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Band-Aid Solutions: New York's Piecemeal Attempt to Address Legal Issues Created by DOMA in Conjunction with Advances in Surrogacy

James Healy*

I. Introduction

In California, in July of 2009, Cat Cora, a renowned celebrity chef, gave birth to a son as a result of an implanted embryo.¹ The embryo was the product of an in vitro fertilized egg and sperm. Both the egg and the sperm were donated.² Due to the advances of assisted reproductive technology (ART), this type of pregnancy and birth is not at all uncommon; through 2006, nearly five hundred thousand babies have been born using such ART.³ Ms. Cora's situation, however, was a little more complex because the egg donor was her domestic partner, Jennifer Cora. The two women had been together for over ten years, and Jennifer had already given birth to three other children, also through in vitro fertilization. Indeed, Jennifer had given birth to her third child only a few months earlier and the embryo was one of two fertilized eggs, one having been donated

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1. Desiree Fawn, *Cat Cora Welcomes Baby Boy Nash!*, CELEBRITY BABYSCOOP (July 23, 2009), <http://www.celebritybabyscoop.com/2009/07/23/cat-cora-welcomes-baby-boy-nash>.

2. *Iron Chef Cat Cora and Her Lesbian Partner Both Pregnant*, FOX NEWS (Mar. 10, 2009), <http://www.foxnews.com/entertainment/2009/03/10/iron-chef-cat-cora-lesbian-partner-pregnant/>.

3. *Frequently Asked Questions About Infertility*, AM. SOC'Y FOR REPROD. MED., <http://www.asrm.org/awards/index.aspx?id=3012> (last visited Jan. 11, 2010).

by Cat. Although the couple will not DNA-test to determine which embryo produced the child, all four children are the genetic offspring of the same sperm donor.⁴

If the happy family chooses to remain in California, their legal family status will be impacted by several laws and judicial holdings. Currently, the status of same-sex marriage in California is indeterminate,⁵ but the law does provide that registered domestic partners shall have the same rights as married spouses, including with respect to a child of the partnership.⁶ The California Supreme Court acknowledged that legal motherhood can be a factor of either genetics or giving

4. *Iron Chef Cat Cora and Wife Both Pregnant*, HUFFINGTON POST (Mar. 9, 2009), http://www.huffingtonpost.com/2009/03/09/iron-chef-cat-cora-and-wi_n_173283.html.

5. Same-sex marriage has undergone a turbulent history in California. In 2004, the mayor of San Francisco began offering marriage licenses to same-sex couples despite the 2000 law, which limited marriage to one man and one woman. CAL. FAM. CODE § 308.5 (West 2004). The Supreme Court of California ordered the city to stop issuing the marriage licenses. Clay Rehg, *California Bans Gay Marriage by Simple Majority Vote*, 14 PUB. INT. L. REP. 152, 152 (2009). In May of 2008, the Supreme Court of California struck down the law as unconstitutional and effectively granted same-sex couples the right to marry. *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008). For the next five months 18,000 same-sex couples were married in California. In November of that year Proposition 8, a constitutional amendment prohibiting same-sex couples from marrying, passed by a popular vote, once again banning same-sex marriage. See Rehg, *supra* at 153. In June of 2009, the California Supreme Court held that Proposition 8 did not violate the California Constitution, and, therefore, same-sex couples could not legally marry in the state. *Strauss v. Horton*, 207 P.3d 48, 60 (Cal. 2009). Proposition 8 was then challenged in Federal Court, and in August of 2010, Judge Vaughn R. Walker held that Proposition 8 violated both the due process and equal protection clauses of the Constitution. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010). The Ninth Circuit then granted a stay of Judge Walker's order pending an expedited appeal. *Perry v. Schwarzenegger*, No. 10-16696, 2010 WL 3212786, at *1 (9th Cir. Aug. 16, 2010). This issue has become even more complicated in that the California Governors (Schwarzenegger and Brown) have chosen not to appeal the decision. See Carol J. Williams, *Judges Ask for Court's Help on Prop. 8: Panel Seeks Input on the Right of Private Groups to Defend the Ban on Gay Marriage*, L.A. TIMES, Jan. 5, 2011, at AA1. The case was then appealed by the political groups that placed the initiative on the ballot. It is unclear, however, if those groups will be determined to have standing in the case. *Id.* Although it seems inevitable that the Supreme Court will address, and ultimately resolve, the same-sex marriage issue, the procedural snag in this instance may delay that decision longer than expected.

6. CAL. FAM. CODE § 297.5(d) (West 2010).

birth,⁷ and further addressed, in 2005, the specific situation in which one lesbian domestic partner donates an egg for the other to carry with the intention that the baby will be the child of both.⁸ Ultimately, the court in *K.M. v. E.G.* held that a child could legally have two parents who are both women.⁹ The critical factor the court considered was the intention of the two women to act as parents together.¹⁰

California has adopted the Uniform Parentage Act (UPA), which, among other things, determines the legal father of a child conceived through ART. The model statute provided that, when a married woman used donated sperm to give birth, her husband, assuming he had consented to the procedure, is the legal father.¹¹ The sperm donor is presumed to have lost his

7. *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993). A married couple entered into a contract with another woman to carry the embryo of the husband and wife and relinquish the baby after birth. The surrogate mother and the genetic mother both filed suits, prior to birth, to be declared “the mother.” *Id.* at 778. The court acknowledged that, although both women presented acceptable proof of maternity, under (then current) California law the child could only have one mother. *Id.* at 781-82. It ultimately found in favor of the genetic—rather than the surrogate—basing its decision on the original intent of the parties. *Id.* at 787.

8. *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005).

9. *Id.* at 681.

10. *Id.* In this case the court had to deal with the intersection of the Uniform Parentage Act, adopted into the California Family Code, designed to protect and define the non-parental relationship of an anonymous sperm donor in an ART assisted pregnancy, which states:

If, under the supervision of a licensed physician and surgeon and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband’s consent must be in writing and signed by him and his wife.

CAL. FAM. CODE § 7613(a) (West 2010). For a situation where, in the same clinical setting, a woman donates an egg in an ART assisted pregnancy with intention that she will be a co-parent to the child, see *K.M.*, 117 P.3d at 681.

11. UNIF. PARENTAGE ACT (amended 2002), *available at* <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/upa7390.htm> (“The donor of semen provided to a licensed physician for use in artificial insemination of a *married* woman other than the donor’s wife is treated in law as if he were not the natural father of a child thereby conceived.” (emphasis added)).

claim to parentage.¹² In adopting the UPA, the California Legislature made an important modification to the model statute. The legislature removed the word “married” to allow single women to obtain donated sperm without the donor incurring parentage and the resultant responsibility and liability.¹³

Furthermore, California allows second parent adoption, the process permitting a same-sex partner to establish a legal parent-child relationship with a non-birth, non-genetic, child through an adoption that does not terminate the legal status of the original parent.¹⁴

So if Cat, Jennifer, and the four children remain in California, their domestic harmony should not be much in doubt. Under statutory law,¹⁵ and the decision in *K.M. v. E.G.*,¹⁶ their status as parents should not be questioned. The sperm donor will not be able to assert any parental rights,¹⁷ and, to be 100 percent certain, they could perform a second parent adoption—although who would be adopting whom is a question to be answered later in the discussion. What if, however, the family chose to re-locate? What if, hypothetically, they began to move around the country looking for a new state to put down roots?

