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Cover Page Footnote

29-2

MODERN REFORMATION: AN OVERVIEW OF NEW YORK'S DOMESTIC RELATIONS LAW OVERHAUL

*Meaghan E. Howard**

I. INTRODUCTION

Although many of us lovingly declare, “Until death do us part” on our wedding day, should we instead utter the caveat, “or at least until one of us declares this marriage to have *irretrievably broken down*?”¹ Perhaps this is an absurd measure and certainly not one likely to garner much popularity, but in a way, such sentiment is a potential reality for many married couples. With nearly half of all first time marriages ending in divorce,² there is no wonder that legal reform in the area of domestic relations law has recently taken the State of New York by storm. Beginning October 12, 2010, with the implementation of no-fault divorce³ and continuing in July 2011 with the enactment of the Marriage Equality Act,⁴ New York gave a

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¹ See N.Y. DOM. REL. LAW § 170(7) (McKinney 2010) (listing the seventh ground for divorce as “[t]he relationship between husband and wife has broken down irretrievably”).

² See U.S. Census Report, *Tbl.1336. Marriage and Divorce Rates by Country: 1980-2008* at 840, U.S. CENSUS BUREAU (2008), <http://www.census.gov/compendia/statab/2011/tables/11s1335.pdf> (showing the divorce rates in the United States for the year 2008).

³ N.Y. DOM. REL. LAW § 170(7).

⁴ Marriage Equality Act, ch. 95, 2011 N.Y. Sess. Law News of N.Y. (McKinney) (codified as amended N.Y. DOM. REL. §§ 10-a, 10-b, 11, 13 (effective July 24, 2011)).

much-needed makeover to its domestic relations laws (“DRL”),⁵ which govern the parameters of marriage and divorce in the Empire State.⁶

The connection linking New York’s passage of no-fault divorce and the Marriage Equality Act is that both play a paramount role in what has become a modern wave of divorce reform.⁷ The birth of this reformation in New York State commenced in 1966 with the addition of three new grounds for divorce, which joined the previous sole ground of adultery.⁸ While the majority of the other forty-nine states were experiencing a “divorce revolution”⁹ in the 1970s and 1980s through their adoption of the no-fault system, New York held steadfast to its contentious, fault-based grounds for divorce.¹⁰ Ostensibly, there was no end in sight for the fault versus no-fault standoff. Then, after much debate and encouragement from matrimonial attorneys and judges who called for reform to the existing domestic relations laws,¹¹ this modern wave of change commenced with the adoption of no-fault. Thereafter, divorce reformation gained additional momentum with the legalization of same-sex marriage as provided for by the Marriage Equality Act.¹²

Remarkably, New York was the final state to adopt the no-fault system, which signaled a momentous departure from its

⁵ N.Y. DOM. REL. LAW (McKinney 2012).

⁶ See N.Y. DOM. REL. LAW § 170 (governing actions for divorce); N.Y. DOM. REL. LAW § 10-a (governing same-sex marriages).

⁷ See David Paul Horowitz, *Breaking up is [Easier] to Do*, N.Y. ST. B.J. 18, 18 (2010) (discussing the new divorce law).

⁸ Joel Stashenko, *Those Eager to be “Ex-Spouse” Embrace No-Fault*, N.Y. L.J., Oct. 13, 2010, at 1.

⁹ See LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* xvii (1985) (arguing that there were three components to the “divorce revolution:” “The soaring divorce rate and the widespread adoption of no-fault divorce laws, . . . [and] the changing social context of divorce which is reflected in both attitudes and behavior”).

¹⁰ See J. Herbie DiFonzo & Ruth C. Stern, *Addicted to Fault: Why Divorce Reform has Lagged in New York*, 27 PACE L. REV. 559, 567 (2007) (“By the late 19th century, New Yorkers were well-acquainted with the fact that other jurisdictions offered easier access to marital dissolution.”).

¹¹ See, e.g., Matrimonial Commission, *Report to Chief Judge of the State of New York* 18 (Feb. 2006), available at <http://www.courts.state.ny.us/reports/matrimonialcommissionreport.pdf> (stating that no-fault divorce was a necessary and recommended reform to the fault-based system).

¹² N.Y. DOM. REL. LAW § 10-a (McKinney 2012).

longstanding and notorious relationship with fault-based divorce law.¹³ Under the new legislation, parties may dissolve their marriage so long as one malcontented spouse alleges under oath that the parties' marriage has "broken down irretrievably for a period of at least six months."¹⁴ A divorce will thereafter be granted so long as all of the parties' economic issues, child custody and/or visitation arrangements have been settled through either legal agreement or the incorporation of such issues into the parties' judgment of divorce.¹⁵

Prior to the advent of no-fault, the aptly named fault-based divorce system initially demanded that at least one of the parties allege some wrongdoing against his or her spouse that would constitute a statutorily valid ground for divorce.¹⁶ Because spousal transgression was often required for divorce under the old domestic relations law, even couples who desired to part ways on cordial terms were forced to "participate in the ritual of proving one partner's fault."¹⁷

Preceding the enactment of no-fault, New York's last significant change took place in 1966, nearly half a century earlier, when the legislature incorporated additional grounds for divorce: abandonment, imprisonment of a spouse in excess of three years, cruel and inhuman treatment, and living separately and apart from one's spouse for a period, originally, of two or more years¹⁸ pursuant to a separation agreement.¹⁹ However, from 1787 until the 1966 amend-

¹³ Stashenko, *supra* note 8.

¹⁴ N.Y. DOM. REL. LAW § 170(7).

¹⁵ *Id.*

¹⁶ See N.Y. DOM. REL. LAW § 170(1)–(5) (explaining the fault provisions which continue to be in existence for those parties that may not qualify for no-fault divorce, for example, a couple seeking a divorce after three months of marriage will not meet the requisite six month period of irretrievable breakdown). *But cf.* Maurer v. Maurer, 42 P.2d 186, 187 (Or. 1935) (holding in a rather extreme fashion, that neither husband nor wife entered the court with "clean hands" because each had committed marital misconduct, and therefore, neither should be granted a divorce).

¹⁷ See WEITZMAN, *supra* note 9, at 9.

¹⁸ See N.Y. DOM. REL. LAW § 170(5) (indicating that spouses now only need to live apart for a period of one year in order to seek a divorce under this subsection).

¹⁹ See Stashenko, *supra* note 8 (explaining that New York was the last state to adopt no-fault divorce, and that the first major modification to divorce laws in the state only occurred in 1966, with the addition of new grounds to the sole ground of adultery); see also Lauren Guidice, *New York and Divorce: Finding Fault in a No Fault System*, 19 J.L. & POL'Y 787, 799-800 (2011) (explaining that this was technically New York's first form of a no-fault divorce provision under the "conversion divorce," wherein one party could petition the court to convert the separation agreement into a judgment of divorce).

ment, adultery was the lone ground for divorce.²⁰ Presumably, adultery was the exclusive ground for divorce for so long because physical and emotional betrayal is one of the most contemptible marital transgressions.²¹ However, the primary reason that adultery reigned supreme was because it offered a method of control for the more conservative groups and legislators who sought to make the process of obtaining a divorce difficult in an effort to reinforce the sanctity of the institution of marriage.²² Not only is adultery considered to be the ultimate act of spousal misconduct, but it is also one of the most difficult to prove.²³ With the imposition of a mere four grounds for divorce,²⁴ many married couples' desire to dissolve the marriage was stifled by the reality that their marital woes did not quite fit into the mold for an action for divorce under the domestic relation laws as they stood. This, too, was a method that some believed would keep divorce at bay; by only allowing the most serious spousal misconduct to result in dissolution of the bond of marriage, couples would be forced to reconsider their aspirations to separate.²⁵

However, the modern wave of reform continued to alter the status quo of the domestic relations law on July 24, 2011, when the Marriage Equality Act took effect.²⁶ This ground breaking and supremely controversial legislation literally redefined marriage for New York State by rendering same-sex marriage a legally valid institu-

²⁰ Stashenko, *supra* note 8.

²¹ See WEITZMAN, *supra* note 9, at 4 ("Because adultery was considered such a clear violation of both moral and legal norms, it provided one of the earliest grounds for divorce.").

²² DiFonzo & Stern, *supra* note 10, at 560.

²³ See N.Y. PENAL LAW § 255.30 (McKinney 2012). Section 25.30(1) specifically states:

A person shall not be convicted of adultery or of an attempt to commit adultery solely upon the testimony of the other party to the adulterous act or attempted act, unsupported by other evidence tending to establish that the defendant attempted to engage with the other party in sexual intercourse, and that the defendant or the other party had a living spouse at the time of the adulterous act or attempted act.

Id.

²⁴ See N.Y. DOM. REL. LAW § 170(1)–(4) (listing the four grounds of divorce that existed prior to the enactment of no-fault).

²⁵ See WEITZMAN, *supra* note 9, at 7 ("Since the aim of the law was to preserve marriage as a lifelong union, divorce was restricted to situations in which one party committed a serious marital offense such as adultery, cruelty, or desertion, giving the other party the legal basis or *ground* for the divorce.").

²⁶ Marriage Equality Act, ch. 95, 2011 N.Y. Sess. Law News of N.Y. (McKinney) (codified as amended N.Y. DOM. REL. §§ 10-a, 10-b, 11, 13 (McKinney 2011)).

tion,²⁷ something gay, lesbian, and transgendered couples' heterosexual counterparts have always had the unfettered right to enjoy. With the passage of this legislative measure, New York became the fifth state to legalize same-sex marriage in the United States.²⁸

However, amidst all of the excitement and celebration surrounding the enactment of the Marriage Equality Act as a progressive step for the State, one must also wonder what the implications will be for same-sex couples that later seek to terminate their marital relationship through divorce. Although it may seem cynical to immediately ponder the ramifications of same-gender divorce in light of the historic legislation, the question must be asked: Will divorce impact gay spouses in the same fashion as it does heterosexual spouses? And more importantly, do the current divorce laws, as written, need to be further adapted to better accommodate and protect same-sex couples?

Although reform has occurred at a rapid pace in New York in recent years, it is a bit peculiar that the State was the last to adopt the long established and widely accepted practice of no-fault divorce yet, is one of the pioneers in solemnizing same-sex marriage in the United States.²⁹ Thus, there is a palpable dichotomy between the two domestic relations laws. On one hand, New York held onto the relic of fault-based divorce for an unusually long period of time, in part due to notions of marital sanctity and reinforcement of the traditional nuclear family.³⁰ On the other hand, the State, after succumbing to the battle over no-fault divorce, quickly adopted a progressive social and legislative policy by validating the desire of same-sex couples to marry.³¹

²⁷ See N.Y. DOM. REL. LAW § 10-a(1) ("A marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex.").

²⁸ The other jurisdictions that now permit same-sex marriages at the time of publication are: Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, Washington, and the District of Columbia. Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws, <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx> (last visited Jan. 15, 2013).

