

## ONLY IN NEW YORK: THE GEOGRAPHY OF FAMILY LAW

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“The body repeats the landscape. They are the source of each other and  
create each other.”  
Meridel Le Sueur<sup>1</sup>

“Where we are shapes who we are.” - Adam Alter<sup>2</sup>

Family law is shaped by innumerable factors including history, culture, politics, religion, economics and ideas. This Article explores the ways in

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1. MERIDEL LE SUEUR, *THE ANCIENT PEOPLE AND THE NEWLY COME* (quoted in JANE SMILEY, *A THOUSAND ACRES* (frontpiece) (1991)).

2. Adam Alter, Opinion, *Where We Are Shapes Who We Are*, N.Y. TIMES (June 14, 2013) available at [http://www.nytimes.com/2013/06/16/opinion/sunday/a-self-defined-by-place.html?\\_r=0](http://www.nytimes.com/2013/06/16/opinion/sunday/a-self-defined-by-place.html?_r=0).

which family law is shaped by geography. In what ways is New York family law unique? How did it get that way?

As a practical matter, it is a given that family law is local.<sup>3</sup> While federal law mandates child support guidelines, state law sets them. While federal law prohibits parental kidnapping,<sup>4</sup> state law determines what constitutes ‘kidnapping’, and what distinguishes it from ‘rescue’. From the prerequisites for entering into marriage through the grounds for divorce and the ‘equitable’ distribution of marital property, state law governs and state law varies, often widely.

This Article highlights the anomalies of New York family law across a broad range of topics: marriage, divorce, equitable distribution, maintenance, child support, pre-marital as well as separation agreements, parentage laws, and unmarried cohabitants. These examples are based on my own “real” experience, practicing family law in one state, teaching it in four others, and coming to conferences like this for the past twenty years. But my analysis, my understanding of where these anomalies come from and why they persist, is grounded in the path-breaking work of Professor Margo Melli. As she noted almost fifteen years ago, when asked to support a new no-fault law in Wisconsin:

“Why should I favor such a bill?” I asked. “Because it will take out all the hostility and bitterness we see in divorce now.” My reply was more visionary than I knew. “Senator,” I said, “if my husband of twenty years decides he prefers a new—probably younger—wife to me, I want you to know that I will be just as spiteful and bitter and uncooperative as I can. And I don’t care what you call it.” I was right, of course. We know now that no-fault divorce did not end the bitterness of the divorce process.<sup>5</sup>

Professor Melli’s insight that divorce is not necessarily a ‘clean break,’ but often the beginning of a new relationship, is key to New York’s long resistance to no-fault divorce, its approach to ‘human capital’ in equitable distribution, its new formula for temporary maintenance, and the zeal with which it enforces child support.<sup>6</sup>

Equally important is Professor Melli’s insistence that family law is always applied—and can only be understood—in concrete, real-world contexts. As explained below, this approach, drawing on the unique history, politics, and demographics of New York, is crucial to an understanding of marriage, pre-marital as well as separation agreements, and parentage laws in the Empire State.

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3. See Jill E. Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825 (2004).

4. Parental Kidnaping Prevention Act of 1980, 28 U.S.C. § 1738A (2006).

5. See Marygold S. Melli, *Whatever Happened to Divorce?*, 2000 WIS. L. REV. 637, 638 (2000).

6. See discussion *infra* Parts III, IV, and V.

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As June Carbone and Naomi Cahn note in their provocative recent book, *Red Families v. Blue Families*,<sup>7</sup> New York is a very blue state. As the authors explain, “The blue families of our title are on one side of the cultural controversy. . . . The terms of the blue family order embrace the pill, encourage education, and accept sexuality as a matter of private choice.”<sup>8</sup> New York has the second highest median age for marriage in the country (28 for women and 29.9 for men)<sup>9</sup> and it is fourth in the country for the mean age of mothers at first birth.<sup>10</sup>

New York is also, as Sam Roberts explains in his analysis of the most recent census, one of the most diverse—racially, ethnically, and in terms of country of origin<sup>11</sup>—and one of the most mobile.<sup>12</sup> While New York has the fourth highest income per capita rate in the country, 13% of its population lives below the poverty level.<sup>13</sup> As Roberts notes, “In New York City, the median income for the lowest fifth was \$8,844, down \$463 from 2010. For the highest, it was \$223,285, up \$1,919.[In Manhattan] [t]he wealthiest fifth made more than 40 times what the lowest fifth reported, a widening gap (it was 38 times, the year before) surpassed by only a few developing countries, including Namibia and Sierra Leone.”<sup>14</sup> There’s a lot of money in this state, and a lot of hustlers trying to get their share. As Alicia Keys puts it, New York is a “concrete jungle where dreams are made of, There’s nothing you can’t do.”<sup>15</sup> This includes, as an elderly New York woman recently showed, having DOMA declared unconstitutional.<sup>16</sup>

This Article shows how the ever-changing culture of the Empire State takes form through its family law, from the rigid (if arbitrary) restrictions on solemnization (discussed in Part I), through the willingness of its courts to consider a medical degree (or a law degree) marital property (discussed in Part III) to their wariness in dealing with cohabiting couples (discussed in Part VIII).