This Article will highlight the legal cross-purposes created by the inconsistent laws and policies of the several states with respect to same-sex marriage, adoption, and custody, and then will focus in more detail on how this inconsistency is manifest in New York State specifically. It will point out how the increasing use of ART, in particular gestational surrogacy, creates an increasing tension between inconsistent legislative, executive and judicial actions. In the end, it is likely that the legal

12. *Id.*

13. “The donor of semen provided to a licensed physician and surgeon or to a licensed sperm bank for use in artificial insemination or in vitro fertilization of a *woman* other than the donor’s wife is treated in law as if he were not the natural father of a child thereby conceived.” CAL. FAM. CODE § 7613(b) (emphasis added).

14. *Sharon S. v. Superior Ct.*, 73 P.3d 554 (Cal. 2003).

15. CAL. FAM. CODE § 297.5(d).

16. 117 P.3d 673, 681 (Cal. 2005).

17. CAL. FAM. CODE § 7613(b).

quandaries created can only be resolved by a constitutional declaration.

II. Overview of the National Conflict of Same-Sex Marriage, Adoption and Custody

If Jennifer and Cat's first stop was Oklahoma, they may be surprised to find that not only does that state restrict marriage to a man and a woman,¹⁸ but it also does not recognize any same-sex partnership.¹⁹ Although in California the Coras, through their domestic partnership, would be given the same rights as married couples, particularly regarding their children, in Oklahoma they would be considered legal strangers in all aspects.

As of late 2010, states have taken a number of different approaches to same-sex marriage. Five states and the District of Columbia allow same-sex couples to legally marry,²⁰ eight states allow for some form of domestic partnership or civil union, and the rest have laws or constitutional provisions restricting marriage to heterosexual couples.²¹ States' different approaches to marriage regulation are not, by themselves, unusual. What makes them problematic, however, is how the federal government and, by legal extension the states, have chosen to contend with these differences.

The Constitution states that, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial

18. See OKLA. CONST. art. II, § 35(A) (2010) ("Marriage in this state shall consist only of the union of one man and one woman.").

19. See 43 OKLA. ST. ANN. § 3.1 (West 2010) ("A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage.").

20. As of the writing of this article, Connecticut, Iowa, Massachusetts, New Hampshire and Vermont allow same-sex marriage. See NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/IssuesResearch/HumanServices/SameSexMarriage/tabid/16430/Default.aspx> (last updated Sept. 2010). The status of same-sex marriage in California is still uncertain. See *supra* text accompanying note 5.

21. California, Hawaii, Maine, Nevada, New Jersey, Oregon, Washington and Wisconsin all allow for some legal recognition of same-sex relationships. The law is, however, particularly mutable in this area. *Id.*

Proceedings of every other State.”²² Traditionally, with respect to marriage, this constitutional clause required each state to recognize a marriage legally entered into in another state.²³ In 1996, however, Congress passed the Defense of Marriage Act (DOMA), which barred the federal government from recognizing same-sex marriage and permitting states to do so as well.²⁴ Given this permission, thirty-nine states adopted some statutory version of the DOMA.²⁵ As a consequence, some states recognize same-sex marriages from other states,²⁶ some states grant some recognition to domestic partnerships or civil unions from other states,²⁷ and others, like Oklahoma, will not legally recognize any same-sex relationship from any state.²⁸

Since Oklahoma’s law would seriously call into question the legal nature of the Coras’ relationship and the certainty with which they both could be legal parents to their children, it is likely that they would try to find their new home in another state. If, instead, they went to Michigan, they would find a prohibition against joint adoption by same-sex couples.²⁹ State law for same-sex adoption is even less consistent than for same-sex marriage. Fifteen states and the District of Columbia allow same-sex couples to adopt jointly.³⁰ Five states prohibit same-

22. U.S. CONST. art. IV, § 1.

23. The Supreme Court clearly defined marriage with respect to the full faith and credit clause in *Loughran v. Loughran*, 292 U.S. 216, 223 (1934) (“Marriages not polygamous or incestuous, or otherwise declared void by statute, will, if valid by the law of the state where entered into, be recognized as valid in every other jurisdiction.”).

24. 28 U.S.C. § 1738C (2006).

25. See NAT’L CONF. OF ST. LEGISLATURES, *supra* note 20.

26. See, e.g., CAL. FAM. CODE § 308(a)-(c) (West 2010).

27. See, e.g., N.J. STAT. ANN. § 37:1-34 (West 2010).

28. See 43 OKLA. ST. ANN. § 3.1 (West 2010).

29. It is both telling and ironic that, although it is widely understood that Michigan does not allow same-sex couples to jointly adopt, there is no statute or appellate court decision explicitly stating this. The basis for the prohibition is a 2004 statement by the attorney general of the state and the overall conservative nature of the Michigan courts. See Amanda Ruggeri, *Emerging Gay Adoption Fight Shares Battle Lines of Same-Sex Marriage Debate*, U.S. NEWS & WORLD REP., Oct. 31, 2008, available at <http://www.usnews.com/articles/news/national/2008/10/31/emerging-gay-adoption-fight-shares-battle-lines-of-same-sex-marriage-debate.html>.

30. As with same-sex marriage, the law on adoption is often in flux. As of

sex couples from jointly adopting,³¹ either through specific language in a statute,³² court decisions interpreting somewhat ambiguous adoption law,³³ or a prohibition against any unmarried couples adopting. Since these states do not sanction same-sex marriage, they effectively deny those couples the ability to jointly adopt.³⁴ Most other states are unclear about whether, as a matter of law, same-sex couples can jointly adopt. The statutes are ambiguous in that they do not explicitly prohibit the practice and often the courts have not ruled definitively.³⁵

If a state does not specifically allow same-sex couples to adopt, and the state does not allow for same-sex marriage, then the right of joint custody or visitation would depend on the local court's determination. As recently as 2007, appellate courts in only twenty states addressed the issue of whether same-sex, non-genetic, partners have some form of parental custody or visitations rights.³⁶ Those courts used a wide range of standards

the beginning of 2010, California, Colorado, Connecticut, District of Columbia, Illinois, Indiana, Iowa, Maine, Massachusetts, New Jersey, New York, Oregon, Vermont, Washington and Wisconsin are the states that allow joint adoption by same-sex couples. See HUM. RTS. CAMPAIGN, http://www.hrc.org/issues/parenting/adoptions/adoption_laws.asp (last visited Jan. 9, 2011). Yet, in Florida, a state traditionally showing antipathy toward same-sex couples, a state court of appeal held that the ban on same-sex adoption was a violation of the Florida Constitution. See Fla. Dep't of Children & Families v. Adoption of X.X.G., 45 So. 3d 79, 92 (Fla. Dist. Ct. App. 2010). Further, the governor and attorney general chose not to appeal the decision, thus ending a thirty-three year ban on same-sex adoption. See Mary Ellen Klas, *Gay Adoption Fight Over*, ST. PETERSBURG TIMES, Oct. 23, 2010, at 1B.

31. States hostile to same-sex couples adopting are Arkansas, Michigan, Mississippi, Ohio, and Utah. See HUM. RTS. CAMPAIGN, *supra* note 30.

32. See, e.g., MISS. CODE ANN. § 93-17-3(5) (West 2009) ("Adoption by couples of the same gender is prohibited.").

33. HUM. RTS. CAMPAIGN, *supra* note 30.

34. Note how the two laws in North Carolina work to deny same-sex joint adoption. N.C. GEN. STAT. ANN. § 48-2-301(c) (West 2009) ("If the individual who files the petition is unmarried, no other individual may join in the petition . . ."); N.C. GEN. STAT. ANN. § 51-1 ("A valid and sufficient marriage is created by the consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely . . .").

35. See, e.g., Katherine M. Swift, *Parenting Agreements, the Potential Power of Contract, and the Limits of Family Law*, 34 FLA. ST. U. L. REV. 913, 950-52 (2007).

