.

Benjamin agrees to maintain the current health insurance policies on Elizabeth, Sarah, and Eli, or substantially similar policies if the current policies become unavailable.

Elizabeth agrees that, to offset the increased costs of living separate and apart, while retaining the ability to care for Sarah and Eli, she will diligently seek such employment as she is qualified to perform, and will timely inform Benjamin when she becomes employed. At such time, the amount due Elizabeth for support and maintenance will decrease to \$750.00 per month.

In the interest of retaining family unity, and to achieve the most favorable tax results, Elizabeth and Benjamin will consult together when preparing tax returns, and will file a joint return if that is in the best financial interest of the family.

If it is in the best financial interest of the family that they file separately, the amount due Elizabeth for support and maintenance will be considered spousal support, and be income to her and a deduction to Benjamin.

Bank Accounts and Payment of Loans

Elizabeth and Benjamin agree to establish separate checking accounts for their individual use until such time as they mutually agree to resume joint banking. Elizabeth, having currently no separate income, will withdraw the sum of \$2,000.00 from the parties' joint savings account, which she will place in her new checking account as a buffer against the needs of herself, Sarah, and Eli.

Elizabeth and Benjamin agree to retain the remaining \$8,000.00 in the joint savings account, and agree that neither will withdraw any portion thereof without the agreement of the other, which shall not be unreasonably withheld. Benjamin agrees to continue making at least minimum payments on the joint credit cards held by him and Elizabeth.

At such time as Elizabeth becomes employed, she agrees to match the minimum payment on the credit card with the lowest balance, in the interest of working together to reduce family debt. In the interest of openness and reconciliation, Elizabeth and Benjamin agree to promptly inform

each other in the event of an unexpected financial need, especially one related to Sarah and Eli or to the health of either party, and to render unto the other all reasonable aid in such need.

Counselling and Family Interaction

Elizabeth and Benjamin, entering into this agreement in the hope of resolving the differences between them and renewing the marriage relationship, agree to attend biweekly counselling with a licensed marriage therapist. Any charges will be paid by Benjamin until such time as Elizabeth is employed, after which they will be shared equally.

Further, twice monthly, Elizabeth and Benjamin will meet with their pastor for prayerful advice and counselling in the Word.

Beginning two weeks after this agreement is finalized, Elizabeth and Benjamin agree to meet at least once each week to eat, spend time together, and discuss the status of their relationship. In the interest of renewing and maintaining family unity, as the process of reconciliation progresses, the parties may choose to meet as a family, prepare food, and eat and spend time together with Sarah and Eli.

Severability

If a court of competent jurisdiction shall at any time hold that a portion of this agreement is invalid, the remainder shall continue in full force and effect. Elizabeth and Benjamin shall, however, negotiate a substitute provision so that each shall be in the same relative financial position he or she would have been in had the determination of invalidity not been made.

Governing Jurisdiction

Elizabeth and Benjamin intend that this agreement be interpreted and enforced under the laws of the Commonwealth of Virginia.

In witness whereof, the parties hereto have set their hands and seals this 9th day of October, 2015.

ELIZABETH ASTON (SEAL)

BENJAMIN ASTON (SEAL)

COMMONWEALTH OF VIRGINIA,
CITY OF NEWPORT NEWS, to-wit:

I, a Notary Public in and for the Commonwealth of Virginia, do hereby certify that ELIZABETH ASTON and BENJAMIN ASTON, whose names are signed to the foregoing writing dated on this 9th day of October, 2015, have acknowledged the same before me.

(SEAL)

Notary Public

SAMPLE 2

RECONCILIATION AGREEMENT AND STIPULATION IN ACCORDANCE WITH VA. CODE ANN. § 20-155 (2011).

This Agreement and Stipulation (“Agreement”) entered into by and between Mary Boyd of 303 Blackstone Ave., Virginia Beach, Virginia (“Wife”) and Mark Boyd of 131 Main St., Apt. C, Virginia Beach, Virginia (“Husband”) (collectively referred to as “the parties”) is executed, effective, and binding upon the parties as of January 1, 2011.