²⁹ See *id.* ("Lawmakers voted . . . to legalize same-sex marriage, making New York the largest state where gay and lesbian couples will be able to wed and giving the national gay-rights movement new momentum from the state where it was born.").

³⁰ See MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/nuclear%20family> (last visited Jan. 11, 2013) (defining the nuclear family as "a family group that consists only of father, mother, and children").

³¹ N.Y. DOM. REL. LAW § 10-a; see also Alexandra Harwin, *Ending the Alimony Guessing*

These recent reformations to the domestic landscape have created an interesting juxtaposition in the State's attempt to protect the underlying importance of family values, while accommodating society's changing notions of what defines a family unit in today's modern times. With the advent of same-sex marriage, it appears that the vast majority of society, at least in New York, has reached the conclusion that the term "spouse" can no longer be narrowly construed as "husband" and "wife" in the traditional male-female sense.³²

The fact that one may now marry a partner of the same sex and enjoy the benefits of the institution, does not, however, mean that the legislature's work is done. These recent changes have given rise to a host of new issues concerning whether the equality and fairness that was intended by both the no-fault law³³ and Marriage Equality Act³⁴ will truly be a reality for spouses seeking to break the marital bond under these newly adopted laws. More specifically, Part II of this Comment will offer a brief history of divorce reform in New York. Part III will consider whether eliminating the grounds requirements under no-fault actually improves the divorce process by taking the sting out of the often contentious battle of the spouses. In relation to same-sex divorce, this Comment, in Part IV, will address various disadvantages gay couples potentially face as they forge their way through the vast disparity between the state and federal law's recognition of their union and how the parties' assets may be impacted in the event of divorce.

Additionally, in the subsections following Part IV, this Comment will examine the oppressive effect that the Defense of Marriage

Game, N.Y. TIMES, July 3, 2011, <http://www.nytimes.com/2011/07/04/opinion/04harwin.html> (noting the rapidity with which New York adopted same-sex marriage following the no-fault divorce amendment); Danny Hakim, *Republicans Appear on the Verge of at Least Sharing Control of the New York Senate*, N.Y. TIMES, Nov. 3, 2010, http://www.nytimes.com/2010/11/04/nyregion/04nylegis.html?_r=1 (explaining how Democratic leadership, beginning in 2008, paved the way for liberal-leaning policies concerning no-fault divorce and the proposal of the same-sex marriage enactment).

³² N.Y. DOM. REL. LAW § 10-a (stating that all gender-specific language shall be construed as gender neutral when implementing the rights and responsibilities of spouses).

³³ See, e.g., Stashenko, *supra* note 8 (stating the position of a former Justice of the New York Supreme Court Appellate Division that the new no-fault law will be successful in "its primary purpose: to avoid as much as possible the 'misery and nastiness and expense and delay caused by having to find fault as a factor' ") (statement of Sondra M. Miller, a former Appellate Division Judge).

³⁴ N.Y. DOM. REL. LAW §§ 10-a (intending to make marriage fair for all sexes).

Act (“DOMA”)³⁵ has on the State’s effort to oversee its domestic relations laws and other issues concerning federalism and reciprocity. Since the ultimate results are yet to be realized during this period of transition in New York, it is the position of this Comment that no-fault, although the prevailing method for divorce in the United States, will fall short of its intended goal to keep the acrimony out of divorce proceedings. Irrespective of the concept of no-fault, the harsh realities of divorce and the need to “point the finger” will continue to play a role in divorce proceedings in New York. Moreover, although the Marriage Equality Act is a step in the right direction to bringing about true marriage equality, it can be considered nothing more than a heartfelt gesture by the State until the federal Defense of Marriage Act is repealed.³⁶ This is merely recognizing the unfortunate truth that so long as DOMA exists, same-sex marriages will not be legal equals to traditional marriages comprised of a husband and wife. This reality can only be remedied by increasingly protective laws that pay special heed to the tax implications that equitable distribution of the marital assets may have on same-sex spouses and, most importantly, the parenting rights and best interests of the children from these marriages.

³⁵ See 1 U.S.C. § 7 (2006) [hereinafter DOMA]. Definition of “marriage” and “spouse” is stated as follows:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

Id.; see also 28 U.S.C. § 1738C (2006), which additionally states:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Id.

³⁶ 1 U.S.C. § 7.

II. BRIEF HISTORY OF DIVORCE REFORM AND THE DEVELOPMENT OF NO-FAULT DIVORCE LAWS IN NEW YORK

Before understanding where the law is headed under the recent reforms, it is necessary to first look back to the history of divorce in the twentieth century to determine how and why the domestic relations law has evolved into its current state. In the past, “The traditional law defined the basic rights and obligations of husbands and wives on the basis of gender, creating a sex-based division of family roles and responsibilities.”³⁷ Thus, the new laws, based not in tradition, but rather in progression, will have to adapt to meet the needs that justice and society demand.

Prior to 1970, all fifty states required some form of fault to establish the requisite grounds for a divorce.³⁸ That all changed with the progressive action that California took in being the first to adopt a no-fault divorce system “in the Western World.”³⁹ Thus the term “Divorce Revolution” was born from Lenore J. Weitzman, who studied the social and legal changes that took place in the wake of this unprecedented no-fault divorce legislation.⁴⁰

In taking a cue from California, nearly every other state had adopted some provision of no-fault into its version of the domestic relations laws by 1985.⁴¹ The relatively swift evolution from a nation focused on fault to a nation permitting less stringent divorce laws can only be explained by a general change in the country’s moral and social values.⁴² As society progressed in the twentieth century, so, too, did the notion that marriage was not the ultimate, unbreakable union that it was once thought to be. Instead, many married couples were realizing that they wanted a way out of unhappy, lackluster relationships that had faded over time. Divorce, specifically no-fault di-

³⁷ WEITZMAN, *supra* note 9, at 2.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at ix-x.

⁴¹ Guidice, *supra* note 19, at 793.

⁴² *Id.*; see also Frank F. Furstenberg, Jr., *History and Current Status of Divorce in the United States*, 4 THE FUTURE OF CHILDREN 29, 34 (1994), available at <http://www.jstor.org/stable/1602476> (remarking on the shift from the idealities of the 1950’s marriage to a society focused on “individual interests [and] away from forming permanent unions to more fluid and flexible arrangements”).

orce, made the chances of future happiness more viable for those seeking to part ways with their once-beloved spouse.⁴³ Thus, the popularity of the no-fault divorce system exponentially grew across the nation.⁴⁴

The fault-based system focused on the State's interest in the preservation of marriage and the belief that the fault requirement, including a spouse's burden to prove such fault, would deter the dissolution of marriages.⁴⁵ As society evolved, so did the common perceptions and stigmas that were typically coupled with the idea of divorce and those who chose to end their marriages through such means.⁴⁶ People began to accept divorce as a social norm and loosened the grips of the "social ostracism"⁴⁷ that often burdened men and women who had experienced a failed marriage.⁴⁸ The line between traditional gender roles became less distinct as women entered the workplace by the masses. Thus, a newfound emphasis of individualism and personal freedom became prevalent in society.⁴⁹ Furthermore, the sexual revolution, which created new sexual norms, was changing the shape of relationships between men and women.⁵⁰ As a result of all these societal changes, the fault system was rapidly losing its allure with state legislatures and constituents alike.⁵¹

Notwithstanding the acceptance of no-fault by many of its fellow states, New York was firm in its stance on proving that the fault of the parties mattered.⁵² Perhaps New Yorkers needed to hold onto

⁴³ See W. Bradford Wilcox, *The Evolution of Divorce*, NATIONAL AFFAIRS, 81 (2009), <http://nationalaffairs.com/publications/detail/the-evolution-of-divorce> ("[W]hile less than 20% of couples who married in 1950 ended up divorced, about 50% of couples who married in 1970 did.").

⁴⁴ *Id.*

⁴⁵ Guidice, *supra* note 19, at 794.

⁴⁶ WEITZMAN, *supra* note 9, at xvii.

⁴⁷ *Id.*

⁴⁸ See *id.* ("Divorce has become recognized as a possibility for most American couples, and divorced men and women are no longer considered exceptional or deviant in most social circles.").

⁴⁹ *Id.* at xviii.

⁵⁰ See Furstenberg, *supra* note 42 ("The sexual revolution in no small measure made marriage seem less attractive.").

⁵¹ See *id.* (discussing the cultural changes that took place in the United States).

⁵² See DiFonzo & Stern, *supra* note 10, at 593 ("Various reasons have been cited for this reconsideration of blameworthiness, including 'the growing evidence that divorce often hurts children, feminists' renewed recognition of the importance of legal protection for mothers raising children, and concerns about the economic disparities created by differences in mar-

the idea that someone was to blame in order to make sense of the increased number of divorces that seemed to be affecting the entirety of the United States.⁵³ Or, perhaps, the State was not sold on the idea that no-fault truly meant “no-fault” and, therefore, a modification to the law would not be worth the trouble of reformation.⁵⁴ Whatever the cause may be, New York would not budge, and the four grounds for divorce continued to be alleged by disgruntled spouses across the State seeking a way out of their lifeless marriages.⁵⁵

It should be noted that out of the reforms from 1966, New York tested the no-fault water by adding what is known as the “conversion divorce” into its domestic relations law.⁵⁶ Although this conversion form of divorce was not a true no-fault provision, it was the closest that New York would come to implementing no-fault for several decades.⁵⁷ Under this conversion form of divorce, the spouses must agree to live separate and apart for a specified period of time.⁵⁸ The requisite time period for separation ultimately decreased from

riage rates.’ ”) (quoting Robin Fretwell Wilson, *Don't Let Divorce off the Hook*, N.Y. TIMES, Oct. 1, 2006, <http://www.nytimes.com/2006/10/01/opinion/01LIwilson.html>).

⁵³ See *id.* at 592–93 (“[T]he removal of fault from divorce throughout the nation has been criticized as an inappropriate erasure of culpability, thus muddying the moral message of marriage.”).

⁵⁴ See Joel Stashenko, *Woman Wins Divorce After Trial in No-Fault Dispute*, N.Y.L.J., Jan. 23, 2012. In York State’s first contested no-fault divorce the defendant-husband asserted certain affirmative defenses to counter the automatic granting of a judgment of divorce at the request of his wife. *Id.* Although the wife sought a divorce under the no-fault provision, she ultimately alleged various marital wrongdoings against her husband in an effort to obtain the divorce. *Id.* Justice James F. Quinn ultimately granted the parties a divorce, but noted the validity of the husband’s challenge, stating, “It is interesting to note that the legislature wanted to create a no-fault provision, but maintained all six other grounds for divorce in the statute It appears that New York is a quasi-no-fault state based upon the availability of grounds, and no-fault provisions.” *Id.*

⁵⁵ William M. Hohengarten, *Same-Sex Marriage and the Right of Privacy*, 103 YALE L.J. 1495, 1515 (1994) (discussing the four fault based grounds for divorce in New York).