## I. THE STATE OF MATRIMONY IN THE STATE OF NEW YORK

There are several striking features of New York marriage law. First, while some states fine officiants or the parties for failure to comply with formal

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7. NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES* 141 (2010).

8. *Id.* at 1-2.

9. *Id.* at 25.

10. *Id.*

11. SAM ROBERTS, *WHO WE ARE NOW: THE CHANGING FACE OF AMERICA IN THE TWENTY-FIRST CENTURY* (2004).

12. *Id.* at 72-73.

13. State & County QuickFacts, U.S. DEPT. OF COMMERCE, <http://quickfacts.census.gov/qfd/states/36000.html>.

14. Sam Roberts, *Income Data Shows Widening Gap Between New York City’s Richest and Poorest*, N.Y. TIMES (Sept. 20, 2012), available at <http://www.nytimes.com/2012/09/20/nyregion/rich-got-richer-and-poor-poorer-in-nyc-2011-data-shows.html>.

15. JAY-Z, *EMPIRE STATE OF MIND* (ROC NATION 2010).

16. *See infra* Part D.

requirements, New York has held some marriages void for such a failure. At the same time, its lack of a central registry, combined with its appeal to immigrants from every country on earth, generates an unusual number of bigamy cases, which many would view as a more serious matter. Aside from bigamists, New York prides itself on being a welcoming jurisdiction. Although as recently as 2006, New York's highest court refused to find a right to same-sex marriage under the state constitution, by 2011 the state legislature legalized same-sex marriage. Two years later a federal court in New York struck down the Defense of Marriage Act, in a decision affirmed by the U.S. Supreme court.

*A. Liberal, But Picky*

As set out in the Model Marriage and Divorce Act §206, and in the laws of most states, the failure to comply with the formal requirements of licensure and solemnization does not invalidate the marriage.<sup>17</sup> It may result in a fine for the offending official, or the parties, or even prosecution for a misdemeanor, but the marriage is not void.<sup>18</sup> In New York, however, a marriage must be performed by one of the officials set out in Art. 3§11. Conspicuously absent are ministers of the Universal Life Church ("ULC"),<sup>19</sup> who, as Judge Alan D. Scheinkman notes, perform most of the marriages set out in the Sunday N.Y. Times.<sup>20</sup> As Judge Scheinkman further notes,

There is no requirement that the church, synagogue, or other religious congregation over which the clergyman presides be affiliated with any denomination or order. Nor is there any requirement that clergy have received formal sanctioning authority from a governing board of a denomination or order or from the church, synagogue or congregation itself. . . . The liberality in construction is stretched to the breaking point where the officiating clergyman appears to be a mere philanderer professing only a pseudo-religious faith.<sup>21</sup>

Finding that the ULC "will ordain anyone for a modest free will offering,"<sup>22</sup> the Court in *Ravenal v. Ravenal*<sup>23</sup> drew the line, a line affirmed by the Appellate Division in *Ranieri v. Ranieri*,<sup>24</sup> and *Rubino v. City of New York*.<sup>25</sup>

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17. Model Marriage and Divorce Act § 206 (1998).

18. *Id.*

19. See JOANNA GROSSMAN & LAWRENCE FRIEDMAN, *INSIDE THE CASTLE: LAW AND FAMILY IN 20TH CENTURY AMERICA*, 42 (2011) (Virginia also refuses to permit such marriages).

20. Alan D. Scheinkman, *Practice Commentary*, Matrimonial and Family Law § 1:16.

21. *Id.*

22. *Id.*

23. *Ravenal v. Ravenal*, N.Y.S.2d 324 (N.Y. Sup. Ct. 1972).

24. *Ranieri v. Ranieri*, 539 N.Y.S.2d 382 (N.Y. App. Div. 1989).

25. *Rubino v. City of New York*, 480 N.Y.S.2d 971 (N.Y. Sup. Ct. 1984).

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Currently, Suffolk County does not recognize online ministers.<sup>26</sup> Neither do the counties of Nassau, Westchester, Putnam, or Dutchess, owing to *Ranieri*, above. In 2006 New York City began allowing online ministries, including ULC, to officiate at weddings in the five boroughs.<sup>27</sup>

A recent decision, *Oswald v. Oswald*,<sup>28</sup> finds them valid. But as Professor Joanna Grossman notes, given the three cases finding them invalid, they are still legally questionable. The *Oswald* court “does not deal with the core problem that led to the three earlier rulings: the New York legislature has imposed a definition of church and clergy that the ULC does not seem to meet.”<sup>29</sup> The problem is that while New Yorkers want the legitimacy of state-sanctioned marriage, many also want the flexibility to choose their own officiant.