36. See Deborah H. Wald, *The Parentage Puzzle: The Interplay Between*

to determine those partners' rights.³⁷ This situation is further complicated by sometimes conflicting federal laws.

By the mid 1980s, every state had adopted the Uniform Child Custody Jurisdiction Act (UCCJA).³⁸ This statute intended to, among other things, provide for the equivalent of full faith and credit to out-of-state child custody orders.³⁹ Significantly, the Act also states that one state cannot make a custody determination if there is a pending custody issue in the court of another state.⁴⁰ This, however, can be in opposition to DOMA, which allows states to refuse to recognize same-sex marriage or legal relationships. An example of this incompatibility was litigated over the span of five years and across two states in the case of *Miller v. Jenkins*.⁴¹ A lesbian couple from Virginia, which does not offer or recognize same-sex marriage or civil union, traveled to Vermont to enter into a civil union.⁴² After having an ART-assisted child, the couple

Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage, 15 AM. U. J. GENDER SOC. POL'Y & L. 379, 393 (2007).

37. For example, Wisconsin uses a four prong test to measure whether a non-biological mother should be granted custody. *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 421 (Wis. 1995) (examining whether 1) biological parent consented to and/or fostered relationship, 2) petitioning parent lived in same house, 3) petitioner took responsibility for child's care, education and development, and 4) there was a sufficient length of time to create a bond). In New Jersey, the court used the Wisconsin test to determine if the woman seeking custody has acted as a "psychological parent." *V.C. v. M.J.B.*, 748 A.2d 539, 555 (N.J. 2000). On the other end of the spectrum, however, is Ohio where a court has ruled that parentage (and the right to custody) should be determined by strict genetics. *Belisto v. Clark*, 644 N.E.2d 760, 767 (Ohio Ct. C.P. 1994). It should be noted that, in the time since this decision, the court has acknowledged that this approach may be out of step with use of ART by same-sex partners. *See generally Nemcek v. Paskey*, 849 N.E.2d 108 (Ohio Ct. C.P. 2006).

38. Courtney G. Joslin, *Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond*, 70 OHIO ST. L.J. 563, 576 (2009).

39. *Id.*

40. *Id.*

41. *Miller-Jenkins v. Miller-Jenkins*, No. 2007-271, 2008 WL 2811218 (Vt. Mar. 14, 2008); *Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2d 822 (Va. 2008). For a complete history of this case, see Joslin, *supra* note 38, at 564, 583-86.

42. *See Joslin, supra* note 38, at 564.

established permanent residence in Vermont.⁴³ Subsequently, when their relationship ended, the Vermont court made a temporary custody determination. One of the women decided that she did not want the other to have any contact with the child and so moved back to Virginia and filed an action requesting full custody and sole legal parenthood.⁴⁴ The Virginia lower court determined that it was not bound to recognize the Vermont determination, which was based on the civil union entered into in Vermont, because Virginia's DOMA rendered that union null and void. Simply, the court determined that DOMA, allowing no faith and credit, trumped UCCJA, which called for full faith and credit.⁴⁵ The conflict occupied the courts of Vermont and Virginia from 2003 to 2008. Ultimately, the supreme courts of both states held that the original Vermont custody order was valid,⁴⁶ although it took almost one-third of the baby's childhood to get this binding, final determination.

As Michigan might not seem too friendly to the Coras' ART family, they may decide that the best course of action is to perform a second parent adoption, which they may have found unnecessary in California. For that purpose, they may travel south into Ohio. Unfortunately for the Coras, however, they would find that an Ohio court has held that second parent adoption is not allowed without the termination of the rights of the biological parent.⁴⁷

Second parent adoption restriction seems to correspond roughly in states that appear to have open antipathy to same-sex relationships. Three states have laws banning lesbian or gay

43. *Id.* at 583.

44. *Id.* at 584.

45. In point of fact, the Virginia court, alluded to in the appellate court ruling, referred to the Parental Kidnapping Prevention Act ("PKPA") rather than the Uniform Child Custody Jurisdiction Act ("UCCJA"). See *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 332 (Va. Ct. App. 2006). The PKPA has a similar full faith and credit recognition intention as the UCCJA on interstate custody and visitation orders. 28 U.S.C. § 1738A (2006).

46. *Miller-Jenkins*, 2008 WL 2811218, at *1; *Miller-Jenkins*, 661 S.E.2d at 822.

47. *In re Adoption of Jane Doe*, 719 N.E.2d 1071, 1073 (Ohio Ct. App. 1998) ("Based upon the clear meaning of R.C. 3107.15(A), we find that the trial court did not err in finding that the biological mother's parental rights would terminate upon adoption of the child by appellant, a non-stepparent.").

individuals outright from adopting the children of their partners, and the courts of three other states have determined that second parent adoption is not permissible.⁴⁸ Six of the seven states also ban same-sex marriage or partnerships and do not permit same-sex couples to adopt children jointly.⁴⁹ Conversely, thirteen states allow second parent adoption either by statute or by a ruling of an appellate court.⁵⁰ The majority of states, however, have neither explicitly prohibited the practice, nor do they have any court decisions ruling one way or another regarding the practice.⁵¹

Flustered, frustrated, and perhaps missing the warm weather of California, the family might travel to Florida, looking to establish legal rights and residence. Their stay in Florida, though, would be brief. While California afforded them the right to enter into a domestic partnership, which would confer all the same rights as married couples enjoy, Florida bars same-sex couples, by statute and constitutional provision, not only from marrying but also from entering into civil unions or legal domestic partnerships.⁵² Furthermore, Florida refuses to

48. Arkansas, Mississippi, and Utah have statutes prohibiting gays or lesbians from second parent adoptions. Nebraska, Ohio and Wisconsin have had second parent adoption restricted by appellate court decision. Joslin, *supra* note 38, at 578-79.

49. *Id.* (Arkansas, Mississippi, Utah, Ohio, and Wisconsin are consistent with their lack of same-sex recognition for marriage, joint adoption and second parent adoption). Nebraska most probably should be included in this group, but in *In re Adoption of Luke*, 640 N.W.2d 374 (Neb. 2002), the court, in ruling against second parent adoption, also stated:

[t]he county court also stated that Nebraska's adoption statutes do not provide for 'two non-married persons to adopt a minor child, no matter how qualified they are.' Because A.E. alone sought to adopt Luke, the issue of whether two nonmarried persons are entitled to adopt was not presented to the county court in this case. Thus, that issue is not before this court on appeal, and we do not consider it.

Id. at 378.

50. Joslin, *supra* note 38, at 578 n.70.

51. See HUM. RTS. CAMPAIGN, *supra* note 30.

52. FLA. STAT. ANN. § 741.04(1) (West 2010) ("No county court judge or clerk of the circuit court in this state shall issue a license for the marriage . . .

recognize, under its DOMA, any same-sex marriage or domestic partnership from another state.⁵³ Unlike California, it is not clear whether or not second parent adoption is permitted.⁵⁴

In 2006, a Florida appellate court ruled on a case involving a same-sex couple that had two children through ART.⁵⁵ Despite a fifteen-year relationship and the fact that the couple entered together into a sperm donation and subsequent co-parenting agreements,⁵⁶ the only meaningful factor in determining custody, visitation, or child support rights was biology.⁵⁷ The non-biological partner, acting as parent to the children, was considered a legal stranger.⁵⁸ Perhaps shaken by the tenor of the law in Florida, the Coras might choose to make a final attempt at stability and clarity in their family relationships. They might travel to New York and hope for a clearer and more logical legal determination of how they relate to one another.