⁵⁶ See N.Y. DOM. REL. LAW § 170(5) (“The husband and wife have lived apart pursuant to a *decree or judgment of separation* . . . and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such decree or judgment.”) (emphasis added); N.Y. DOM. REL. LAW § 170(6) (McKinney 2012) (“The husband and wife have lived separate and apart pursuant to a *written agreement of separation* . . . and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such agreement.”) (emphasis added).

⁵⁷ Douglas Mossman & Amanda N. Shoemaker, *Incompetence to Maintain a Divorce Action: When Breaking up is Odd to Do*, 84 ST. JOHN’S L. REV. 117, 136 (2010) (noting that New York did not have a no-fault law, but instead, had a form of conversion divorce).

⁵⁸ See N.Y. DOM. REL. LAW § 170(5) (“The husband and wife have lived apart pursuant to a decree or judgment of separation for a period of one or more years . . .”).

two years to one, exhibiting a loosening of the reins on divorce law.⁵⁹ The parties must also live separate and apart pursuant to the terms of a separation agreement or judicial decree in what could be considered a trial separation.⁶⁰ Once the parties' one-year term had been complied with, the party seeking the divorce had to show that he or she had substantially abided by the terms of the written agreement or judicial decree. At that point, the couple could request that the court utilize their trial separation as a conversion ground to obtain a permanent judgment of divorce.⁶¹

However, the conversion divorce is a bit of a misnomer, as it does not literally manufacture a judgment of divorce out of the parties' separation agreement, even if the parties have abided by its terms.⁶² On the contrary, an altogether new judgment of divorce would be entered if the conversion ground for a divorce was granted, although a judge could choose to incorporate the separation agreement in whole, or part, into the judgment of divorce.⁶³ Moreover, before the parties' divorce is even granted, equitable distribution, maintenance, child support, and other unresolved marital issues must be dealt with *de novo* in the spouses' action for divorce.⁶⁴ The no-fault aspect of a conversion divorce is completely absent when the parties seek a divorce based on a judgment of separation as opposed to a separation agreement because the judgment of separation does in fact require some finding of fault.⁶⁵ Although the conversion divorce falls short of being a true no-fault provision, it was an early attempt by the legislature to acknowledge that there was no state or public policy interest in forcing a couple to remain in a lifeless marriage.⁶⁶

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *See id.* (explaining an action for divorce "pursuant to a decree or judgment of separation").

⁶³ *See* N.Y. DOM. REL. LAW § 170(5) (defining conversion divorce).

⁶⁴ *See, e.g.,* *Blauner v. Blauner*, 400 N.Y.S.2d 335, 336 (App. Div. 1st Dep't 1977) (holding that the trial court had the privilege to consider spousal maintenance and child support *de novo* in view of the party's conversion ground).

⁶⁵ N.Y. DOM. REL. LAW § 200 (McKinney 2003) (requiring that the spouse seeking a separation judgment allege one of the following grounds: cruel and inhuman treatment, abandonment, the neglect and/or refusal to provide support to the other spouse, adultery, and imprisonment for three or more years).

⁶⁶ *See* *Gleason v. Gleason*, 256 N.E.2d 513, 514-15 (N.Y. 1970) ("[T]he Legislature repealed this State's ancient divorce laws [S]ection 170 of the Domestic Relations Law

III. THE ENACTMENT OF NO-FAULT DIVORCE IN NEW YORK STATE

In recent years, it became apparent that New York would eventually have to join the no-fault party or forever lose its invite. The State has come a long way since the days of adultery being the lone ground for divorce, and Woody Allen's witty commentary, "The Ten Commandments say 'Thou shalt not commit adultery,' but New York State says you have to," no longer applies.⁶⁷ Now, couples are free to file for divorce if the marital relationship has reached its breaking point without slinging false allegations of marital infidelities at one another.⁶⁸

Prior to the no-fault reform, however, many members of the legal community complained that the fault-based system was placing married couples in a position where they felt compelled to lie to the court, or at the very least embellish the less savory details of their spouse's alleged marital flaws to obtain the proper grounds for divorce.⁶⁹ Malcolm S. Taub, a matrimonial attorney based in Manhattan, has even gone so far as to remark, "What the fault divorce system has done is that it has institutionalized perjury This play-

specifie[s] two 'nonfault' grounds predicated on a couple's living apart for a period of two years after the granting of a separation judgment or decree or the execution of a written separation agreement.") (citations omitted).

⁶⁷ Arlene S. Kayatt, "No-Fault" Divorce in New York One Year Later: Is Breaking up Still Hard to Do?, NEW YORK CIVIC (Nov. 4, 2011), <http://nycivic.org/story/No-Fault-divorce-new-york-one-year-later> (quoting actor, Woody Allen).

⁶⁸ See William Glaberson, *Change to Divorce Law Could Recall a TV Quiz Show: "To Tell the Truth,"* N.Y. TIMES, June 16, 2010, <http://www.nytimes.com/2010/06/17/nyregion/17divorce.html?pagewanted=1&fta=y> (lamenting, "[f]or decades, New York State's divorce system has been built on a foundation of winks and falsehoods," based upon the unfortunate reality that spouses would feel compelled to lie to the Court to establish grounds for the divorce under the fault-based system).

⁶⁹ See, e.g., *id.* ("If you wanted to split quickly, you and your spouse had to give one of the limited number of allowable reasons—including adultery, cruelty, imprisonment or abandonment—so there was a tendency to pick one out of a hat."); Joel Stashenko & Noeleen G. Walder, *Divorce Lawyers Predict Reduced Costs, Less Stress Under No-Fault*, N.Y. L.J. (July 6, 2010), http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202463271835&Divorce_Lawyers_Predict_Reduced_Costs_Less_Stress_Under_NoFault&slreturn=20120924112104 ("[T]he [fault-based] system forces some spouses, desperate to escape marriages, to commit perjury.") (quoting Lee Rosenberg, Esq. of Saltzman Chetkof & Rosenberg); DiFonzo & Stern, *supra* note 10, at 578 (citing to Howard Hilton Spellman's observation of the "orgy of perjury" that took place in so-called "Mexican divorces," wherein American couples travelled to Mexican courthouses in an effort to obtain a quick divorce, prior to the 1966 amendment).

acting goes on and everybody looks the other way and follows the script.”⁷⁰ Acting State Supreme Court Justice Jeffrey S. Sunshine, the supervising judge of the Second Department, openly critiqued the old fault-based system because it frequently required judges to hear matters that should remain private between the parties.⁷¹ Justice Sunshine also remarked on the legal implications of hearing such “he said/she said” testimony, stating, “[I]t is not a subject that lends itself to an easy decision, since there are often no witnesses to what goes on in private. ‘Some of the claims may be dubious.’ ”⁷² This disregard for telling the truth on the part of the litigants, the judge’s inability to decipher the truth, and the imposition on marital privacy were undoubtedly some of the most prevalent factors leading to the reformation of the law in 2010.⁷³ Judges were not the only members of the community that were concerned with the state of matrimonial law prior to the 2010 enactment.⁷⁴ Although some women’s groups had concerns about what no-fault would mean for the union of marriage, and, in particular, the financial ramifications of allowing one spouse to unilaterally determine that the marriage was over,⁷⁵ it was actually the Women’s Bar Association of the State of New York that began the initial drafting of the current no-fault legislation.⁷⁶ Sondra Miller, one of the legislation’s authors, explained that the original drafters

⁷⁰ See Glaberson, *supra* note 68.

⁷¹ *Id.* (noting the inherent invasion of privacy into the marital relationship, Judge Sunshine asked, “Should we really, . . . in the 21st century be having people get on the stand and testify that ‘my spouse refused to have sex with me?’ ”).

⁷² *Id.*

⁷³ See N.Y. DOM. REL. LAW—No Fault, ch. 384, S. 3890-A (2010) (McKinney) (amending section 170 of the Domestic Relations Law by adding no-fault divorce); see also S. 3890-A, 233rd Leg., 2010 Reg. Sess., ch. 384 (N.Y. 2010) (“The above-referenced bills were enacted by the Legislature . . . [to] bring about significant and rational reform to New York’s process for adjudicating divorce proceedings . . . [and to] help ensure representation for lower income individuals . . . and ease the burden on the parties in what is inevitably a difficult and costly process.”).

⁷⁴ See Glaberson, *supra* note 68 (explaining how the fault requirement “forced lawyers to question clients closely to try to find an acceptable reason to explain the split, even when the real reason is pretty simple: The client does not like his or her spouse”).

⁷⁵ See Kayatt, *supra* note 67 (stating that women’s groups “vigorously opposed” no-fault divorce); see also Stephanie Coontz, *Divorce, No-Fault Style*, N.Y. TIMES, June 16, 2010, <http://www.nytimes.com/2010/06/17/opinion/17coontz.html?pagewanted=all> (discussing the “trade-offs” that are coupled with social change and the effect such social and legal changes may have on the traditional female homemaker who has invested herself in the home as opposed to her own potential earning capacity).

⁷⁶ Sondra Miller, *No Fault Clear and Simple*, N.Y. L.J., Dec. 3, 2010.

were very cognizant of the need for clear and concise language, noting that there was a purposeful attempt to make the legislation devoid of any “unnecessary or ambiguous verbiage.”⁷⁷ Miller further explained that the legislative intent behind the No-Fault Divorce Act was to both “eliminate the bitterness and hostility engendered by allegations of misconduct [and] to eliminate the cost and delay of divorce litigation.”⁷⁸

Ultimately, the question becomes whether New York’s intended goal of decreasing costs, time delays, and spousal hostility will be realized through the implementation of no-fault divorce. Though it seems clear that New York was in desperate need of a reformation of its divorce laws to catch up to speed with the rest of the country, it appears that the State is fighting an uphill battle. Divorce can often be an incredibly trying time in a person’s life; therefore, it is conceivable that the legislature would aspire to alleviate some of the hardships that are inherently coupled with such a proceeding. However, because divorce has the unrivaled ability to bring out one’s inner most acrimony toward his or her embittered spouse, merely removing the grounds requirement will unlikely be enough to take the sting out of being served with divorce papers and coming to terms with the reality that one’s marriage and/or family will be divided as a casualty of the dissolution.