### B. *Foreigners, Immigrants and Fresh Starts*

#### 1. “Career Brides”

New York is one of the top five states in drawing foreigners,<sup>30</sup> and many decide to stay. To remain in the country legally, however, may be problematic. Some entrepreneurial New Yorkers saw a business opportunity. Victor L. Robles, a clerk in Manhattan, noted that one woman had applied for 27 marriage licenses between 1984 and 2002. Checking the records, he discovered at least “a dozen others had married in numbers that were highly suspicious.”<sup>31</sup> Four women were arrested by the Manhattan District Attorney in a scheme in which they offered to marry immigrants for about \$1,000.<sup>32</sup> Databases on marriages in New York are not linked to each other, or to databases in other states.

It is unclear why immigration authorities apparently overlooked these “highly suspicious numbers.”<sup>33</sup> It is also unclear whether these ‘career brides’ provided a path to citizenship, or merely a two-year delay in deportation. Under the federal Immigration Marriage Fraud Amendments,<sup>34</sup> an alien married to a citizen for under two years can only be granted conditional status. Two

26. Vincent M. Mallozzi, *Reconsidering the Rev. Best Friend*, N.Y. TIMES (Nov. 16, 2012), available at <http://www.nytimes.com/2012/11/18/fashion/weddings/making-sure-that-online-officiant-is-legal.html>.

27. *Id.*

28. *Oswald v. Oswald*, 963 N.Y.S.2d 762 (N.Y. App. Div. 2013).

29. Joanna L. Grossman, *A Difference of Opinion: Are Universal Life Church Weddings Valid in New York?*, JUSTICIA (May 17, 2013) <http://www.verdict.justice.com/2013/05/14/a-difference-of-opinion>.

30. ROBERTS, *supra* note 11, at 73.

31. Susan Saulny, *Here Comes the Bride, Again, and Again*, N.Y. TIMES (July 10, 2003) at 1.

32. *Id.*

33. *Id.*

34. 8 U.S.C. §§1154(h), 1255(e), and (1986).

years later, permanent resident status may be granted upon the petition of both parties.

## 2. Gomez v. Windows on World

Wilder Gomez married Elisa Gomes Escalante in Colombia in 1984.<sup>35</sup> He left Colombia and came to New York by himself in 1991.<sup>36</sup> He got a job at Windows on the World, at the top of the World Trade Center.<sup>37</sup> He had a new life and in 1992, he married Tatiana Gomez.<sup>38</sup> On 9/11, he was killed in the attack on the World Trade Center.<sup>39</sup>

Tatiana filed a claim for widow's benefits.<sup>40</sup> But Escalante had already filed.<sup>41</sup> And Colombia, unlike New York, has a national registry, in which all births, deaths, marriages, and divorces must be formally recorded.<sup>42</sup>

In New York, as in most states, the most recent marriage is presumed legitimate.<sup>43</sup> The law assumes that people are not bigamists. In a national system like ours, however, where state (or county) registries are unconnected, it is difficult to prove that an earlier marriage has not been terminated, at least in theory, because the decedent could have obtained a divorce in any state where he had satisfied the state residency requirement, or satisfied a court that he had. He could even have obtained a divorce abroad. Marriage, unlike child support, is not registered in any national database. So if someone is married in Oregon, or even upstate, and neglects to mention it, there is no check. The integrity of the Colombian registry, affirmed by a legal expert, convinced the tribunal that the first marriage was still in effect when the second ceremony was performed.

### C. Same-Sex Marriage

In *Hernandez v. Robles*, the New York Court of Appeals rejected claims that limiting marriages to a man and a woman violated the equal protection or due process clauses of the state constitution.<sup>44</sup> The plaintiffs in *Hernandez* were 44 same-sex couples represented by New York City's leading law firms and advocacy groups.<sup>45</sup> By the time the case reached the Court of Appeals, the state's highest court, plaintiffs had conceded that New York Domestic Relations law limited marriage to opposite-sex couples.<sup>46</sup> The only question was whether that limitation violated the state Constitution. That depended, for

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35. Gomez v. Windows on World, 23 A.D.3d 967, 968 (2005).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. 23 A.D.3d at 968.

42. *Id.*

43. *Id.*

44. 855 N.E.2d 1 (Ct. App. N.Y. 2006).

45. *Id.* at 5.