RECITALS

- A. Husband and Wife were married in Virginia Beach, Virginia, on February 14, 2002, and are presently married.
- B. The parties are the parents of the following children: Micah, age 6, Melissa, age 4, and Marie, age 6 months (“the Children”).
- C. In consequence of certain differences that exist between them, the parties separated in December, 2010, and have continued to live separate and apart since that date, but desire to resolve their differences, and resume their marital relationship after a short period of time living separate and apart, yet legally married, so as to reestablish trust and communication between themselves.
- D. The parties mutually understand and agree that the purpose of this Agreement is to foster reconciliation and that neither party intends, anticipates, nor desires a divorce.
- E. The parties desire to rehabilitate their marriage for themselves and for the best interests of their children.
- F. The parties agree that upon their marriage they made a commitment to God and each other to remain married for life, and that by effectuating this Agreement, the parties desire is to reconcile their differences and live their lives together, in a harmonious marital relationship.
- G. This Agreement is entered into voluntarily, without duress of coercion, for valuable consideration, after due and considered deliberation, and each party has been fully advised of the financial and personal status of the other, no representations of fact or otherwise having been made by either party to the other except as expressly set forth in this Agreement, and each party considers the terms of this Agreement to be fair and equitable and not unconscionable.
- H. The parties understand and have been advised on the law of the State of Virginia as it relates to this Agreement and believe that all of the provisions of this Agreement are lawful and enforceable. The parties are estopped from asserting any illegality or unenforceability as to any provision of this Agreement.

I. Wife is represented by Xxxx, and Husband is represented by Yyyy.

NOW, THEREFORE, in consideration of the foregoing, and of the mutual promises and agreements herein contained, and with the intent of being legally bound hereby, the parties agree as follows:

ARTICLE I. GENERAL PROVISIONS

The parties agree that the following conditions shall govern the implementation of this agreement:

1.1 Governing Law: This Agreement shall be construed and governed according to the laws of the State of Virginia.

1.2 Duration: This Agreement shall remain in place in the event of reconciliation and cohabitation unless modified or rendered null and void by a voluntary writing by both parties. Failure of a party to meet his or her obligations under this Agreement shall in no way void or alter the obligations of the parties except as provided for in this Agreement.

1.3 Parties Shall Not Enter a Contract in Name of Other Party: By execution of this Agreement, in the absence of mutual consent to the contrary, or as otherwise provided in this Agreement, Husband and Wife shall be fully and individually responsible for any and all obligations individually incurred by himself or herself from the date of the parties' separation. The parties shall not make any purchase or contract, or enter into any transaction, in the name of the other party. Each party agrees to defend, indemnify, and save the other harmless from any suit or claim asserted against him or her on account of any such debt or obligation. Husband and Wife agree that neither shall in any manner pledge the debt of the other.

1.4 Complete and Final Expression: This Agreement contains the entire understanding of the parties, and they shall not be bound by any understandings other than those expressly set forth in this Agreement.

1.5 Modification and Waiver: A modification or waiver of any of the provisions of this Agreement shall be effective only if made in a voluntary writing by both parties and executed with the same formality as this Agreement. Failure of either party to insist upon strict performance of any of the provisions of this Agreement shall not be construed as a waiver of any subsequent default of the same or similar nature.

1.6 Interpretation. No provision in this Agreement is to be interpreted for or against any party because that party or that party's legal representative drafted the provision.

ARTICLE II. RELATIONSHIP BETWEEN PARTIES

2.1 Mediation: If Husband or Wife alleges that the other violated a term or condition of this Agreement, no judicial remedy may be sought until the parties attempt to resolve the dispute with a qualified, impartial, third-party mediator.

2.2 Marital and Financial Counseling: The parties shall enter into and continue marital and family counseling with a licensed Christian counselor of their choice who is trained in marriage restoration principles. The parties shall also enter into and continue professional counseling and advisement regarding debt management.

2.3 Mutual Exclusivity of the Parties' Relationship: Husband and Wife shall not enter into any relationship with any other person not a party, male or female, including, but not limited to any type of: (1) sexual relationship, (2) emotional intimacy of the kind associated with dating or sensual emotions, (3) cohabitation, (4) dating, (5) financial support, and (6) domestic duties.

2.4 Time to Build Relationship: Husband and Wife agree to spend one day per week with each other, alone, without interruption, for a period of not less than 4 hours so as to focus on activities that build their relationship. The parties also agree to spend at least one other entire day per week together with each other and their children.

2.5 Church Attendance: Husband and Wife agree to attend church together each week with the goal of rehabilitating their relationship with each other and God, as well as fostering relationships with others who will support the reconciliation of the parties' marital relationship.