Furthermore, there remains some division among the New York trial courts regarding the true legislative intent of the amendment to Domestic Relations Law Section 170.⁷⁹ Some members of the matrimonial law community construe the no-fault provision to mean simply what the name implies, an elimination of any need for a fault-finding proceeding to determine whether the marital relation-

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Compare *Strack v. Strack*, 916 N.Y.S.2d 759, 763-64 (Sup. Ct. Essex County 2011) (holding that spouses may oppose an assertion of irretrievable breakdown by trial, specifically finding that “Domestic Relations Law § 170(7) is not a panacea for those hoping to avoid a trial”), with *A.C. v. D.R.*, 927 N.Y.S.2d 496, 505 (Sup. Ct. Nassau County 2011) (“[A] plaintiff’s self-serving declaration about his or her state of mind is all that is required for the dissolution of a marriage on grounds that it is irretrievably broken.”); see also Stashenko, *supra* note 54 (discussing the state of confusion that the lower courts remain in until further appellate decisional law is established to clarify the issue. Jennifer Goody, Esq. of Wand, Powers & Goody has commented that the “courts remain ‘very unclear’ about the level of proof, if any, needed to grant a no-fault divorce”).

ship has, in fact, “broken down.”⁸⁰ This group has determined that “[i]t is contradictory and violative of the legislative intent that a ground based on no wrongdoing, ‘no fault,’ could become the subject of fault finding.”⁸¹ Sondra Miller, former Justice of the Appellate Division, Second Department, is among the camp that believes that a plaintiff’s assertion that the marital relationship has irretrievably broken down for a period of six months or more is sufficient for a divorce to be granted once all of the ancillary financial and custodial issues have been resolved.⁸² Miller posed the question: “Is it possible that experienced attorneys discern that the legislative intent was to substitute trials on ‘irretrievable breakdown’ for trials on fault?”⁸³

The opposing school of thought answered that question in the affirmative.⁸⁴ Professor Timothy Tippins, a well-known member of the New York matrimonial law community, suggests that defendant-spouse does have the right to challenge the plaintiff’s assertion that the marriage has become irretrievably broken.⁸⁵ Professor Tippins has argued:

[T]he statute does not express any intent to strip litigants of the opportunity to be heard. The language to which the “no-trial” contingent points in support of the proposition that the Legislature was bent on eliminating the right to trial is the statutory proviso that one party has “stated under oath” that the marriage has been irretrievably broken for the requisite six months.

⁸⁰ See, e.g., Elliott Scheinberg, *No-Fault Divorce, Defenses, Pleadings, Independent Actions*, 244 N.Y. L.J. 4, Nov. 30, 2010 (“The Legislature’s requirement of no more than a perceptual statement made under oath eliminates any further exploration as to underlying fact.”); Miller, *supra* note 76 (explaining the legislative purpose as follows: “This legislation enables parties to legally end a marriage which is in reality already over and cannot be salvaged. Its intent is to lessen the disputes that often arise between the parties and to mitigate the potential harm to them and their children caused by the current process”).

⁸¹ See Scheinberg, *supra* note 80.

⁸² Miller, *supra* note 76.

⁸³ *Id.*

⁸⁴ See, e.g., Timothy M. Tippins, *No-Fault Divorce and Due Process*, N.Y. L.J. (Mar. 3 2011), http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202483982370&NoFault_Divorce_And_Due_Process (“The Legislature enacted a no-fault statute, not a no-ground statute, and not a no-trial statute. It did not enact divorce-on-demand. The new ground hinges on the ultimate conclusion that the marriage has been irretrievably broken for at least six months and that requires proof of fact.”).

⁸⁵ *Id.*

That is a rather anemic argument upon which to anchor the deprivation of due process of law.⁸⁶

Professor Tippins has suggested that the courts will be reduced “to a mere rubber stamp for fraud and perjury” if defendants are not given the opportunity to present evidence to oppose their spouses’ allegations that the marital relationship has become defunct.⁸⁷

Although it is difficult not to side with the faction supporting a litigant’s right to be heard and challenge his or her spouse’s unilateral assertion of irretrievable breakdown, the law, as written, does not support such a conclusion. Consequently, in view of the language contained in the statute, the Nassau County Supreme Court in *A.C. v. D.R.*,⁸⁸ correctly held that:

[T]he Legislature did not intend nor is there a defense to DRL § 170(7). Suggestions that the party wishing to stay married has a constitutional right that is being infringed upon in violation of due process is unavailing. Staying married, against the wishes of the other adult who states under oath that the marriage is irretrievably broken, is not a vested right. “Marital rights have always been treated as inchoate or contingent and may be taken away by legislation before they vest.”⁸⁹

Based upon a reading of the language used in DRL Section 270(7), it is abundantly clear that the legislature intended to ease the hardship of establishing grounds by allowing one party to determine that the marriage is unsalvageable. DRL Section 270(7) provides, “An action for divorce may be maintained [if] . . . [t]he relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath.”⁹⁰ Thus, based upon the plain meaning of the statute, one can conclude that it is the plaintiff’s subjective prerogative to determine whether the marriage has been irreparably harmed for the requisite statutory period. Under the current legislation, although one spouse believes the marriage is capable of repair, it does not mean that the other

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ 927 N.Y.S.2d 496 (Sup. Ct. Nassau County 2011).

⁸⁹ *Id.* at 506 (quoting *Gleason*, 265 N.E.2d at 519).

⁹⁰ N.Y. DOM. REL. LAW. § 270(7).

spouse is entitled to defend against the assertions of the party moving for the dissolution.⁹¹ Such an interpretation of the law would, as Sondra Miller suggests, result in the counterintuitive substitution of trials on the irretrievable breakdown of a marriage for trials concerning one spouse's fault.⁹²

The addition of no-fault divorce may alleviate some of the initial stresses of having to assert often embarrassing or painful grounds against the other spouse, but the new legislation is not capable of truly fostering a cooperative environment devoid of all emotional anguish. Over the course of the relationship, couples acquire real property, financial assets, educational degrees, retirement benefits, and many produce children. When it comes to divorce, couples are facing the prospect of divvying up two things that are nearest and dearest to their hearts: their children and their finances. It is this emotion that has the potential to give rise to protracted litigation concerning the equitable division of the marital property, as well as the custody and/or visitation issues relating to the parties' children.⁹³ Therefore, the legislative purpose behind the enactment of no-fault may be a bit optimistic,⁹⁴ in view of the fact that fighting over grounds is not generally what prolongs divorce proceedings and increases the cost of litigation.⁹⁵ Rather, it is the suspicion and disbelief over the respective spouses' finances, the hiring of forensic accountants, and other experts to uncover the "truth" that greatly increases the cost for divorce.⁹⁶

Although the no-fault system may not be entirely effective in

⁹¹ Miller, *supra* note 76.

⁹² *Id.*

⁹³ See Horowitz, *supra* note 7 ("False accusations and the necessity to hold one partner at fault often result in conflict within the family. The conflict is harmful to the partners and destructive to the emotional well being of children. Prolonging the divorce process adds additional stress to an already difficult situation.").

⁹⁴ See Miller, *supra* note 76 ("We were careful to avoid unnecessary or ambiguous verbiage: the purpose of the long-awaited reform was not only to eliminate the bitterness and hostility engendered by allegations of misconduct, but to eliminate the cost and delay of divorce litigation.").

⁹⁵ See, e.g., Stashenko, *supra* note 8 (Attorney Susan Bender from the firm Bender Rosenthal Isaacs & Richter, posits that the enactment of no-fault will bear little impact on divorce litigation, explaining that, "[i]n our practice, the grounds for divorce are rarely the issue, it is custody and financial issues. . . . The divorce cannot be finalized until everything else is done, [and] [b]y that time, the clients are so litigation-weary that you say, 'Adultery?' They say, 'Fine.' 'Cruel and inhuman treatment?' 'Fine.'").

⁹⁶ *Id.*

carrying out the proposed legislative intent, it is not the position of this Comment that divorce litigants were in a better position under the old fault-based system. On the contrary, some have suggested that fault should be accounted for in determining certain elements of a couple's divorce proceeding.⁹⁷ This position is understandable from a litigant's perspective because it may allow a litigant the chance to air his or her spouse's grievances to the court in hopes of a larger financial award upon dissolution.⁹⁸ Additionally, from an emotional standpoint, it might give some disgruntled spouses comfort in just having someone to listen to their side of the story, whether it is the presiding judge or even their attorney.⁹⁹ Because divorce is so emotionally charged, litigants may believe that they are being disadvantaged by the denial of more illustrative grounds for divorce. However, parties must bear in mind that no-fault divorce is not equivalent to "no-ground" divorce, and the plaintiff in an action for divorce is still responsible for establishing that the marital relationship has "irretrievably broken" down for a period of at least six months.¹⁰⁰

⁹⁷ See Guidice, *supra* note 19, at 791. Guidice argues that:

[F]ault should matter in the division of assets, even where it is properly excluded from the reasons for divorce. By allowing fault to be taken into account when determining maintenance awards, New York courts would maintain the requisite authority to provide equitable post-divorce settlements regardless of which party desired the divorce.

Id.

⁹⁸ See *Blickstein v. Blickstein*, 472 N.Y.S.2d 110, 113-14 (App. Div. 2d Dep't 1984) (holding that although equitable distribution awards are not typically based upon marital misconduct, a trier of fact may consider this as a factor in its final disposition in "situations in which the marital misconduct is so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship—misconduct that 'shocks the conscience' of the court thereby compelling it to invoke its equitable power to do justice between the parties").

⁹⁹ See Glaberson, *supra* note 68 (noting the dual role of attorneys under the fault system, "I have to sit there like a shrink or I'm not even sure what, but definitely not a lawyer . . .").

¹⁰⁰ Tippins, *supra* note 84.

IV. THE ULTIMATE DOMESTIC RELATIONS REFORM: NEW YORK'S MARRIAGE EQUALITY ACT

A. Domestic Relations Issues for Non-traditional Spouses and Families Prior to the Enactment of the Marriage Equality Act

The enactment of no-fault divorce legislation was the start of the modern wave of divorce reform that New York has experienced in recent years.¹⁰¹ However, it was not until the passage and subsequent effectuation of the Marriage Equality Act on July 24, 2011, that New York's domestic relations laws came to be viewed as progressive and, without question, controversial.¹⁰²

Although marriage prior to July 24, 2011, was limited to only those relationships between a man and a woman, New York State has some relatively recent history with the issue of same-sex marriage, even prior to the passage of the new law.¹⁰³ Specifically, in 2008, only three years before passing its own Marriage Equality Act, the Supreme Court of New York County presided over *Beth R. v. Donna M.*,¹⁰⁴ a divorce proceeding concerning a lesbian couple whose marriage was performed in Canada.¹⁰⁵ Several weeks earlier, the Fourth

¹⁰¹ Note that although divorce reform commenced in 1966, with the addition of several more grounds for divorce, this was only the predecessor to what would become the modern era of reformation for New York domestic relation laws. See Stashenko, *supra* note 8 (acknowledging that New York State was the last of the union to enact no-fault divorce, stating that "it is the first substantial change to the grounds-based divorce law since 1966 . . . [since then], [t]wo other new divorce-related laws also went into effect . . .").