III. The Situation in New York

A. *Marriage*

In New York State, the Domestic Relations Law (DRL) does not specifically refer to same-sex marriage as does, for example, the law in Tennessee,⁵⁹ which forbids it, or in Vermont, which specifically amended its law to allow it.⁶⁰ In 2006, the New York

unless one party is a male and the other party is a female.”).

53. FLA. STAT. ANN. § 741.212 (“Marriages between persons of the same sex entered into in any jurisdiction . . . are not recognized for any purpose in this state.”).

54. The decision by the district court of appeal in Florida striking down the state’s statutory ban on homosexual adoption, *see supra* note 30 and accompanying text, did not address whether or not second parent adoption, regardless of sexual orientation, would be permitted.

55. *See Wakeman v. Dixon*, 921 So. 2d 669 (Fla. Dist. Ct. App. 2006).

56. *Id.* at 670.

57. *Id.* at 673.

58. *Id.* at 672-73.

59. TENN. CODE ANN. § 36-3-113(a) (West 2010) (“[T]he relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state in order to provide the unique and exclusive rights and privileges to marriage.”).

60. VT. STAT. ANN. tit. 15, § 8 (2010) (substituted “two people” for “one

Court of Appeals determined that, although the DRL does not explicitly define marriage as between a man and a woman, the intent of the 1909 legislature to limit marriage to members of the opposite sex was implicit in its use of the terms “husband” and “wife” in descriptive and regulatory sections.⁶¹ The court viewed the law as specifically prohibiting same-sex marriage in New York.⁶² The legal issue in this case, then, became whether or not the court would determine that the law, as defined, was unconstitutional.⁶³ Same-sex marriage can be legitimized or banned through legislation, court action,⁶⁴ or both, with different results, as is the case in California. In California, there has been a strange dance between the legislature, the courts, and the electorate.⁶⁵ Ruling on the legislative prohibition against same-sex marriage, the California Supreme Court found the statute to be unconstitutional.⁶⁶ This decision was then invalidated by the passage of Proposition 8, a constitutional amendment, which defined marriage as between a man and a woman.⁶⁷

The New York Court of Appeals, unlike the California Supreme Court, analyzed the New York statute’s constitutional issue under a rational basis test, the lowest level of constitutional scrutiny, and found that it was rational for the legislature to deny same-sex couples the rights and benefits of marriage.⁶⁸ In deferring to the intent of the 1909 legislature, the

man and one woman”).

61. *Hernandez v. Robles*, 855 N.E.2d 1, 6 (N.Y. 2006).

62. *Id.* (“New York’s statutory law clearly limits marriage to opposite-sex couples.”).

63. *Id.*

64. *See, e.g., Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (finding IOWA CODE § 595.2, which defined marriage as only between a man and a woman, unconstitutional).

65. *Rehig, supra* note 5, at 152-55.

66. *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008).

67. CAL. CONST. art. 1, § 7.5.

68. *Hernandez*, 855 N.E.2d at 6-17. It is worth noting that, although the constitutional amendment overturned the decision in *In re Marriage Cases* regarding same-sex marriage, the law as it stands now in California based on that decision is that the issue of same-sex marriage requires strict scrutiny. This is in stark contrast to the New York court’s decisions to treat the issue under rational basis.

court did make clear that it was up to the legislature to make any change that would recognize same-sex marriage.⁶⁹ As recently as December 2009, the New York legislature has voted specifically not to do so.⁷⁰

Despite the Court of Appeals' ruling that same-sex couples do not have the right to be married in New York, other lower courts have addressed the issue of recognizing the same-sex marriages of couples married legally in other jurisdictions. For example, the Appellate Division, Fourth Department ruled that a lesbian couple's marriage legally entered into in Canada should be recognized in New York for the purpose of obtaining spousal health benefits.⁷¹ Other departments have not held similarly, distinguishing between marriages and legal civil unions.⁷² In *Martinez*, the court stated that:

For well over a century, New York has recognized marriages solemnized outside of New York unless they fall into two categories of exception: (1) marriage, the recognition of which is prohibited by the "positive law" of New York and (2) marriages involving incest or polygamy, both of which fall within the prohibitions of "natural law."⁷³

In an interesting analysis and application of the *Hernandez* decision, the court reasoned that if the Court of Appeals stated that the legislature could pass a (positive) law permitting same-sex marriage, then that law, by definition, would not be in opposition with public policy.⁷⁴

Shortly thereafter, in 2008, then-Governor David Paterson

69. *Id.* at 1-5.

70. Jeremy W. Peters, *New York Senate Turns Back Bill on Gay Marriage*, N.Y. TIMES, Dec. 3, 2009, at A1.

71. *Martinez v. Cnty. of Monroe*, 850 N.Y.S.2d 740 (App. Div. 2008).

72. *See, e.g., Langan v. State Farm Fire & Cas.*, 849 N.Y.S.2d 105 (App. Div. 3d Dep't 2007) (declining to recognize a civil union from Vermont for the purpose of granting death benefits).

73. *Martinez*, 850 N.Y.S.2d at 742.

74. *Id.* at 192.

issued an executive order directing state agencies to recognize same-sex marriages performed in other states or foreign countries.⁷⁵ This directive has been upheld, at least at the trial level,⁷⁶ and continues to be the policy for state agencies. Currently in New York, therefore, same-sex couples may not marry legally in the state, but the law compels recognition of same-sex marriages entered into in other states or countries. The implications and contradictions of this duality extend beyond the obvious areas of health and death benefits, to the more complex and constantly evolving areas of adoption and child custody.

B. *Adoption*

In New York, the DRL states that “[a]n adult unmarried person, an adult married couple together, or any two unmarried adult intimate partners together may adopt another person.”⁷⁷ Again, although it might be inferred, the language does not specifically refer to same-sex couples as adoption laws in some other states do.⁷⁸ In 1995, the Court of Appeals addressed the issue of adoptions by unmarried couples (both heterosexual and homosexual).⁷⁹ Specifically, the court held that same-sex partners could legally adopt a child together in New York (if that is found to be in the interest of the child).⁸⁰

75. Arlene G. Dubin & Sheila Agnew, *As the Same-Sex Landscape Evolves Prepare to Serve This New Group of Clients*, N.Y. L.J., Aug. 10, 2009.

76. *Golden v. Paterson*, 877 N.Y.S.2d 822, 837 (Sup. Ct. 2008). Taxpayers challenged the executive order on the basis of state expending funds for benefits or entitlements for spouses previously not eligible. Here the court’s application of the rational basis test worked against those challenging the order. In any event the court, albeit a supreme court, upheld the validity of the order.

77. N.Y. DOM. REL. LAW § 110 (McKinney 2010). The statute was amended in 2010 to include unmarried couples. Prior to the amendment the statute read: “an adult unmarried person or an adult husband and his adult wife together may adopt another person.”

78. *See, e.g.*, MISS. CODE ANN. § 93-17-3(5) (West 2007) (“Adoption by couples of the same gender is prohibited.”).

79. *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995).