2.6 No Interference or Molestation: Except as to the parties' mutual agreement, each party shall be free from direct or indirect interference by the other in his or her personal and business activities as of the date of the execution of this Agreement. No party shall molest, disturb, trouble, or interfere with the peace of the other.

ARTICLE III. PROPERTY AND DEBT

3.0 Intent of the Parties as Indicated in this Agreement Controls: The parties have been informed of and understand the law regarding disposition of property under *Va. Code Ann.* § 20-107.3 in the event of divorce. Because the parties' desire is for reconciliation of their marriage, the parties knowingly, voluntarily, and willingly choose to allocate their property in the following manner as indicated in this Agreement. The parties do not waive any rights they may have under Virginia law.

3.1 Mortgage Payment on Real Property:

- a. **Responsibilities:** Husband, for the purpose of reestablishing trust and commitment to the marriage, as well as to permit Wife to continue her duties in the home and her status as a stay-at-home mother, shall be responsible for making the mortgage payment (\$1234.00/month) on the jointly owned marital residence located on Blackstone Ave. The parties shall retain an equal interest in the residence; however, Wife, as primary custodian of the children, shall retain the exclusive use and possession of the marital residence until the parties reconcile. Husband agrees to provide for any major repairs or maintenance of the marital residence. Wife agrees to provide for routine maintenance, cleaning, and general housekeeping.
- b. **Limitations:**

- i. The parties agree that Husband shall continue to pay the mortgage payments until complete or the property is sold upon mutual agreement of the parties.
- ii. Wife agrees that if she violates Section 2.3 of this Agreement, Husband shall be entitled to full reimbursement by Wife for all mortgage payments Husband makes from the date of execution of this Agreement. Husband agrees that if he violates Section 2.3 of this Agreement, he will not be entitled to reimbursement, even in the event Wife violates Section 2.3 of this Agreement.

3.2 Equity: The parties shall retain joint ownership of the \$40,000 equity in the marital home.

3.3 Automobiles: The parties are the joint owners of a 2004 Caravan minivan and a 1998 Chevy suburban.

- a. Responsibilities: The parties agree that it is necessary and in the best interest of the children for the 2004 Caravan minivan to remain in Wife's possession and control. Husband, as an expression of his commitment to the marriage, shall provide for the \$300 per month minivan payment. Wife shall be responsible for allocating funds from the joint checking account for fuel and minor repairs. Husband shall retain authority and control over the 1998 Chevy Suburban and be responsible for all expenses related to the vehicle.
- b. Insurance: Husband shall provide insurance for both vehicles.
- c. Limitation: The purpose of this Agreement is for reconciliation; therefore, as an incentive for reconciliation of the marital relationship, the parties agree that if they have not reconciled within six months of the effective date of this Agreement, Wife will become financially responsible for all expenses related to the Caravan minivan, including, but not limited to, the \$300 per month payment, insurance, fuel, and repairs from that date forward until reconciliation. If reconciliation occurs after six months from the effective date of this Agreement, Husband shall resume financial responsibilities related to the Caravan minivan.

3.4 Accounts:

- a. Savings Account: The parties agree that Husband shall have sole ownership, access, and control of the savings account until the parties reconcile, whereupon Wife shall then have equal ownership, access, and control of the savings account. Husband shall deposit the balance of his salary in the savings account after depositing the required amounts in the parties' joint checking account as indicated in 3.4(b). Husband shall draw money from the savings account to pay his personal expenses, including, but not limited to rent, groceries, and other necessities during the time the parties live apart. Husband, as necessity arises, shall transfer money from the savings account to the parties' joint checking account to pay the parties' credit card debt as indicated in Section 3.5(c) of this Agreement as well as other household expenses of either party.

- b. Checking Account: The parties agree that they shall have joint ownership and control over the checking account. The parties agree that the checking account shall be used to pay Wife's household expenses and Husband's household expenses. On the first day of each month, Husband shall deposit \$600 in this account as per Section 4.1 of this Agreement; \$1000 as per Section 5.2 of this Agreement; and \$250, (or more upon mutual agreement of the parties) as per Section 3.5(d) of this Agreement.
- c. Documentation: The parties agree to keep each other informed of each other's household expenses, and provide documentation to the other party if a party so requests.