¹⁰² See, e.g., Tyler Kingkade, *New York Town Clerk Refuses to Let Same-Sex Couple Get Married*, HUFFINGTON POST, Sept. 15, 2011, http://www.huffingtonpost.com/2011/09/15/new-york-town-refuses-to-marry-gay-couple_n_964595.html (reporting that a town clerk from Ledyard, New York, has refused to issue marriage certificates to same-sex couples seeking to marry. The clerk was met with opposition by the president of People for the American Way Foundation, who asserted, "Public officials can't pick and choose the laws they want to follow If a public official simply decides to shirk the obligations of her office, then she should resign and be replaced by someone who will do the job and carry out state law").

¹⁰³ See, e.g., *Beth R. v. Donna M.*, 853 N.Y.S.2d 501, 502 (Sup. Ct. N.Y. County 2008) (dealing with a divorce action stemming from a same-sex marriage consummated in Canada); *Martinez v. County of Monroe*, 850 N.Y.S.2d 740, 743 (App. Div. 4th Dep't 2008) (concluding that the marriage of a Canadian same-sex couple was legally recognized in New York).

¹⁰⁴ 853 N.Y.S.2d 501 (2008).

¹⁰⁵ *Id.* at 502.

Department recognized a same-sex marriage performed outside of New York State for the first time.¹⁰⁶ This was one of the first times in New York's history that the State expanded the boundaries of its domestic relations laws to encompass a same-sex divorce issue.¹⁰⁷

Beth R. is particularly interesting because it also concerned two minor children arising from separate artificial fertilization procedures.¹⁰⁸ The first child was born prior to the parties' marriage in 2004, and the second was born approximately two years after the women's nuptials.¹⁰⁹ The plaintiff paid for the insemination procedures but she was never permitted by the defendant to officially adopt the children through a non-biological second parent adoption process.¹¹⁰ The children did however utilize the last name of the non-biological mother.¹¹¹ Both parties were responsible for caring for and providing emotional and financial support for the health and well-being of their two children.¹¹² In all respects, each party held herself out to be the children's parent.¹¹³

In 2006, a few years into the marriage, the defendant-wife expressed her desire to terminate the marriage and subsequently "served a Notice to Quit on [the] [p]laintiff to remove her from the [defendant's Manhattan] apartment."¹¹⁴ The plaintiff responded by filing for divorce in April 2007, and "the parties entered into a stipulation" of visitation concerning the two children.¹¹⁵ Thereafter, the defendant moved to have the divorce action dismissed on the ground that the marriage was void pursuant to New York law and, therefore, no divorce could be granted.¹¹⁶

The court, however, found that in light of the absence of any

¹⁰⁶ *Martinez*, 850 N.Y.S.2d at 743.

¹⁰⁷ *Beth R.* at 506; *see also Martinez*, 850 N.Y.S.2d at 743 (recognizing same-sex marriages solemnized outside of the United States to be valid under the laws of New York State, and further finding the denial of one partner's employment benefits to the other spouse to be a form of discrimination unlawfully based upon the employee's sexual orientation).

¹⁰⁸ *Beth R.*, 853 N.Y.S.2d at 502-03.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 503; *see also In re Jacob*, 660 N.E.2d 397, 398, 405-06 (1995) (recognizing the right of same-sex second parent adoptions in the State of New York).

¹¹¹ *Beth R.*, 853 N.Y.S.2d at 503.

¹¹² *Id.*

¹¹³ *Id.* at 503-04.

¹¹⁴ *Id.* at 503.

¹¹⁵ *Id.* at 504.

¹¹⁶ *Beth R.*, 853 N.Y.S.2d at 504.

prevailing statutory authority, the issue of same-sex divorce was subject to the common law and doctrine of reciprocity between jurisdictions.¹¹⁷ The court specifically looked to the fact that “New York courts have long held that out-of-state marriages, if valid where entered will be respected in New York even if under New York law the marriage would be void.”¹¹⁸ Nonetheless, the courts have recognized two circumstances which allow deviation from the rule of comity, stating, “New York will not recognize either a marriage prohibited by positive law of this state or a marriage abhorrent to New York public policy.”¹¹⁹ In reality, the courts have only applied this exception in cases involving incestuous marital relationships and polygamy.¹²⁰ Therefore, this deviation from the rule is construed very narrowly.

Furthermore, the residency requirements of DRL Section 230 were satisfied in this case, thus giving the court the ability to ultimately grant the parties a judgment of divorce.¹²¹ Subsection two of the *Required Residence of Parties* statute of DRL Section 230 states:

An action to annul a marriage, or to declare the nullity of a void marriage, or for divorce or separation may be maintained only when . . . [t]he parties have resided in this state as husband and wife and either party is a resident thereof when the action is commenced and has been a resident for a continuous period of one year immediately preceding.¹²²

Although Beth R. and Donna M. married in Canada, they resided in a New York apartment together for the duration of the marriage.¹²³ This Manhattan residence, therefore, satisfied New York’s residency requirement under DRL Section 230(2).¹²⁴

However, litigants to a divorce proceeding in New York State

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See N.Y. DOM. REL. LAW § 230 (stipulating when an action for divorce may be granted).

¹²² *Id.* at § 230(2).

¹²³ *Beth R.*, 853 N.Y.S.2d at 502-03.

¹²⁴ See N.Y. DOM. REL. LAW § 230(2) (requiring that the parties live together as husband and wife and that either one of the parties be a resident of the state at the commencement of the action).

are also subject to the statutory and constitutional mandates that give courts the authority to render decisions concerning the equitable distribution of the parties' marital property, as well as custody and visitation of any children of the marriage.¹²⁵ In rem and personal jurisdiction must first be established before any court can issue a binding decision over the parties.¹²⁶ In rem jurisdiction is created under Civil Practice Law and Rules ("CPLR") 314,¹²⁷ and personal jurisdiction is established under CPLR 302(4)(b).¹²⁸ CPLR 302(4)(b) is especially important in divorce proceedings because of its ability to grant the court personal jurisdiction over a defendant-spouse, even if that spouse no longer lives within the boundaries of the state.¹²⁹ The language of this statute provides in part that the party seeking monetary support, "distributive awards or special relief in [divorce] actions may exercise personal jurisdiction over" a non-resident defendant so long as the party moving for the support is a resident or domicile of the state in which the marital domicile existed prior to couple's separation.¹³⁰ Beth R. and Donna M. met the statutory and constitutional requirements for residency and jurisdiction because both spouses remained within New York State throughout the duration of their marriage.¹³¹ However, other same-sex couples seeking divorces in New York State must also take notice of these requirements if they wish to have the New York court system preside over their divorce.

Once the jurisdictional elements were deemed satisfied, the court in *Beth R.* ultimately held that the defendant's motion to dismiss the divorce action must be denied¹³² in view of the Fourth Department's contemporary decision in *Martinez v. County of Monroe*.¹³³ *Martinez* based its finding upon an alternative reading of the

¹²⁵ See N.Y. C.P.L.R. 314 (McKinney 2012) (setting forth the service requirements that grant New York courts *in rem* jurisdiction over a litigant's property that is located within the state. This allows service to be completed on a defendant living outside of the State of New York, so long as he or she has property that is present in the state); N.Y. C.P.L.R. 302(4)(b) (granting personal jurisdiction of the courts over a non-resident spouse for purposes of spousal or child support, so long as the party seeking such support is domiciled in the state).

¹²⁶ N.Y. C.P.L.R. 301; N.Y. C.P.L.R. 314; N.Y. C.P.L.R. 302(4)(b).

¹²⁷ N.Y. C.P.L.R. 314.

¹²⁸ N.Y. C.P.L.R. 302(4)(b).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Beth R.*, 853 N.Y.S.2d at 502-03.

¹³² *Id.* at 509.

¹³³ 850 N.Y.S.2d 740, 743 (App. Div. 2008) ("The Legislature may decide to prohibit the

2006 Court of Appeals decision in *Hernandez v. Robles*,¹³⁴ which held same-sex marriages were neither permitted by New York's domestic relation laws nor the State Constitution.¹³⁵ The Fourth Department in *Martinez* interpreted *Hernandez* to mean that although actual solemnization of same-sex marriages was not permitted under state law, the recognition of same-sex marriages from other permitting jurisdictions was not barred by the New York State Constitution or by public policy.¹³⁶ The plaintiff in *Beth R.* thus argued that "she [was] entitled to maintain an on-going [parental] relationship with . . . the [two] children" born to the couple.¹³⁷ This was met with opposition by the defendant, who averred that the plaintiff had not legally adopted the children, and, therefore, had no such lawful right to exercise visitation with the minors.¹³⁸

In addressing the defendant's argument, the court cited to *Shondel J. v. Mark D.*,¹³⁹ a New York Court of Appeals case, wherein that court determined that:

The potential damage to a child's psyche caused by suddenly ending established parental support need only be stated to be appreciated. Cutting off that support, whether *emotional* or financial, may leave the child in a worse position than if the support had never been given. . . . [T]he issue does not involve the equities between the two adults; the case turns *exclusively* on the best interests of the child.¹⁴⁰

The decision in *Shondel J.* is crucial to the issue of non-biological parental rights and obligations. The New York Court of Appeals was clear in its message "that both the statute and case law required that the best interests of the child controlled whether a per-

recognition of same-sex marriages solemnized abroad. Until it does so, however, such marriages are entitled to recognition in New York.").

¹³⁴ 855 N.E.2d 1, 5 (2006) (holding that the question of same-sex marriage should be left to the legislature to decide, and "that the New York State Constitution does not compel [such] recognition" until the legislature speaks to the issue).

¹³⁵ *Id.* at 8-9.

¹³⁶ *Martinez*, 850 N.Y.S.2d at 743.

¹³⁷ *Beth R.*, 853 N.Y.S.2d at 506.

¹³⁸ *Id.*

¹³⁹ 853 N.E.2d 610 (2006).

¹⁴⁰ *Beth R.*, 853 N.Y.S.2d at 507 (alteration in original) (quoting *Shondel J.*, 853 N.E.2d at 615-16).

son was required to continue support payments, even if it was belatedly determined that he was not the biological parent.”¹⁴¹

In applying the de facto parent or equitable estoppel¹⁴² principles, the court determined that the parties had “held out plaintiff to the world” and, most compellingly, presented the plaintiff as the parent to the children.¹⁴³ Although the plaintiff in *Beth R.* was a non-adoptive and non-biological parental figure, the court nonetheless concluded that it was in the best interest of the children to permit the plaintiff to be heard through her motion for custody.¹⁴⁴ Specifically, the court in *Beth R.* offered the sound reasoning that “[i]f the concern of both the legislature and the Court of Appeals is what is in the child’s best interest, a formulaic approach to finding that a ‘parent’ can only mean a biologic or adoptive parent may not always be appropriate.”¹⁴⁵

In reaching its conclusion, the court admonished the defendant for her efforts “to minimize the significance of the act of marriage” in order to similarly reduce the plaintiff’s role as a parental figure in the children’s lives.¹⁴⁶ The court specifically defined the importance of the institution for the defendant: “Marriage is ‘a status founded on contract and established by law. It constitutes an institution involving the highest interests of society. It is regulated and controlled by law based upon principles of public policy affecting the welfare of the people of the State.’”¹⁴⁷ Here, it is evident that the court sought to underscore the importance of the family unit, irre-

¹⁴¹ *Id.*

¹⁴² *Id.* at 508, which states:

[T]he doctrine of equitable estoppel is imposed by law in the interest of fairness to prevent the enforcement of rights which would work [a] fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party’s words or conduct, has been misled into acting upon the belief that such enforcement would not be sought[] The paramount concern in applying equitable estoppel in these cases has been and continues to be, the best interests of the child.