80. *Id.* at 405 (“New York has not adopted a policy disfavoring adoption by either single persons or homosexuals. In fact, the most recent legislative

While this decision put gay and lesbian couples on comparable footing with their heterosexual counterparts with respect to adopting a child who is a biological stranger to both parents, it did not address the fundamental difference between a child born to a married couple and a child born to a committed lesbian couple. When a child is born into a marriage, it is presumed that the husband of the mother is the child's father,⁸¹ even when the husband may not be the "genetic" father. Conversely, if one member of a lesbian couple gives birth to a child in New York, which does not allow for same-sex marriage, the partner of the mother has no legal right or connection to the child, even if there has been an ongoing relationship with the intention, and some history, of raising the child together.⁸²

Second parent adoption became the method by which same-sex couples could establish legal parentage in such situations. The Court of Appeals ruled on this issue in *In re Jacob*.⁸³ The court held that, although the DRL specifies that, when an adoption takes place the biological parent is relieved of all parental duties,⁸⁴ a termination of parental rights is not required when a child is being adopted but remains in the family unit.⁸⁵ It applied the same legislative exception that allows for step-parent adoption without the termination of the

document relating to the subject urges courts to construe section 117 in precisely the manner we have as it cautions against discrimination against 'nonmarital children' and 'unwed parents.' An interpretation of the statute that avoids such discrimination or hardship is all the more appropriate here where a contrary ruling could jeopardize the legal status of the many New York children whose adoptions by second parents have already taken place." (citations omitted)).

81. Wald, *supra* note 36, at 400.

82. *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991). For a thorough examination of this case, see Suzanne B. Goldberg, *Family Law Cases as Law Reform Litigation: Unrecognized Parents and the Story of Alison D. v. Virginia M.*, 17 COLUM. J. GENDER & L. 307 (2008).

83. 660 N.E.2d at 398.

84. N.Y. DOM. REL. LAW § 117(1)(a) (McKinney 2010) ("After the making of an order of adoption the birth parents of the adoptive child shall be relieved of all parental duties toward and of all responsibilities for and shall have no rights over such adoptive child or to his property by descent or succession, except as hereinafter stated.").

85. *In re Jacob*, 660 N.E.2d at 403-04.

rights of the biological parent.⁸⁶ The case decided was the consolidation of two cases, one of which involved an unmarried heterosexual couple and the other involved a lesbian couple who conceived a child through ART.⁸⁷ In its holding, the court made a statement that may portend the crux of many issues ahead regarding same-sex parentage and marriage:

These concerns are particularly weighty in *Matter of Dana*. Even if the Court were to rule against him on this appeal, the male petitioner in *Matter of Jacob* could still adopt by marrying Jacob's mother. Dana, however, would be irrevocably deprived of the benefits and entitlements of having as her legal parents the two individuals who have already assumed that role in her life, simply as a consequence of her mother's sexual orientation.⁸⁸

Recently a surrogate court in New York has gone a step further. In *In re Adoption of Sebastian*,⁸⁹ the court heard a case involving a lesbian couple who were legally married in the Netherlands and who established a family through ART, where one partner donated an egg, which was fertilized and implanted in the ovary of the other who carried it to term.⁹⁰ The court recognized that, in such a situation, determining the legal mother of the child is equivocal at best.⁹¹ New York has not adopted the Uniform Parentage Act (2000),⁹² which does not establish a test to determine legal motherhood but does imply that the gestational mother is presumed to be the legal mother.⁹³ Instead the courts in New York, without statutory guidance or Court of Appeals precedent, must rely on a range of

86. *Id.* (applying N.Y. DOM. REL. LAW § 117(1)(d)).

87. *Id.* at 398.

88. *Id.* at 405.

89. 879 N.Y.S.2d 677 (Sur. Ct. 2009).

90. *Id.* at 678-79.

91. *Id.* at 687.

92. *Id.* at 690.

93. See UNIF. PARENTAGE ACT § 201(a)(1) (amended 2002).

persuasive decisions. The challenge is that those decisions are not consistent. Courts have held that “in [an] ‘egg donation’ case, the wife, who is the gestational mother, is the natural mother of the children”⁹⁴ Other courts, however, have placed dispositive weight on the genetic relation between mother and child and determined that the egg donor was, in fact, the legal mother.⁹⁵ In fact, the *Sebastian* court admitted that the standard could be neither, but instead applied a case-by-case balancing of the two different standards.⁹⁶

It is important to recognize that there are two issues that underlie the court’s consideration of this case. The first is a legal schism between how the situation could or would be resolved if the couple was heterosexual.⁹⁷ The second is the failure of the existing law, or even a binding judicial decision, to address the rapid advancement of ART and the different ways in which it is now used, particularly with respect to same-sex committed partners.⁹⁸ In addressing the first issue, the court made an implied side-step and considered the two-mother issue a gender classification,⁹⁹ and it analyzed the law under a constitutional “heightened scrutiny” standard.¹⁰⁰

To its credit, the court could have easily focused narrowly on only New York law and how it was applied in this particular case. In New York, a child born into a marriage is legally

94. *McDonald v. McDonald*, 608 N.Y.S.2d 477, 480 (App. Div. 1994).

95. *Arredondo v. Nodelman*, 622 N.Y.S.2d 181, 182 (Sup. Ct. 1994).

96. *In re Adoption of Sebastian*, 879 N.Y.S.2d at 687 (referencing *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005), a California Supreme Court case, which held that a child could have two parents (mothers)—one based on gestation and one based on genetics).

97. *Id.* at 687-88.

98. *Id.* at 680.

99. This presumes that the issue can be only fully discussed when one parent gives birth to the child. Homosexual men would be subject to the same classification, but the analysis would be under a different set of constraints. Both men would have to adopt the child since neither would be seen to have a presumption of parenthood. *Id.* at 688-89. Interestingly, the classification fails to consider the situation in which one member of a same-sex male couple donates sperm to create an ovum with the intention of parenting the child. Seen this way, it may be less clear whether this was a gender classification rather than a sexual orientation classification, which most likely would not be subject to intermediate scrutiny.

100. *Id.* at 689.

presumed to be the child of the husband.¹⁰¹ Therefore, through some minor interpretation of the language, a child born into a valid same-sex marriage in New York would, absent a legal action to the contrary, confer parental rights to the non-gestational parent. Because, by executive order, New York recognizes legal same-sex marriages entered into in other jurisdictions,¹⁰² the parents of Sebastian—legally married in the Netherlands¹⁰³—would be considered legally married in New York. Applying this analysis, the birth and non-birth mothers would, in New York, be Sebastian’s legal parents. The court further identifies two other available options, somewhat less radical than adoption, which the couple could employ to try to establish parentage.¹⁰⁴ The court could have stopped here; second parent adoption would appear to be unnecessary.¹⁰⁵ The court, however, significantly points out that, because of the disparate legal status of same-sex couples throughout the United States, the only way to create a presumption of parentage that would be protected by the Full Faith and Credit Clause of the Constitution, and thus travel from state to state, is by granting an adoption, ironically unnecessary in New York.¹⁰⁶

What the court does not mention, but is nonetheless particularly significant, is the fact that recognition of the couple’s marriage in New York is due to an executive order, not a statutory or constitutional provision. Governor Paterson’s successor, Governor Andrew Cuomo, stated during his campaign that, “I don’t want to be the governor who just proposes marriage equality. . . . I want to be the governor who signs the

101. See N.Y. DOM. REL. LAW § 24(1) (McKinney 2010); see also N.Y. FAM. CT. ACT § 516-a (McKinney 2009). It is, however, unclear how much of this statute has been rendered unconstitutional as a result of the *Sebastian* decision.

102. Dubin & Agnew, *supra* note 75, at 9.

103. *In re Adoption of Sebastian*, 879 N.Y.S.2d at 679.

104. The couple could apply for an amended birth certificate, see, e.g., *Doe v. N.Y. Bd. of Health*, 782 N.Y.S.2d 180, 184 (Sup. Ct. 2004), or they could file an acknowledgement of paternity. N.Y. PUB. HEALTH LAW § 4135-b (1)(a) (McKinney 2010).

105. *In re Adoption of Sebastian*, 879 N.Y.S.2d at 692.