3.5 Credit Card Debt:

- a. ***No New Accounts***: The parties have approximately \$10,000 in credit card debt. In an effort to reduce financial pressures on the marriage, the parties agree that reducing their debt is a mutual goal; therefore, no new credit card accounts shall be opened by either party until the current balance of each active account is paid to a zero balance. Once the parties have paid their credit card debt to a zero balance, the parties may only open a credit card account upon mutual agreement, and upon consultation with a qualified, professional financial adviser.
- b. ***Cessation of Accruing Credit Card Debt***: The parties further agree that they will no longer use the existing credit cards to make purchases of any kind. From the date of execution of this Agreement, all expenses shall be paid only from the joint checking account (or cash withdrawn from such account) as indicated in Section 3.4(b) of this Agreement.
- c. ***Husband makes payments***: Husband agrees to continue to pay the minimum amount due on the monthly credit card statement bills.
- d. ***Additional Payments Shall be Made to Reduce Debt***: The parties agree that, in an effort to reduce the strain on their marriage caused by credit card debt, at a minimum, an additional \$250 per month beyond the minimum required payment will be applied to the credit card account of the parties' choice. Husband shall deposit \$250 (or more upon mutual agreement of the parties) in the parties' joint checking account on the first day of each month for the purpose of reducing credit card debt. This amount does not change Husband's responsibility to deposit the monetary amounts into the checking account as designated in Section(s) 4.1 and 5.2 of this Agreement.

3.6 Tangible Personal Property: The parties agree, except upon mutual agreement, that all personal effects, household furniture and furnishings, and other articles of personal property currently in the marital home shall remain in the marital home for Wife's use. Husband does not waive any right or claim in any of the personal property by any provision in this Agreement.

ARTICLE IV. SPOUSAL SUPPORT

4.1 Support of Wife. Husband shall pay Wife \$600 monthly, payable on the first of each month. Such payments shall terminate upon Wife's violation of Article II, Section 2.3. The

purpose of this Agreement is to reconcile the marriage; however, in the event of divorce, the parties do not waive any claims for spousal support for themselves against the other party, now and in the future as may be applicable under *Va. Code Ann.* § 20-107.1, as amended.

4.2 Health Insurance: Husband shall maintain health insurance coverage for Wife and pay co-pays for Wife so long as Wife does not violate Article II, Section 2.3 of this Agreement.

ARTICLE V. CHILD CUSTODY, VISITATION RIGHTS, AND SUPPORT

5.1 Custody and Visitation.

- a. The parties shall have joint legal custody (as defined in *Va. Code Ann.* § 20-124.1, as amended) of the Children. The parties have been informed and understand Virginia Law regarding custody, and in consideration of the best interests of the Children, they agree that Wife shall have primary physical custody of the children and Husband shall have partial physical custody of the Children. The parties shall communicate with each other regarding decisions as to the Children's education, health, extra-curricular activities, and other matters that either party considers important. Visitation will be determined upon the mutual agreement of the parties.
- b. Each party agrees that discussions of financial concerns or other areas of marital conflict will not be conducted in the presence of the Children.
- c. Each party agrees to inform the other as to the activities, development, and any other information regarding the Children that a reasonable parent would consider important.

5.2 Family Support.

- a. For the purpose of support and maintenance of both of the minor children of the parties, Husband shall deposit into the parties' joint checking account the sum of \$1000 per month, commencing on the first day of the month after the execution of this Agreement, and each first day of each month thereafter, until written modification of this Agreement by the parties or order of any court of competent jurisdiction.
- b. Husband shall maintain, at his expense, health insurance for the benefit of the children of the parties. Any medical, hospital, dental, prescription, or other health expenses of the children not paid by health insurance shall be paid by Husband. Both parties shall fully cooperate in executing any health insurance forms in order to obtain any reimbursements to which they may be entitled pursuant to said policy.

ARTICLE VI. TAXES

6.1 Income Taxes: The parties agree to timely file joint federal and state income tax returns for the 2010 tax year. Any tax obligations owed shall be paid by Husband. Any tax refunds received shall be allocated completely to paying the parties' credit card debt. The parties agree to cooperate in executing all tax returns and necessary documents to effectuate these provisions.

ARTICLE VII. ATTORNEY'S FEES.

7.1 Attorney's Fees:

- a. Husband agrees to pay Husband's and Wife's attorney fees for the preparation of this Agreement.
- b. In the event of divorce, each party shall pay his or her own attorney's fees incurred in connection with the action for divorce.
- c. The parties further agree that in the event either party defaults under the provisions of this Agreement, the defaulting party shall be liable for all expenses incurred by the non-defaulting party in connection with the enforcement of this Agreement, including, but not limited to, all legal fees, court costs, and travel expenses.