Id. (alteration in original) (quoting *Jean Maby H. v. Joseph H.*, 676 N.Y.S.2d 677, 679 (App. Div. 2d Dep’t 1998)).

¹⁴³ *Id.*

¹⁴⁴ *Beth R.*, 853 N.Y.S.2d at 508-09.

¹⁴⁵ *Id.* at 508.

¹⁴⁶ *Id.* at 509.

¹⁴⁷ *Id.* (quoting *Fearon v. Treanor*, 5 N.E.2d 815, 816 (1936)).

spective of the sex or biological status of each party in relation to their children.¹⁴⁸ Finally, although the court deferred its ultimate decision regarding the status of plaintiff's continuing relationship and obligations to her children until a later custody conference, the court did indicate that the plaintiff may be considered the legitimate parent of the child who was conceived after the parties' date of marriage.¹⁴⁹ Unfortunately, this specific circumstance leaves the child born prior to the date of marriage at a disadvantage and somewhat in a stage of legal limbo as a result of the failure to pursue a second-parent adoption of the child.¹⁵⁰ It is situations like the ones faced by the parties in *Beth R.* that demonstrate that same-sex couples desiring to build families clearly face obstacles when the federal government and the vast majority of states refuse to legally recognize their relationships as legitimate.¹⁵¹ Unlike traditional heterosexual couples, who have the benefit of the presumption that all children born throughout the duration of the marriage are legitimate children of the marriage,¹⁵² same-sex, non-biological parents must seek second-parent adoption to best protect their parenting rights, especially in the event of di-

¹⁴⁸ See *id.* ("Although Defendant seeks to minimize the significance of the act of marriage, the law does not share her view. . . . As a result of being married, Plaintiff may be constrained to provide support for the Defendant and Defendant would be a recipient of a portion of Plaintiff's estate. These factors significantly affect the children's welfare. Moreover, although people enter into marriages for many reasons, creating familial bonds is one of the most significant reasons, particularly for the benefit of their children.").

¹⁴⁹ *Beth R.*, 853 N.Y.S.2d at 509; see N.Y. DOM. REL. LAW § 73 (McKinney 2008). Section 73 was enacted on July 21, 2008 to deal with the issue of children born via artificial insemination, as was the case in *Beth R.* *Id.* The statute states: "Any child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, birth child of the husband and his wife for all purposes." *Id.*

¹⁵⁰ See N.Y. DOM. REL. LAW § 73 (failing to discuss the rights of children born by way of artificial insemination prior to marriage).

¹⁵¹ See 1 U.S.C. § 7 (defining marriage as "a legal union between one man and one woman"); Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws, *supra* note 28 (enumerating that only ten jurisdictions permit for same-sex marriage).

¹⁵² See N.Y. DOM. REL. LAW § 24(1) (McKinney 2012), stating in full:

A child heretofore or hereafter born of parents who prior or subsequent to the birth of such child shall have entered into a civil or religious marriage, or shall have consummated a common-law marriage where such marriage is recognized as valid, in the manner authorized by the law of the place where such marriage takes place, is the legitimate child of both birth parents notwithstanding that such marriage is void or voidable or has been or shall hereafter be annulled or judicially declared void.

Id.

voice.¹⁵³ Second-parent adoptions allow the non-biological parent to fully adopt his or her child and enjoy equal co-parenting rights with his or her significant other or spouse.¹⁵⁴

In view of the fact that same-sex partners do not have the traditional means of biological procreation available to them, the reality that one parent may be left out of the biological makeup of his or her child is something that will have to be taken into consideration under the new laws.¹⁵⁵ Although unfortunate for many, the truth is:

Despite the coparents' intent to conceive and raise a child together, and despite long-standing, nurturing, supporting, and loving parental roles, a same-sex coparent is often a third party in the eyes of the law. Because of a lack of biological connection, a coparent becomes a nonparent and, thus, a stranger.¹⁵⁶

Thus, a same-sex parent's most viable and protective option is to proceed with a second parent adoption at the earliest possible stage following the child's birth to best ensure one's parental access to the child.

B. Domestic Relations and the Effect on Family Law Under the Marriage Equality Act

Notwithstanding the momentous passage of the Marriage Equality Act and similar laws pertaining to same-sex marriage in other states, some in the legal community are still concerned that same-sex couples will face considerably greater hardships than their heterosexual counterparts if the marriage fails.¹⁵⁷ Specifically, same-sex

¹⁵³ Marissa Wiley, Note, *Redefining the Legal Family: Protecting the Rights of Coparents and the Best Interests of their Children*, 38 HOFSTRA L. REV. 319, 321-22 (2009) ("New York State must recognize and protect nontraditional families through each possible mechanism, including second-parent adoption, coparenting agreements, judicial resolutions, and legislative action in order to foster and preserve loving parenting relationships and to truly serve the best interests of a child.").

¹⁵⁴ *Id.* at 323 ("This form of adoption is currently the best way for a coparent to fortify the legal parental relationship because it places the coparent in legal parity with the biological parent.").

¹⁵⁵ *Id.* at 321-22.

¹⁵⁶ *Id.* at 319-20.

¹⁵⁷ See, e.g., Elisabeth Oppenheimer, *No Exit: The Problem of Same-Sex Divorce*, 90 N.C. L. REV. 73, 74 (2011) ("Same-sex divorce is one of the most complicated and least discussed

spouses may face greater strains on their familial bonds should they decide to terminate their marital partnership and instead become litigants in a divorce proceeding.¹⁵⁸ As previously touched upon, the possibility of at least one of the parties to a same-sex marriage being a non-biological or non-adoptive parent is a prevalent reality in the modern familial landscape.¹⁵⁹

This may not be a problem for same-sex spouses while they are a united family, but in the event of divorce, people change and so, too, do their intentions.¹⁶⁰ What may begin as two people starting their marital life together and building a family may result in a bitter clash over custody, with one parent using his or her biological parental status to trump the non-biological spouse in court.¹⁶¹ This seems inherently unfair to both the parents and, more importantly, to the children who may have their relationship with a parental figure severed with little to no say in the matter. The court in *Beth R.* lamented “A child by the age of three clearly identifies with parental figures. The abrupt exclusion of a parental figure may be damaging to the emotional well being of that child.”¹⁶² This is a valid public policy issue that must be considered when dealing with the burgeoning area of same-sex domestic relations law.

There has been some ambiguity as to whether same-sex spouses will receive the same presumption of legitimacy for children

aspects of the gay rights movement. . . . One of the first things family lawyers tell excited gay couples planning to marry may come as a surprise: maybe they should reconsider.”); Harriet Newman Cohen, Bonnie E. Rabin & Tim James, *Marriage Equality Remains an Aspiration: Non-recognition Statutes Pose Legal Complications for Same-Sex Unions*, N.Y. L.J. (Aug. 1, 2011) (noting the uphill battle that same-sex couples still face as a result of federal non-recognition of same-sex marriage, and remarking that this issue “greatly complicat[es] the legal landscape for same-sex married couples”).

¹⁵⁸ See Oppenheimer, *supra* note 157, at 73 (“There are people desperate to end their marriages who are unable to do so, and there are same-sex couples unwilling to get married in the first place because divorce may be unavailable.”).

¹⁵⁹ See Wiley, *supra* note 153, at 359 (opining that “New York State must be tolerant and flexible with the innumerable variations of family compositions and protect all families equally in order to faithfully enforce the state policy of placing a child’s welfare before all other concerns in the dissolution of a family”).

¹⁶⁰ See, e.g., *Beth R.*, 853 N.Y.S.2d at 503-04, 506 (demonstrating how the parties’ intentions changed once the divorce proceeding began, with the defendant-mother seeking to bar plaintiff’s access to her non-biological children conceived during the parties’ three year marriage).

¹⁶¹ See *id.* at 502-06.

¹⁶² *Id.* at 509.

born to their marriages as enumerated in section 24 of the DRL.¹⁶³ It is this author's opinion that same-sex parents will enjoy the benefits of that provision along with heterosexual couples based upon a plain meaning interpretation of the statute.¹⁶⁴ Furthermore, although the recent changes to the law may ultimately render second-parent adoptions obsolete, diligent attorneys are continuing to urge their clients to pursue such proceedings in order to best protect their parenting rights under the law.¹⁶⁵

Attorneys are primarily recommending this precautionary procedure to protect their clients from the perils of travelling or, better yet, from parties who move to another state or jurisdiction that does not participate in reciprocity with New York State's domestic relations laws.¹⁶⁶ In such states, same-sex parents may unwillingly have their parental rights stripped from them absent any formal documentation showing their parental status under the law.¹⁶⁷ This un-

¹⁶³ See, e.g., Lee Rosenberg, *Marriage and Divorce: An Overview of Rights, Obligations and Options for Non-Traditional Couples*, NASSAU LAWYER, at 20, (Nov. 2011) (explaining that "there is technically no court decision extending the presumption of legitimacy to children of same sex married couples, but the gender neutral language of the Marriage Equality Act . . . would lead one to believe that it would be extended"); Chris Hawley & Michael Hill, *Gay Marriage Will Spur Adoption Boom, New York Lawyers Predict*, HUFFINGTON POST, July 11, 2011, http://www.huffingtonpost.com/2011/07/11/gay-marriage-adoption_n_894916.html (remarking on the likelihood that the Marriage Equality Act "will make second-parent adoption unnecessary" going forward).

¹⁶⁴ N.Y. DOM. REL. LAW § 24(1) states:

A child heretofore or hereafter born of parents who prior or subsequent to the birth of such child shall have entered into a civil or religious marriage, or shall have consummated a common-law marriage where such marriage is recognized as valid, in the manner authorized by the law of the place where such marriage takes place, is the legitimate child of both birth parents notwithstanding that such marriage is void or voidable or has been or shall hereafter be annulled or judicially declared void.

Id.

¹⁶⁵ See Abby Tolchinsky & Ellie Wertheim, *Creative Parenting Agreements Still Needed with Same-Sex Marriage*, N.Y. L.J. (Aug. 29, 2011) (Teresa Calabrese, collaborative lawyer and mediator stated, "Until our marriages have full recognition in the United States, I will always urge my clients to file second-parent adoptions. I think that is the only way to ensure that this legal relationship will be fully recognized and the only way to protect your family . . .").