106. *Id.* at 692-93.

law that makes equality a reality in the state of New York.”¹⁰⁷ Given this sentiment, it is unlikely that he would be inclined to rescind the executive order. However, the Democrat-controlled state legislature failed to pass legislation allowing for same-sex marriage prior to the election,¹⁰⁸ and, with the Republican Party taking control of the state senate,¹⁰⁹ is doubtful that Governor Cuomo will have any bill to sign in the foreseeable future. Consequently, not only is same-sex marriage unlikely to become allowed in New York, but recognition of foreign same-sex marriage is tenuous; a court decision or ballot initiative away from elimination.

C. Surrogacy

The second causal issue in the *Adoption of Sebastian* case is the legal confusion that is created by the more extensive and creative use of gestational surrogacy. There are two traditional branches of surrogacy, which roughly correspond to two motivational forces.¹¹⁰ Full surrogacy, which entails a woman carrying her own ovum to term for the benefit of another (woman or couple), has been looked at as a way to avoid pregnancy and delivery.¹¹¹ Because there is no conflict between genetics and gestation, the mother is unarguably the legal parent. Gestational surrogacy, where a woman carries a genetically different ovum to term, has been traditionally

107. Celeste Katz, *Cuomo Tells Gay Activists He Will Legalize Same-Sex Marriage, Make 'Equality a Reality' in New York*, N.Y. DAILY NEWS, Oct. 14, 2010, available at http://www.nydailynews.com/ny_local/2010/10/14/2010-10-14_cuomo_tells_gay_activists_he_will_legalize_samesex_marriage_make_equality_a_real.html.

108. Jeremy W. Peters, *New York State Senate Votes Down Gay Marriage Bill*, N.Y. TIMES, Dec. 2, 2009, at A1.

109. Brendan Scott & Ginger Adams Otis, *GOP Takes the State Senate*, N.Y. POST, Dec. 5, 2010, at 2.

110. For a fascinating historical and legal analysis of sperm and egg donations, gestational and full surrogacy, and the economic and social implications of the distinction between the two, see Noa Ben-Asher, *The Curing Law: On the Evolution of Baby-Making Markets*, 30 CARDOZO L. REV. 1885 (2009).

111. *Id.* at 1887.

viewed as a cure for infertility.¹¹² Due to this perhaps erroneous categorization, full surrogacy, particularly when there is a financial component to the adoption arrangement, has been viewed as “baby-selling.”¹¹³ Gestational surrogacy, on the other hand, has been viewed as a medical response to infertility and, accordingly, has seen less hostility from society and given more deference from the courts.¹¹⁴

The New York legislature, however, responding perhaps to the stigma of the concept of “baby-selling,” passed laws which have repercussions beyond the limited confines of full surrogacy. The DRL states that surrogate contracts are unenforceable because they are contrary to the public policy of the state.¹¹⁵ While this might be viewed to be a prohibition against baby-selling, the statute defines surrogate parenting contracts as follows:

“Surrogate parenting contract” shall mean any agreement, oral or written, in which:

- (a) a woman agrees either to be inseminated with the sperm of a man who is not her husband or to be impregnated with an embryo that is the product of an ovum fertilized with the sperm of a man who is not her husband; and
- (b) the woman agrees to, or intends to, surrender or consent to the adoption of the child born as a result of such insemination or impregnation.¹¹⁶

As such, under this law any agreement, even if just to allow for the adoption of an ART child by a committed same-sex partner, is unenforceable. The statute further provides that in any dispute arising concerning the parental rights of the egg or sperm donor, the gestational mother’s right of parentage

112. *Id.*

113. *Id.* at 1906-12.

114. *Id.* at 1923-24.

115. N.Y. DOM. REL. LAW § 122 (McKinney 2010).

116. *Id.* § 121(4)(a)-(b).

supersedes any surrogate parenting agreement.¹¹⁷

The implications of this may have broad repercussions. Although the *Sebastian* court mentioned the lack of guidance regarding motherhood when there is a conflict between gestational and genetic “mothers,”¹¹⁸ it did not appear to consider the ramifications of the DRL in conjunction with a small, mostly overlooked, technical detail of the case. The court alludes to the situation in which both genetics and gestation can be determinants of parentage,¹¹⁹ but does not specifically apply the DRL to address this question. What is telling, however, is the fact that the court granted an adoption to the genetic mother rather than to the gestational mother.¹²⁰ What the court is doing in this case, without necessarily intending to, is affirming the interpretation of the DRL that says that, absent any subsequent adoptive process, the gestational mother is the legal mother regardless of the intention of the parties. While this may make sense in New York, an argument could be made that less than twenty five miles away in New Jersey the decision would have been to allow an adoption by the gestational mother if there were clear evidence that the intention was for the genetic mother to raise the child.¹²¹

The problem would seem to be that, when written, surrogacy laws did not contemplate the use of ART in a way distinct from an infertility cure or baby-selling. As committed same-sex couples, by necessity, employ ART to become co-

117. *Id.* § 124(1).

118. *In re Adoption of Sebastian*, 879 N.Y.S.2d 677, 681 (Sur. Ct. 2009) (“At present there is no clear law in New York determining the relationship between a child and various women who may lay claim to parentage through genetic or gestational relationship.”).

119. *Id.* at 680. The court references, in particular, California which has used intent as the critical test for determining the legal mother. *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. Sup. Ct. 1993) (“[W]e do not believe this case can be decided without enquiring into the parties’ intentions as manifested in the surrogacy agreement.”). It is important to note, however, that Ohio, New Jersey, and Tennessee have all followed the rule that if the genetic parents were known and showed the intention, before the birth, to act as parents then they are determined to be the legal parents. See Wald, *supra* note 36, at 391-92.

120. *In re Adoption of Sebastian*, 879 N.Y.S.2d at 693.

121. See Wald, *supra* note 36, at 391-92.

parents, courts are struggling to determine parentage without clear legislative guidelines. This lack of clarity was best expressed by an Ohio court:

The court finds that there are no statutory or constitutional sections granting it authority to render a declaratory-judgment action to determine parentage and to issue an order directing the hospital expecting to deliver the unborn child to designate the genetic or biological parents as the natural and legal parents of the child. The court finds that it lacks subject-matter jurisdiction to determine parentage of an unborn child that is the subject of a surrogacy agreement in a declaratory-judgment action. The legislature should consider enacting legislation that addresses the legal rights of children born under surrogacy agreements.¹²²

In essence, the Ohio judiciary is throwing up its hands and telling the legislature that the laws, as enacted, do not offer certainty as to parentage in gestational surrogacy situations between committed same-sex partners. The *Sebastian* court may have recognized, and, to an extent, addressed the essential problem of establishing legal parentage which exists when the validity of a couple's marital status changes when they move from state to state. It did not, however, consider the more fundamental question occurring when a child has a genetic and a gestational mother, both of whom want to establish legal parentage—who is the already existing legal mother? Although it would appear straightforward to interpret the DRL as establishing the gestational mother as the legal parent,¹²³ this seems at odds with the language in other decisions, which deny the parental rights of parents who are neither biological nor

122. *Nemcek v. Paskey*, 849 N.E.2d 108, 111 (Ohio Ct. C.P. 2006). In its decision, the court was rejecting an early decision which determined that genetics was the strict determinant of parentage.