ARTICLE VIII. ADVICE OF COUNSEL

8.1 Advice of Counsel. The parties declare that each has read and fully understands everything set forth in this Agreement; that each has obtained independent legal counsel of his or her choice and has been fully informed of all legal rights, liabilities and obligations in this Agreement under the law of the State of Virginia; that after such advice and knowledge each party believes this Agreement to be fair; and that each party signs this Agreement voluntarily.

IN WITNESS WHEREOF, this Agreement is signed and sealed on the date first stated above at Virginia Beach, Virginia.

_____ (SEAL)

Mary Boyd

_____ (SEAL)

Mark Boyd

STATE OF VIRGINIA

CITY OF VIRGINIA BEACH, to-wit:

The foregoing agreement was duly acknowledged before me on this _____ day of _____, _____, by _____.

My commission expires: _____

Notary Public

APPENDIX 2: Various Blog Posts Explicating Law & Family Restoration from
FamilyRestoration.Blogspot.com

A LAW STUDENT PERSPECTIVE: 6.19.2011

Lawyers Learning How to Facilitate Marital Reconciliation

Juile Maxey, Regent 3L, who took Family Law in the Spring of 2011, has described her experience in working on an assignment to draft a document that would serve a struggling married couple in restoring their family. She writes:

It's no secret that Americans live in a culture inundated with divorce. Even within Christianity, the divorce statistics are staggering. I fear that my generation has almost grown numb to the painful concept of divorce and we see it as just another event that will probably occur in most people's lives. As future attorneys, we are faced with the enormous issue – Can we turn the tide of divorce in our nation? And if so, how can it be done?

It is a reality to me that men and women will step into my office one day and want out of their marriages for one reason or another. In Professor Kohm's Family Law course, we have been exposed to tools that will enable us, as Christian attorneys, to chisel away at the monster of divorce. One such tool is the reconciliation agreement each student drafted for the course. The reconciliation agreement is similar to a typical separation agreement with one glaring difference – the focus of the agreement is to see the married couple reconcile their issues rather than cut their losses and get out of the marriage. I've never known a person to enter into a marriage hoping it ends in separation and divorce. When two people get married, there is hope that the union will last until death parts them. The reconciliation agreement is about restoring the hope that was a foundational element of the marriage in the first place.

To some, this may seem too idealistic. I would wholeheartedly and happily disagree with that person for several reasons.

First, the reconciliation agreement is a valuable learning tool in a Family Law course. Being that the main difference between the reconciliation agreement and a separation agreement is the end goal; the rest of the document is largely the same. It covers the same issues and the documents are drafted in the same way. So, not only do the students understand how

to draft the reconciliation agreement but also, a typical separation agreement...two birds with one stone.

Additionally, we cannot continue to use the same legal tools and public policy we have been using and expect to see different results in separations and divorces. The reconciliation agreement offers a relatively new approach to remedy a crumbling marriage. During my (short) life, I have witnessed the trend in America - for thousands of couples, the only remedy that made sense to a hurting marriage was to separate and divorce. The reconciliation agreement lets hurting couples know that there is another alternative; a much less messy and destructive alternative. Although the reconciliation agreement seems like the underdog in the fight against divorce, even just a handful of saved marriages would be a giant victory against the enormous beast divorce has become.

Finally, no matter a person's religious beliefs, divorce is never a sought experience. But as a Christian, I believe marriage is a sacred institution given to man by God and it is something we should fight to protect. The reconciliation agreement is a way to unapologetically promote staying together and working out issues in a marriage instead of throwing in the towel. I believe Christian lawyers have something very unique to offer clients outside of legal expertise - Hope. I'm not saying Christian lawyers should try to have a prayer meeting and baptize every client that walks in the door. But I do believe that we should fashion relationships with clients that present a message of hope for their future rather than a message of revenge, anger, greed, or bitterness. I don't pretend to think this is always easy to achieve but I do believe that using a tool such as the reconciliation agreement brings clients one step closer to grasping the hope that we have in Christ.

Drafting the reconciliation agreement in Family Law was a valuable experience. Not only do I feel better equipped and prepared to meet the needs of future clients, but, I know that promoting a reconciliation agreement will be an important tool to chip away at the monster of divorce in our nation.