¹⁶⁶ *Id.*

¹⁶⁷ See Rosenberg, *supra* note 163, warning:

Even if New York does recognize the child as being born of the marriage, recognition of the non-biological parent's rights will still be at issue in other jurisdictions which do not recognize same sex marriage

nervning possibility has caused one attorney to comment that “[g]iven the foregoing complexities, ambiguities and uncertainties, non-traditional families need greater protection than most ‘straight’ couples, particularly while DOMA and non-portability laws remain in effect in other states.”¹⁶⁸

C. The Full Faith and Credit Problem

A new host of problems arises as same-sex couples who are now legally permitted to marry in New York State are forced to navigate the unfriendly waters of states that have mini-DOMAs on the books.¹⁶⁹ Traditionally, the Full Faith and Credit Clause of Article IV, Section 1 of the United States Constitution¹⁷⁰ requires that:

Such acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.¹⁷¹

However, the enactment of DOMA has carved an exception into the longstanding principles mandated in the Full Faith and Credit Clause.¹⁷² DOMA effectively circumvents the Full Faith and Credit and procedure of comity between states by permitting that:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State,

when the parents, individually or together, travel or change residency to a jurisdiction that does not recognize their marriage.

Id.

¹⁶⁸ *Id.*

¹⁶⁹ See Cohen et al., *supra* note 157 (“The courts of many states, primarily those that have adopted state DOMAs, are likely to refuse to adjudicate divorces between samesex couples, denying them access to the courts to obtain a definitive and, one hopes, fair determination of their respective rights and duties going forward.”).

¹⁷⁰ 28 U.S.C. § 1738 (2006).

¹⁷¹ *Id.*

¹⁷² See 28 U.S.C. § 1738C.

territory, possession, or tribe, or a right or claim arising from such relationship.¹⁷³

Accordingly, DOMA serves to bar the federal government from recognizing same-sex marriages and further gives the states, territories, and possessions the permission to “opt-out” of upholding any court orders, legislative enactments, or records that recognize and permit same-sex marital unions.¹⁷⁴ This enactment has resulted in widespread marriage inequality across the United States, whereby same-sex spouses are prevented from enjoying the same federal benefits as their heterosexual equivalents.¹⁷⁵ The problem of DOMA, and the mini-DOMAS enacted by states throughout the country, is that “[i]n our highly mobile society . . . they create enormous uncertainty for same-sex couples, who cannot know to what states or countries their careers, lifestyle preferences and/or family obligations may cause them to move, or where they will find themselves when fate lands one spouse in the hospital.”¹⁷⁶ Even more, same-sex spouses who file for divorce in states operating under local DOMA laws may be turned away from a courthouse that refuses to adjudicate a divorce for spouses of the same gender.¹⁷⁷

D. Legal Limbo: Why Same-Sex Divorce and Equitable Distribution May be the Biggest Obstacle to Overcome Yet

DOMA’s influence is far reaching across the United States and even impacts same-sex couples who are married and residing in states, such as New York, that recognize the institution of same-sex marriage.¹⁷⁸ Although the goal of New York’s recent Act was mar-

¹⁷³ *Id.*

¹⁷⁴ See Cohen et al., *supra* note 157 (noting the dual effect that DOMA has on non-recognition of same-sex marriages at both the federal level and state level, by circumvention of the Full Faith and Credit Clause).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ See John M. Yarwood, Note, *Breaking Up is Hard to Do: Mini-DOMA States, Migratory Same-Sex Marriage, Divorce, and a Practical Solution to Property Division*, 89 B.U. L. REV. 1355, 1359 (2009) (explaining that under DOMA, states are given the choice to ignore same-sex marriage legally performed in another state, “[t]hus, same-sex couples married in a state which permits same-sex marriage cannot rely on the many federal benefits and rights granted to married couples in the state in which the marriage was executed (the home state)

riage equality, which in turn encompasses divorce equality, inequities continue to be a reality for same-sex couples seeking to dissolve the marital bond.¹⁷⁹ One New York attorney who specializes in same-sex family law has predicted that, “even those couples facing no extraordinary obstacles to divorce would find it a very different experience from that of heterosexual couples.”¹⁸⁰ One of the central issues to any divorce is the equitable distribution of the marital property.¹⁸¹ This is so because equitable distribution entails the division of property and title claims for both real and personal property, acquired by the spouses throughout the course of their marriage, and distributed through court order.¹⁸²

Unfortunately, for many same-sex couples, the equitable distribution of their joint marital assets may be a more difficult task when compared to the experiences of traditional heterosexual divorces.¹⁸³ Same-sex spouses, who once celebrated the recognition and solemnization of their marriages in recent years, are now “discover-

or abroad”).

¹⁷⁹ See Cohen et al., *supra* note 157.

New York State has now made same-sex marriage legal, but the title of the new law, the Marriage Equality Act, remains aspirational. Non recognition statutes and other factors create issues that family law practitioners must be aware of in counseling same-sex couples planning for their future . . . or those seeking to end their marriages.

Id.

¹⁸⁰ John Schwartz, *When Same-Sex Marriages End*, N.Y. TIMES, July 2, 2011, <http://www.nytimes.com/2011/07/03/sunday-review/03divorce.html?pagewanted=all> (quoting Margaret M. Brady, Esq.).

¹⁸¹ See Brett R. Turner, *The Equitable Distribution Concept*, 1 Equit. Distrib. of Property, 3d § 1.1, 1 (last updated Nov. 2011) (“Because both parties contribute to that partnership, they are both legally entitled to a fair share of the partnership profits—the property accumulated during the marriage.”).

¹⁸² See N.Y. DOM. REL. LAW § 234 (McKinney 2012), instructing that in divorce proceedings:

[T]he court may (1) determine any question as to the title to property arising between the parties, and (2) make such direction, between the parties, concerning the possession of property, as in the court’s discretion justice requires having regard to the circumstances of the case and of the respective parties.

Id.; see also N.Y. DOM. REL. LAW § 236 (setting forth the relevant factors that a court must consider in making determination as to the parties equitable distribution).

¹⁸³ See Sue Horton, *The Next Same-Sex Challenge: Divorce*, LOS ANGELES TIMES, July 25 2008, <http://articles.latimes.com/2008/jul/25/local/me-gaydivorce25> (“[E]ven in states where gay couples are allowed to divorce, they face financial consequences that heterosexual couples don’t.”).

ing that getting divorced can be far more complicated than getting married.”¹⁸⁴ Irrespective of the fact that same-sex spouses have the same right as heterosexual spouses to obtain a divorce, “a clash between federal and state laws makes the process anything but equal.”¹⁸⁵

Among the inequities that same-sex couples face when divorcing is the probability that one of the spouses may be forced to pay additional taxes associated with the division and transfer of marital property as a result of a settlement agreement or judgment of divorce.¹⁸⁶ For instance, in New York State pensions are construed to be marital property subject to equitable distribution.¹⁸⁷ Although same-sex spouses will be equally entitled to a division of their significant others’ pension plans, they may also be subject to early withdrawal penalties and taxes under the federal law because their marriage is not recognized at the federal level.¹⁸⁸ Conversely, traditional divorces avoid “triggering” such tax ramifications because the federal law has carved an exception for those marriages between a man and a woman.¹⁸⁹

The pension problem is not the only obstacle same-sex divorcees will face. Because the Internal Revenue Service (“IRS”) currently treats transfers of marital property and assets as a “non-taxable event,” traditional spouses are not subject to federal tax implications associated with such transfers during the time of marriage or upon divorce.¹⁹⁰ However, because DOMA prevents federal recognition of

¹⁸⁴ See *id.* (noting that the biggest difficulties for same-sex spouses are still to come with the problems they may face in obtaining a same-sex divorce).

¹⁸⁵ *Id.*

¹⁸⁶ See *id.* (enumerating the discrepancies in the law of equitable distribution facing same-sex couples, and the various tax consequences that face them upon divorce).

¹⁸⁷ See *Majauskas v. Majauskas*, 463 N.E.2d 15, 19 (N.Y. 1984) (recognizing pensions as property of the marriage and determining a “formula” by which pensions are to be divided amongst divorcing spouses).

¹⁸⁸ See *Horton*, *supra* note 183 (“If a judge orders a heterosexual couple to divide a pension during a divorce, federal law allows the pension to be divided without triggering early withdrawal penalties. Divorcing gay couples must pay the penalties.”).

¹⁸⁹ *Id.*

¹⁹⁰ 26 U.S.C. § 1041(a) (2006) (“No gain or loss shall be recognized on a transfer of property from an individual to (or in trust for the benefit of)—(1) A spouse, or (2) a former spouse, but only if the transfer is incident to a divorce.”). See also Eric I. Wrubel, *The Gay Divorce: New York Will Have Many. Now What?*, N.Y. L.J. (Aug. 19, 2011) (discussing the various financial problems and tax implications facing same-sex couples during a divorce proceeding).

same-sex marriages, couples seeking same-sex divorces may be subjected to certain tax consequences, whereas their heterosexual counterparts would be protected under the umbrella of a federally recognized marital union.¹⁹¹ In effect, the IRS views these same-sex spouses as strangers who happen to be completing a property or asset transfer and, thus, may subject them to the standard taxation without any consideration of the parties' marital status at the state level.¹⁹² A basic function of equitable distribution, such as "the transfer of the marital residence between same-sex spouses incident to their divorce could be considered a 'third-party' sale, which would trigger capital gains taxes owed by the transferor (i.e., the seller)."¹⁹³ Likewise, settlement agreements may be stifled by the effect that lump sum cash payments may have with respect to tax implications.¹⁹⁴ A cash payment or transfer of property tendered by one same-sex spouse to the other as a result of a divorce settlement or requirement of court-ordered equitable distribution will likely be subject to a gift tax imposed by the IRS.¹⁹⁵

Spousal support, also known as maintenance or alimony, will be at issue for same-sex couples seeking to receive the same equity that traditional couples receive as a result of divorce.¹⁹⁶ Similar to the aforementioned lump-sum payment, same-sex couples in New York may face tax implications concerning the payment and receipt of spousal support.¹⁹⁷ There are two ways in which spousal support can be structured in New York State.¹⁹⁸ One practice is to render maintenance payments deductible by the payor and taxable as income to the recipient of support.¹⁹⁹ The alternative practice is to make the income non-deductible for the payor spouse and non-taxable to the recipient spouse.²⁰⁰ Both options are available to traditional heterosexual spouses. However, because DOMA does not recognize same-

¹⁹¹ 26 U.S.C. § 1041(a).

¹⁹² Wrubel, *supra* note 190.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ 26 U.S.C. § 102 (2006); *see also* Wrubel, *supra* note 190 (noting the absence of legal benefits and protections available to same-sex spouses at the federal level).