123. N.Y. DOM. REL. LAW §§ 121-22, 124 (McKinney 2010).

adoptive.¹²⁴

IV. Repercussions of the Increasingly Incompatible Laws in New York

By itself DOMA has created a situation that is becoming increasingly untenable. Enacted under a Republican majority Congress, DOMA was arguably the anti-gay-marriage act.¹²⁵ Over the last fourteen years, the push to legitimize some form of legally recognized relationship for same-sex couples¹²⁶ has created litigation which has focused on parsing the language of the statute in such a way to avoid directly addressing the issue of allowing states to deny what has often been seen as a fundamental right.¹²⁷

New York has not adopted its own DOMA,¹²⁸ but neither does it allow for same-sex marriage or civil unions. The New York Court of Appeals has ruled that the legislature has the constitutional power to pass a law permitting same-sex

124. See, e.g., *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991) (“[S]he is not the child’s ‘parent’; [sic] that is, she is not the biological mother of the child nor is she a legal parent by virtue of an adoption.”); *Behrens v. Rimland*, 822 N.Y.S.2d 285, 286 (App. Div. 2006) (“[T]he petitioner, who is neither an adoptive nor a biological parent of Bryce, lacks standing to seek visitation.”). In both these cases, and others with similar holdings, the court is making the statement that acting in a parental role does not confer parental rights. It is interesting, however, that when the gestational mother was also the genetic mother, the court chose to frame the determining factor in terms of biology not gestation.

125. Gabe Vick, *The Defense of Marriage Act: The Crossroad of Love and Legislation*, 22 J. AM. ACAD. MATRIMONIAL LAW. 105, 106-07 (2009).

126. To date, thirteen states allow some form of same-sex marriage or civil union. NAT’L CONF. OF ST. LEGISLATURES, *supra* note 20.

127. E.g., *Smelt v. Cnty. of Orange*, 447 F.3d 673, 683 n.26 (9th Cir. 2006) (“Even if Smelt and Hammer were now in a California registered domestic partnership, that is not by any means a marriage.”). It is hard, however, to reconcile the idea that a domestic partnership is not “treated like a marriage,” the operative phrase of the DOMA, when the California Family Code states unequivocally “[r]egistered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, . . . as are granted to and imposed upon spouses.” CAL. FAM. CODE § 297.5(d) (West 2009).

128. NAT’L CONF. OF ST. LEGISLATURES, *supra* note 20.

marriage.¹²⁹ Lower courts have used the reasoning in *Hernandez* to recognize same-sex marriages from other jurisdictions,¹³⁰ and former-Governor Paterson issued an executive order that affords rights and protection to same-sex couples legally married in other states or countries.¹³¹ Despite these policy trends, there is no definitive law regarding same-sex couples in New York. For example, civil unions from other states have not been regarded with full faith and credit in New York. In *Langan v. State Farm Fire & Casualty*,¹³² a New York appellate division court held that the state Workers Compensation Board was not required to grant death benefits to the surviving partner of a Vermont legal civil union.¹³³

The repercussions of this judicial ambiguity may logically lead to inconsistency that would be difficult to reconcile. For example, consider three hypothetical same-sex couples: one legally married and living in Massachusetts, one living with a registered domestic partnership in California, and one having lived their whole lives in New York. If all three couples end up living in the same apartment building in Manhattan there may be three very different circumstances all existing at the same address.

The couple from Massachusetts, by virtue of their valid out-of-state marriage, would be presumed married under the executive order of Governor Paterson and a number of persuasive lower court decisions. That presumption would vanish in an instant, however, if Governor Cuomo, despite his statements to the contrary, rescinded the order, if the legislature adopted the DOMA, or if the Court of Appeals held that, absent a constitutional or statutory mandate, there was no imperative to recognize an out-of-state marriage.

129. *Hernandez v. Robles*, 855 N.E.2d 1, 5 (N.Y. 2006).

130. *E.g.*, *Lewis v. N.Y. State Dep't of Civil Serv.*, 872 N.Y.S.2d 578 (App. Div. 2009) (recognizing out-of-state marriage for the purpose of obtaining spousal health benefits); *C.M. v. C.C.*, 867 N.Y.S.2d 884 (Sup. Ct. 2008) (highlighting the unique situation that although a same-sex couple may not be married in New York, New York will recognize a same-sex marriage from another state and grant a divorce).

131. *Dubin & Agnew*, *supra* note 75, at 9.

132. 849 N.Y.S.2d 105 (App. Div. 2007).

133. *Id.* at 78-79.

The couple from California would likely not be granted legal status with respect to one another. In California, domestic partnerships confer the same legal rights as marriage,¹³⁴ but in New York there is no recognition of this legal relationship. For example, if one of the two was employed by the state and was eligible for family health benefits, it seems the state could deny those benefits to the domestic partner.¹³⁵

The New York couple knows where they stand. As a result of their continuous residence in New York, they would have the most unambiguous lack of rights. Regardless of the couple's intentions or length of relationship, there is currently no way, short of traveling to one of the five states that allow for same-sex marriage and getting married there, for the couple to create any sort of legal relationship in New York.

It could be argued that the Governor and the judicial branch are attempting to rectify a situation that the legislature has refused to clarify. In failing to adopt DOMA and, as recently as December of 2009, failing to pass a bill allowing for same-sex marriage,¹³⁶ the legislature has left the executive and courts to apply solutions that are neither enduring nor comprehensive. In addition, although New York recognizes marriages from other jurisdictions, it does not recognize civil unions or domestic partnerships, and the courts have not been inclined to extend this recognition.¹³⁷

Without legislative guidance, the judiciary faces an even more daunting task. Many of the questions raised regarding same-sex relationships have to be addressed in the context of quickly changing laws. For example, in December of 2006 before Governor Paterson's executive order in *Gonzalez v. Green*,¹³⁸ a supreme court ruled on a gay couple's petition for divorce. The court held that the couple's Massachusetts marriage was valid

134. CAL. FAM. CODE § 297.5(d) (West 2010).

135. *Langan*, 849 N.Y.S.2d at 107-08.

136. Peters, *supra* note 108, at A1.

137. *E.g.*, *Langan*, 849 N.Y.S.2d at 108 ("Although we may recognize the civil union status of claimant and decedent as a matter of comity, we are not thereby bound to confer upon them all of the legal incidents of that status recognized in the foreign jurisdiction that created the relationship.").

138. 831 N.Y.S.2d 856 (Sup. Ct. 2006).

in neither New York nor Massachusetts.¹³⁹ The Massachusetts law defining marriage stated that “[n]o marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void.”¹⁴⁰ They reasoned that, since same-sex marriage was not legal in New York at the time of the marriage, the Massachusetts’ marriage was null and void.¹⁴¹

Twenty months later, in the *C.M. v C.C.*,¹⁴² the court was faced with two new legal developments: first, Governor Paterson’s executive order and second, the repeal of the Massachusetts statute referred to in *Gonzalez*.¹⁴³ Given these changes, any couple now married in Massachusetts would have that union legally recognized in New York. The court, specifically acknowledging these developments, found a way to recognize the Massachusetts marriage, ironically for the purpose of granting a divorce.¹⁴⁴ The cases are strikingly similar, and, notwithstanding the executive order, either court could have used the other’s reasoning. The difference in the outcome of the two cases, it would seem, would have more to do with the rapid changes in the related law, rather than any change in the specific controlling law.¹⁴⁵

If the situation created by DOMA and by legislative inaction in New York regarding same-sex marriage is inconsistent, then those circumstances become almost untenable

139. *Id.* at 858-59.

140. MASS. GEN. LAWS ANN. ch. 207, § 11 (West 2010) (repealed 2008).

141. *Gonzalez*, 831 N.Y.S.2d at 859.

142. 867 N.Y.S.2d 884 (Sup. Ct. 2008).

143. *Id.* at 887-88.

144. In a rather parsed analysis, the court decided that since the couple was married prior to the *Hernandez* decision in 2006, which banned same-sex marriage in New York, the marriage was at that time not (yet) prohibited in New York. Therefore, the (now repealed) Massachusetts statute did not nullify their marriage. *Id.* at 888-89.