8.23.2011

Family Restoration and Law School Best Practices

Practical application and professional identity formation, though recommended by the 2007 Carnegie Report as part of a law school's best practices, is something that most attorneys do not begin to learn until they are in the practice of law. Here at Regent University School of Law students have been learning both these things for quite some time. Since 1997 students in Family Law have been practically applying what they are learning in class in several ways, and that practice has been simultaneously forming their professional identity.

Each student is presented with the assignment of drafting a Reconciliation Agreement for a simulated client involved in a troubled marriage. The client has lost trust in his or her spouse, but does not want to rush to divorce as three small children are involved. Understanding that their futures are at stake as well, this client requests an attorney who can work with him or her to provide legal remedies to foster family restoration. More on how this is appropriate and important in law school, and to attorneys in general can be found

at <http://www.regentfamilyrestoration.blogspot.com/search?q=Reconciliation>. As students work through this simulation, they examine their own objectives in the practice of law, and form convictions on how law should be practiced, particularly regarding families. Their professional identity is often largely formed and informed by this assignment. An article has also been published describing this process for attorneys in the Virginia Bar Association Journal at

Understanding and Encouraging Realistic Reconciliation in an Age of Divorce, 32 VBA J. 8 (June/July 2006).

Furthermore, each semester students in Family law must prepare a statutory compilation of state family law regulations, preferably for the jurisdiction in which the student plans to practice law. This assignment alongside the Reconciliation Agreement assignment often surprises students that their own state code does not foster family breakdown, as they may have heard, but actually seeks to find ways to stabilize and strengthen families. More on how this affects the students can be found at <http://regentfamilyrestoration.blogspot.com/2010/01/state-family-codes-can-restore-families.html>.

Students are able to learn, form their own convictions, and then demonstrate how to analyze and assess both the nature and the regulation of marriage, family, divorce, and parenting from a restorative perspective by the end of this course. Being informed by biblical principles throughout the course adds depth to the students' own personal practice of law from an ethical, moral and formative standpoint. As a result, students grow as people and future lawyers by demonstrating an ability to

accurately apply legal and biblical principles to actual problem settings. In this context, students demonstrate how to learn and evaluate contemporary rules, assumptions and trends in family law in light of biblical principles and standards, and put them into practice in law by the completion of this course.

Carnegie's suggestions for practical application and professional identity formation have been a part of the Family Law curriculum at Regent University for quite some time, and as a result the public is better served by knowledgeable attorneys with a holistic perspective who can actually help them legally and make their lives better because of their practice of law.

11.18.2008

Training Lawyers in Marital Reconciliation to Restore Lost Spousal Trust

Students in Regent's Family Law course each semester are given an assignment:

Draft a marital agreement that will assist your client in averting divorce, allowing this agreement to remain in full force and effect even in the event of reconciliation, and reflecting the sentiments of the clients to do all they can to reconcile their marriage based on their faith and understanding that they made a lifetime commitment to each other, and now to their children.

Here's one student's response to the assignment:

I am doing great with Family Law and am up to date. I really enjoy your class ... Admittedly, I have come to the conclusion that marriage is beyond a contract, and this Reconciliation Agreement (which mirrors a separation agreement, and a pre-nuptial agreement) was very sobering for me to do. It made me as a single realize that I had taken marriage too lightly...it is indeed a covenant. I believe that every single person should draft something like this before getting married. Thank you for this life exercise!

In addition to your readings, I bought a book two days ago by Candice Watters, a former Regent grad called GET MARRIED: WHAT WOMEN CAN DO TO HELP IT HAPPEN. It really ties in a lot that is in the class. She founded www.Boundless.org, a webzine for young adults for Focus on the Family before venturing into full-time motherhood. Before transferring to Regent, I read her column when I felt lonely and isolated from Christians at my former law school. Little did I know I would be blessed to attend her school! I hope I can meet her and Randy Singer (who I read his books after going to a CLS retreat 1L year but have

never met.) I highly recommend this book to married couples that mentor singles, your daughter, and singles. I incorporated many of the ideas from her book into my Reconciliation Agreement.

In preparing this assignment, students experience both professional and personal growth, as they learn basics of a law practice that can actually minister and spiritually support their clients - while helping them to personally make good decisions as well.

It is truly a privilege to be involved in training lawyers to restore families.