¹⁹⁶ Wrubel, *supra* note 190.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *See* Wrubel, *supra* note 190.

²⁰⁰ *Id.*

sex marriages, and thus same-sex divorce, same-sex spouses will not have the benefit of choosing the structure of their maintenance payments.²⁰¹ The IRS can and will ignore any judgment of divorce, or otherwise valid settlement agreement that attempts to apply standard heterosexual spousal tax protections to a same-sex divorce.²⁰²

One final issue is the question of how courts presiding over same-sex divorces will deal with the fact that many couples have been sharing a home, building a life, and acquiring de facto joint assets, in some instances, decades before the Marriage Equality Act passed in 2011. Pursuant to DRL Section 236(b), the court shall consider the duration and/or length of the parties' marriage when equitably distributing property in a matrimonial action.²⁰³ Because "[c]ourts divvy up property very differently when a couple has been together two years as opposed to 20," same-sex couples who were denied the right to marry prior to 2011, may be at a disadvantage when it comes to equitable distribution awards.²⁰⁴ One author poignantly asks the question: "But if a couple has been together for a decade before gay marriage was legal, how many years should count?"²⁰⁵ This may pose a serious problem for judges who would be placed in a position to decide, presumably based upon the credibility of testimony, how long a "maritalesque" relationship existed amongst the litigants prior to their official marriage ceremony. It is the position of this author that judges may have to perform this function to protect the parties from unjust enrichment while preserving their respective property interests. However, it remains to be seen what justice will require.

V. CONCLUSION

New York's domestic relations laws have experienced a tre-

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ See N.Y. DOM. REL. LAW § 236(b) (enumerating the factors the court must consider in employing equitable distribution of the marital property).

²⁰⁴ Tovia Smith, *Gay Divorce a Higher Hurdle than Marriage*, NATIONAL PUBLIC RADIO (July 20, 2011), <http://www.npr.org/2011/07/20/137674268/gay-divorce-a-higher-hurdle-than-marriage> (commenting on the potential disparity in equitable distribution for couples that have been together for a decade or more, but only legally married since the passage of the law in 2011).

²⁰⁵ *Id.*

mendous amount of reformation within the past two years.²⁰⁶ On the one hand, New York finally entered the modern world by formally making no-fault the official divorce system of the United States.²⁰⁷ On the other hand, the State very boldly adopted the ultra-progressive policy of not only recognizing but now solemnizing, same-sex marriage through the momentous enactment of the Marriage Equality Act.²⁰⁸ It is this author's position that the two domestic relations reforms can be reconciled as a part of a much-needed overhaul of the State's laws concerning the social and familial arenas. This Comment stands for the proposition that both laws, as enacted, are good faith attempts by the State of New York to bring about social equality and acceptance, while attempting to lessen the emotional and financial hardships associated with the dissolution of marital unions. Thus, the social impact of these two laws is tantamount to the importance of their legal implications to the people of New York.

Although the recent reform of New York's matrimonial law in adopting no-fault divorce may not be the ultimate solution to a couple's marital discontentment, it is likely the best solution for the time being and, is no doubt, a good place to start. There is a reason that all other forty-nine states have adopted similar no-fault provisions well before New York got on the bandwagon,²⁰⁹ and that is because battling over grounds only stokes the flames of anguished spouses who want a way out.²¹⁰ Perhaps the State was holding onto the notion that no-fault would provide too much ease for divorce without enough contemplation or incentive to work on the marriage and preserve the sanctity of the family setting.²¹¹ Although this is a valid concern, it is not very probable that the old fault-system was

²⁰⁶ See Domestic Relations Law—No Fault Divorce, ch. 384, sec. 3890-A, 2010 N.Y. Sess. Laws (McKinney) (codified as amended N.Y. DOM. REL. LAW § 170(1)(7)); *see also* Marriage Equality Act, ch. 95, 2011 N.Y. Sess. Law News of N.Y. (McKinney) (codified as amended N.Y. DOM. REL. §§ 10-a, 10-b, 11, 13 (McKinney 2012)).

²⁰⁷ See Domestic Relations Law—No Fault Divorce, ch. 384, sec. 3890-A, 2010 N.Y. Sess. Laws (McKinney) (codified as amended N.Y. DOM. REL. § 170 (1) (7) (McKinney 2010)).

²⁰⁸ See Marriage Equality Act, ch. 95, 2011 N.Y. Sess. Law News of N.Y. (McKinney) (codified as amended N.Y. DOM. REL. §§ 10-a, 10-b, 11, 13 (McKinney 2012)).

²⁰⁹ South Dakota was actually the second-to-last state to adopt no-fault divorce in 1985, nearly twenty-five years before New York would succumb to the vast preference for no-fault legislation. Guidice, *supra* note 19, at 788-89.

²¹⁰ See Miller, *supra* note 76.

²¹¹ See DiFonzo & Stern, *supra* note 10, at 560.

benefiting family unity any more than a no-fault legislative enactment does. Therefore, society is not benefited when the State makes divorces more difficult to obtain by requiring an allegation of fault before one can be granted freedom from an unsalvageable marriage. Feuding spouses make for an unstable home environment, and children are often the true victims of parents who cannot get along.²¹² Although no-fault divorce cannot entirely remove the sting from divorce, it might help parties look past the issue of “fault” and focus on a future in which they can move forward toward a less contentious-based life.

Finally, the advent of the Marriage Equality Act, although socially just and well intentioned, has also brought about much uncertainty within the realm of New York’s domestic relations laws.²¹³ So long as DOMA remains the controlling federal law, capable of superseding state recognition of same-sex marriages, such spouses will be legal unequals under the eyes of the federal law.²¹⁴ This inequality will undoubtedly continue to bring about a plethora of hardships that same-sex spouses must face when filing for divorce.²¹⁵ The only remedy to be used for the time being is the amalgamation of written agreements establishing the parties’ respective rights prior to the time that the couple enters into a formal union.²¹⁶ This means that a prudent couple should seek legal counsel prior to marriage to determine their legal rights and allow them to make an informed decision.²¹⁷ This may be a cynical way of looking at things, but given the wide-

²¹² See Miller, *supra* note 76.

²¹³ See *Marriage Equality for Same-Sex Couples in New York*, LAMBDA LEGAL ORGANIZATION, http://data.lambdalegal.org/publications/downloads/fs_marriage-equality-same-sex-couples-ny.pdf (last visited Jan. 11, 2013) (“[Marriage] is a rapidly evolving legal area with much uncertainty.”).

²¹⁴ See Wrubel, *supra* note 190 (“According to DOMA, any and all federal benefits available to a ‘spouse’ were limited to heterosexual couples; accordingly, legally married same-sex couples are prohibited from availing themselves of any federally granted benefits that are available to their heterosexual counterparts.”).

²¹⁵ See generally Cohen et al., *supra* note 157 (enumerating the various problems same-sex spouses will face under state law as a result of the presence of DOMA).

²¹⁶ See *id.*; see also Wrubel, *supra* note 190 (“[U]ntil DOMA is repealed, practitioners must continue to utilize the remedies previously developed for the dissolution of same-sex relationships (when marriage was unavailable to same-sex couples) to overcome the existing federally sanctioned discrimination.”).

²¹⁷ See Cohen et al., *supra* note 157 (“[S]amesex married couples must inform themselves about the myriad gaps in their legal rights and exercise due diligence in planning their lives together.”).

ranged implications of DOMA, same-sex couples must be educated about their legal rights, so that they may best understand any ramifications that may result from a marriage that ultimately ends in divorce.

One possible solution that may be crucial to the preservation of same-sex spouses' rights in the event of divorce is the use of pre-nuptial agreements, which can enumerate the parties' rights in the event that the relationship runs its course.²¹⁸ A pre-nuptial agreement could be a useful tool so that "parties to a same-sex marriage may chart out their own financial futures while at the same time protecting themselves from the vagaries of the present highly uncertain legal environment."²¹⁹ Furthermore, these agreements could lay out the groundwork for issues concerning "distribution of property, maintenance and inheritance rights."²²⁰ Same-sex couples are also advised to express via written pre-nuptial agreements their intended rights in relation to any children born of the marriage.²²¹ Couples should note that a court possesses the authority to supersede any such agreement in its role as "*parens patriae*" in order to maintain the best interests of the child standard in regard to custody and support issues.²²² One attorney has also intelligently suggested that same-sex couples should form an agreement providing:

[T]hat neither spouse would move to a state with a state DOMA without the written consent of the other spouse, or that, if they are residing in a state that will not grant divorces to same-sex couples, they will take certain specified steps to entitle them to invoke the divorce jurisdiction of New York, or of another specified state that will adjudicate their divorce.²²³

It is highly recommended that same-sex couples draft healthcare proxies for themselves and their children in the event that

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Daniel Clement, *Four Tips to Protect Same-Sex Married Couples in New York*, NEW YORK DIVORCE REPORT BLOG (Dec. 14, 2011), <http://divorce.clementlaw.com/marriage/four-tips-to-protect-same-sex-married-couples-in-new-york/> (giving same-sex couples four simple legal tips that will help protect their rights).

²²¹ Cohen et al., *supra* note 157.

²²² *Id.*

²²³ *Id.*

they travel to a mini-DOMA jurisdiction that may not recognize the validity of the marriage, and therefore spousal or parental rights associated with that union.²²⁴ As previously mentioned in this Comment, the non-biological parent of a child should always complete a second-parent adoption to protect the parent if the marriage fails and the biological parent challenges the other spouse's parenting rights.²²⁵ Finally, in order to predetermine that one's same-sex spouse can inherit the estate of the deceased spouse, same-sex couples should draft a will and/or other trust and estate documents to ensure that their wishes are complied with, no matter the jurisdiction.²²⁶

Ultimately, these new laws will greatly impact the way couples reach an end to their marriages. Divorce is not the most pleasant of topics but is an unfortunate reality in our modern world, and thus, it requires modern solutions. Just as marriage is currently available to all couples residing in New York, so, too, is divorce. Only time will tell what additional amendments must be made to better accommodate divorce litigants as they forge their way through the domestic relations court system. However, it is this author's hope that this Comment has served to inform the legal community, and those affected by its laws, as to the present state of divorce reform and offer a roadmap of how to handle the inevitable difficulties of divorce under such circumstances.

²²⁴ See Clement, *supra* note 221 ("To ensure that your spouse will be entitled to your medical information and to make medical decisions should you be unable, provide him/her with a health care proxy.").

²²⁵ *Id.* ("Should the non-biological parent (or in the case of adoptive children, the non-adoptive parent) be not deemed the 'legal' parent of a child, the party could be denied parenting time, custody or visitation, with children of the relationship.").

²²⁶ See *id.* ("In order to ensure that your spouse inherits from you, no matter your jurisdiction, draft a will and all necessary trust documents to ensure that your wishes are respected in the event of your death.").