145. Both couples were married in 2005, before the *Hernandez* decision and the repeal of MASS. GEN. LAWS ANN. ch. 207, § 11. *C.M.*, 867 N.Y.S.2d at 885; *Gonzalez*, 867 N.Y.S.2d at 857.

when parentage and ART technological advances are added to the mix. If one partner of each of the three hypothetical couples living in the same hypothetical building were to become pregnant and give birth, increasingly unpredictable and incompatible results begin to emerge.

Technically, the couple from Massachusetts, again through the executive order of the Governor, as a married couple would be presumptively the legal parents of the child. The *Sebastian* court, however, noted that the presumption of parentage would not necessarily travel out of state, that is, would not necessarily be given full faith and credit by other states.¹⁴⁶ The *Sebastian* court chose to address this issue and allow the non-gestational mother to seek a second parent adoption, which would be recognized in a foreign state.¹⁴⁷ The court acknowledges, however, that this solution has two inherent problems: first, granting an adoption to a married couple is, at best, redundant, and at worst impermissible;¹⁴⁸ second, there is the hint of gender discrimination in requiring the second parent adoption for a married lesbian couple.¹⁴⁹ The court asks, “why shouldn’t the lesbian genetic mother of a child born to her partner be permitted to utilize either of the existing statutory paternity procedures to establish her parentage status and rights, rather than being limited to the more expensive, time consuming and intrusive adoption mechanism?”¹⁵⁰ There is nothing to indicate that the *Sebastian* (surrogate’s) court’s opinion would be persuasive in any other court if the Massachusetts couple petitioned for a second parent adoption.

The couple from California would have an easier time completing a second parent adoption, but may find themselves frustrated and confused by the requirement to do so. In California, domestic partnerships confer the same legal parentage rights as marriage,¹⁵¹ and, if born in California, it is

146. *In re Adoption of Sebastian*, 879 N.Y.S.2d 677, 691-93 (Sur. Ct. 2009).

147. *Id.* at 691.

148. *See id.* at 683-85.

149. *See id.* at 683-88.

150. *Id.* at 688.

151. CAL. FAM. CODE § 297.5(d) (West 2009).

likely that the child's birth certificate would have automatically listed both mothers. In this case, being born in New York may benefit the child since it is not at all certain, short of an adoption agreement, what weight an out-of-state birth certificate or paternity acknowledgement would be given. For example, if the non-gestational employee were eligible for family health benefits, it seems the state could deny those benefits to the domestic partner,¹⁵² but how would benefit eligibility for a child of domestic partnership be determined?

The New York couple has the same restricted option available. Second parent adoption is the only way that the non-gestational mother could obtain any parental rights. As courts have consistently held, the intention and relationship (other than marriage) do not confer any meaningful parental rights.¹⁵³

To take the hypothetical situation a step further, the law becomes even more unreliable if the pregnancy resulted from an ART procedure that impregnated the gestational mother with the genetic ovum of the other partner. At this point, all three couples face the same murky situation. In applying for a second parent adoption to protect the rights of the non-parent, it is not at all certain who the presumptive parent is. Certainly, under New York's DRL, if any sort of surrogacy contract is made, it is void and the gestational mother is the presumptive parent.¹⁵⁴ Courts in New York, however, have not been consistent in declaring presumptive parent status to the gestational mother. In *Perry-Rogers v. Fasano*,¹⁵⁵ the court had to consider the situation in which an embryo was implanted in the uterus of the wrong woman. When the gestational mother sought visitation with the child she bore, but to whom she was not genetically related, the court determined that her gestational status did not give her standing to seek visitation.¹⁵⁶ The language the court used, in fact, implies that perhaps the presumption of

152. See *Langan v. State Farm Fire & Cas.*, 849 N.Y.S.2d 105, 107-08 (App. Div. 2007).

153. See, e.g., *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991); *Behrens v. Rimland*, 822 N.Y.S.2d 285, 286 (App. Div. 2006).

154. N.Y. DOM. REL. LAW § 124(1) (McKinney 2010).

155. 715 N.Y.S.2d 19 (App. Div. 2000).

156. *Id.* at 74.

parenthood lies with the genetic mother.¹⁵⁷ The intent analysis applied in California,¹⁵⁸ which looks not only at gestation and genetics, but what the parties actually intended, has also been applied in New York.¹⁵⁹

Although one might argue that, in the case of two committed individuals jointly asking to have both mothers declared as parents, a court would likely choose not to focus on the issue of who needs to apply but rather default to recognizing the gestational mother as the parent, as did the *Sebastian* court. However, there are plausible scenarios in which the identity of the presumptive parent would be at issue. For example, what if the New York couple sees their relationship fracture during the pregnancy and chooses to separate? The baby carried in the womb of one woman is a genetic stranger to her. The non-gestational woman is the unborn child's biological mother. If there ensued a contentious custody battle for the unborn, or just born, child, where would the court look for guidance? A compelling case could be made for considering genetics, gestation, or intention to determine parentage.

A similar quandary might occur if the California couple in the hypothetical apartment building, prior to completing a second parent adoption, is tragically killed in a car accident. Imagine they both died intestate, and each set of grandparents bring suit seeking sole custody of the child. Again, each side would be able to make a persuasive legal argument supporting its claim.¹⁶⁰

157. *Id.* at 73 (“It is apparent . . . that a ‘gestational mother’ may possess enforceable rights under the law, despite her being a ‘genetic stranger’ to the child. Given the complex possibilities in these kind of circumstances, it is simply inappropriate to render any determination solely as a consequence of genetics.”).

158. *Johnson v. Calvert*, 851 P.2d 776, 783 (Cal. 1993) (“[W]e have felt free to take into account the parties’ intentions, as expressed in the surrogacy contract, because in our view the agreement is not, on its face, inconsistent with public policy.”).

159. *See McDonald v. McDonald*, 608 N.Y.S.2d 477 (App. Div. 1994).

160. The parents of the gestational mother would rely on N.Y. DOM. REL. LAW §§ 121-22, 124 (McKinney 2010), while the genetic grandparents would argue that decisions holding that biology is a determinate factor in visitation or custody would adhere. *See, e.g., In re Jordan*, 875 N.Y.S.2d 188 (App. Div. 2009) (“[B]iological or legal strangers to a child have no standing to pursue

Perhaps the most convoluted, yet eminently conceivable, situation might occur if the couple from Massachusetts, rather than employing an anonymous sperm donor, chose to use the sperm of a friend, a gay man domiciled in New York and married legally in Connecticut. The two couples decide that they intend to raise the child with two mothers and two fathers. In fact, when the baby is born they list the gestational mother and sperm-donor father on the birth certificate. How would a court analyze the parentage of the child? Because each couple's marriage is recognized under former-Governor Paterson's executive order, and because there is a presumption that the married partner is the parent of the child of the spouse, it would seem that there are four individuals who could legitimately assert parental rights.

V. Conclusion

The questions raised by the laws and judicial decisions that apply, which often at times contradict each other, have no simple answers. Even legislative action clarifying a position on same-sex marriage, while a step in the right direction, would not be enough. It is hard to divine the motivations of couples like the Cora's who chose a somewhat complicated application of ART, but it cannot be discounted that this may very well be a way of attempting to undercut the disparate treatment of homosexuals from state to state due to the DOMA. By creating situations that cannot be simply and consistently adjudicated by lower courts, same-sex couples place a growing pressure on appellate courts, and ultimately the Supreme Court, to reconcile DOMA and the Full Faith and Credit Clause, and, perhaps in the long run, hold that sexual orientation is a semi-suspect classification. Until that time, New York will continue to struggle to shore up a crumbling and ill-fated framework.

visitation.”).