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A Professional Restorative Approach Improves Outcomes for Families in Crisis

Attorneys and Counselors alike who wish to center their work on family restoration often find a great void of resources. This blog has offered some including articles on reconciliation, and training attorneys in the art and skill of marital reconciliation, but this is only a beginning. Improving outcomes for families in crisis is a significant goal for many family advocates.



The Freedom 22 Foundation is an important organization that offers considerable resources for like-minded professionals. While they believe that preserving the opportunity for safe marriages to be restored is part of their agenda, they also recognize that many marriages will end and that many children will be born to unwed parents, and sense a parallel responsibility to show parents that they must in all circumstances build peace and cooperation.

Consider some of their initiatives:

1. UpToParents.org and ProudToParent.org helps parents in divorce and paternity cases to build good co-parenting partnerships (see [Sample](#) for an example of parents' finished work from UpToParents.org).
2. Consulting with courts, bar associations, and other professional groups to build comprehensively cooperative systems of family law that support safety, reduce conflict, build cooperation, and protect the children and healthy relationships in families.

3. WhileWeHeal.org and NoDivorceToday.org helps separated spouses focus on their mutual interests, respond constructively to their children's needs, and preserve their opportunity to restore their marriage in the future should they choose to do so.

Their work introduces these resources and explains how they can be implemented by courts, attorneys, mediators, co-parenting educators, and other family professionals to the substantial benefit of families.

Professionals are encouraged to sign up at UpToParents.org as hypothetical parents in divorce. Just a few minutes sampling the workings of the website can convey the power to focus parents' attention on their children and the future instead of grievances and the past. Furthermore, the "Professionals Corner" link of UpToParents.org includes short articles on the easy and effective use of these websites in a variety of settings. Here are some examples:

1. For early use in all divorce and paternity cases, click [HERE](#).
2. As parents' preparation for mediation, click [HERE](#).
3. Collaborative attorneys' use of the websites, click [HERE](#).
4. Collaborative divorce coaches' use of the websites, click [HERE](#).
5. GALs' and other evaluators' use of the websites, click [HERE](#).

Also offered are concepts toward comprehensively cooperative systems of family law to improve the current state systems of family law dispute resolution. Appreciable improvement in outcomes for families in crisis will require improvement in America's family law systems. To that end, Freedom 22 has developed and consulted widely on a plan for this improvement. More information on this plan and the helpful impact it is having in several jurisdictions is available at the article [A Brief Introduction to a Cooperative System of Family Law](#) (with a linked video) available on the "Professionals Corner" link of UpToParents.org. Professionals are also encouraged to download, complete, and even share with us the [Survey of Family Law Systems](#) also available on that "Professionals Corner." We are presently working on a new website where family professionals will be able to assess their family law systems and receive feedback on possible areas of progress.

Most importantly, these resources emphasize that there are alternatives to divorce. Several authorities, including Dr. Robert E. Emery in *Renegotiating Family Relationships*, have written about the considerable number of parents in divorce cases who say that they actually would prefer not to divorce. While spouses resisting an inevitable divorce present important legal, counseling, and mediation challenges, we also think it is also important to assist separated spouses (or spouses who are about to separate) interested in pursuing a safe reconciliation.

Building on the work of Lee Raffel in *Should I Stay or Go?: How Controlled Separation Can Save Your Marriage*, Freedom 22 has created WhileWeHeal.org and NoDivorceToday.org to help spouses, especially those with children, to focus on making their separations as constructive as possible and doing no damage to any future wish to reconcile.

These websites address a common problem in these cases, namely that most separations are not supported by the clear thinking and careful planning necessary to meet the needs of either children or parents. These websites give parents the chance to see and address the array of typically overlooked separation tasks. With this help, spouses can find it easier to collaboratively create what is called a **"No-Divorce-Today Separation Agreement,"** something that can serve as a foundation either to a successful reconciliation or to a more peaceful, cooperative, and child-focused divorce.

While several progressive judges, attorneys, and co-parenting educators have become interested in this protocol, it can be of special interest to mediators and counselors wishing to develop a subspecialty in constructive separations and assistance to couples wishing to rethink divorce.

Interested professionals are encouraged to visit NoDivorceToday.org for a fuller understanding of these possibilities. Freedom 22 Foundation has undertaken other projects, including writing, presenting, and sharing with other professionals about good co-parenting classes, conducting and instructing on family mediation, and consulting widely on the specifics of good family law systems. Judges, bench and bar associations, mediators, co-parenting educators, and others are invited to contact the Freedom 22 Foundation to share ideas on implementing the use of these resources. Family restoration is possible, and professionals can be a major part of that process.

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State Family Codes Can Restore Families

Each semester when I teach Family Law students are assigned to research and compile their chosen state jurisdiction's statutory family law code. This fall several students were pleasantly surprised to find that their state codes reflected a desire to not only stabilize families but to restore family relationship whenever possible. For example California students discovered that their state code requires family conciliation efforts when divorce is sought. Matt Roach, Grace del Rosario and Ian Martin were all pleasantly surprised by this fact, and encouraged for the future practice of family law.

Nathan McGrath plans to return to Pennsylvania, and made some specific comments about the policies embodied in his state's family law code. Read some of his thoughts:

"I thought that this policy language (and the fact that they specifically label it "policy") at the begging of the divorce section in the PA code was interesting. I must have missed it my first time through. Probably because I was looking for specific provisions and wasn't perusing the code as I was tonight. In any case, I found 3102(a)(2) very interesting and encouraging. PA seems to really want reconciliation of the family, and must recognize—as we have talked about in class—that the best environment for raising the children is having both natural parents together. ..."

PA Code sec. 3102(a)(2):

(a) Policy.--The family is the basic unit in society and the protection and preservation of the family is of paramount public concern. Therefore, it is the policy of the Commonwealth to:

(1) Make the law for legal dissolution of marriage effective for dealing with the realities of matrimonial experience.

(2) Encourage and effect reconciliation and settlement of differences between spouses, especially where children are involved.

(3) Give primary consideration to the welfare of the family rather than the vindication of private rights or the punishment of matrimonial wrongs.

(4) Mitigate the harm to the spouses and their children caused by the legal dissolution of the marriage.

(5) Seek causes rather than symptoms of family disintegration and cooperate with and utilize the resources available to deal with family problems.

(6) Effectuate economic justice between parties who are divorced or separated and grant or withhold alimony according to the actual need and ability to pay of the parties and insure a fair and just determination and settlement of their property rights.

(b) Construction of part.--The objectives set forth in subsection (a) shall be considered in construing provisions of this part and shall be regarded as expressing the legislative intent.

State family codes can indeed work to restore families, and so can the attorneys who work with that state code to serve their clients in family law matters, from "mitigating harm," to "encouraging and effecting reconciliation" in the family.

Strengthen Marriage with an Express Agreement



Marriage is the beginning of a new entity where two people unite their lives together for a common purpose. That adventure, however, can get challenging, and the will to continue can weaken, but an oath and an agreement can make all the difference.

Integrating the concept of an express written agreement under the authority of state code or faith governance can be very effective. A group called [Mary's Advocates](#) is working to do just that through the [True Marriage Proclamation](#).

This Proclamation is much like a covenant marriage statute adopted in Arkansas, Louisiana, and Arizona - see [A Comparative Survey of Covenant Marriage Proposals in the United States](#), 12 REGENT LAW REVIEW 31 (1999) – where an Oath combined with a particular set of rules that the parties agree to that encourage and require counseling and consideration support the parties to a marriage with their own pact. [The True Marriage Proclamation](#) endorses lifetime vows.

When couples create and sign an oath of their marriage vows with the [True Marriage Proclamation](#) they are choosing publicly to connect norms of their self-determined obligations in being Catholic when contracting marriage, with principles of civil law for enforcing contracts, upholding rights of religious freedom, due process, and fundamental liberties, all of which are required by law to be afforded strict scrutiny and protection under our Constitution. The language in the [True Marriage Proclamation](#) not only

endorses this, but empowers third party accountability for the parties, settling and endowing these rights and duties upon the married couple by outright ownership of those rights and duties, while allowing that couple to each celebrate the wonderful gift of a spouse, the new adventure of their marriage, and their explicit understanding of how it all changes life forever. [Mary's Advocates](#) also provide a slightly different version for those who marry in any Christian tradition and want to name God's Word, the Bible, as their authoritative text and the Institute for Christian Conciliation as their arbitrators.

While the concept of a legal agreement has been discussed on this BLog in the context of marital reconciliation in [Understanding and Encouraging Realistic Reconciliation in an Age of Divorce](#), 32 VBA J. 8 (June/July 2006), the Proclamation does so before and during marriage of couples who want to make their intentions absolutely explicit. Strengthening marriage with an express agreement is a great idea.