46. *Id.*

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the New York Court, on whether it was a “rational legislative decision” to limit the benefits of marriage to opposite sex couples.<sup>47</sup> The Court found two grounds for supporting the limitation on marriage, both based on the “undisputed assumption that marriage is important to the welfare of children.”<sup>48</sup> Because opposite-sex couples, unlike same-sex couples, could become parents by “accident or impulse,”<sup>49</sup> the Court held that the legislature could rationally decide that it was more important to offer marriage to opposite sex couples to promote family stability. Second, the Court held that the legislature,

. . . could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like.<sup>50</sup>

In a recent article, *The Transformation of Judicial Self-Restraint*,<sup>51</sup> Professor Pamela S. Karlan unpacks the court’s reasoning in *Hernandez*, exposing its flaws:

The restriction [on same-sex marriage] was a longstanding one. At the time the statute was enacted, homosexual activity was itself a crime. If the court had tried to determine the most likely actual reason for New York’s restriction, it would probably have concluded that access to marriage for same-sex couples had never crossed the legislators’ minds and, if it had, they would have rejected it on the grounds that homosexual activity was immoral and should not entitle its practitioners to the privileges attached to marriage.<sup>52</sup>

As Karlan observes, this is precisely the kind of animus toward homosexuals deplored by the Court in *Romer v. Evans*<sup>53</sup> and *Lawrence v. Texas*,<sup>54</sup> both decided after the enactment of the New York statute at issue, but before the instant case.

Nevertheless, the Court of Appeals sustained the law on the ground that,

[T]he difference between straight and gay couples that supported the challenged statute was that heterosexual sexual activity involved “relationships [that are] all too often casual or temporary” ending in

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47. *Id.* at 6.

48. *Id.* at 7.

49. *Id.*

50. 855 N.E.2d at 7.

51. Pamela S. Karlan, *The Transformation of Judicial Self Restraint*, 100 CALIF. L. REV. 607 (2012).

52. *Id.* at 614-15.

53. *Romer v. Evans*, 517 U.S. 620 (1996).

54. *Lawrence v. Texas*, 539 U.S. 558 (2003).

unplanned pregnancies, while homosexuals “do not become parents as a result of accident or impulse,” and thus do not need state-created institutions and incentives to take care of their children.

[B]y contrasting the feckless, reckless, accident-prone straight fornicator with the gay or lesbian couple that painstakingly achieves parenthood through deliberative means.<sup>55</sup>

Thus, the court concluded that the statute was rational, because the legislature believed that gay couples, whether married or not, could be trusted to take care of their children.<sup>56</sup>

So it was up to the legislature. A bill was defeated in 2009, but in 2011 the Marriage Equality Act had the support of Governor Andrew Cuomo, who made it a priority. On June 4, 2011, the Marriage Equality Act was passed.<sup>57</sup> It provides that:

[a] marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex.

\* \* \*

§2. Legislative intent. Marriage is a fundamental human right. Same-sex couples should have the same access as others to the protections, responsibilities, rights, obligations, and benefits of civil marriage. Stable family relationships help build a stronger society. . . .

It is the intent of the legislature that the marriage of same-sex and different-sex couples be treated equally in all respects under the law.<sup>58</sup>

Under §10-b, however, religious ‘entities’ are exempted: “Such entities shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage.”<sup>59</sup> In a recent Note, *Inseparability, Religious Exemptions and New York’s Same-Sex Marriage Law*,<sup>60</sup> Christopher W. Dickson describes the difficulties confronting the Marriage Equality Act in Albany:

The Marriage Equality Act, which faced an uncertain fate in a Republican-controlled New York State Senate, passed narrowly . . .

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55. *Id.*

56. *Id.*

57. Thomas Kaplan, *Cuomo Seeking Vote to Permit Gay Marriages*, N. Y. TIMES (Feb. 10, 2011), at A20.

58. N.Y. DOM. REL. ART. 13 § 10-b (McKinney Supp. 2010).

59. *Id.*

60. Christopher W. Dickson, *Inseparability, Religious Exemptions, and New York’s Same-Sex Marriage Law*, 98 CORNELL L. REV. 181 (2012).

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Religious groups opposed to same-sex marriage relied heavily upon rhetoric of religious freedom, invoking fears that their organizations and congregants would be forced by law to solemnize or provide services for same-sex marriages in contravention of their beliefs.<sup>61</sup>

In order to pass the law, accordingly, religious organizations and affiliated nonprofits were exempted from civil liability or punishment.<sup>62</sup> In addition, notwithstanding nondiscrimination laws, a religious organization or affiliated nonprofit “retains the right to discriminate in favor of its own adherents in employment and housing decisions and to “tak[e] such action as is calculated . . . to promote the religious principles for which it is established . . .”<sup>63</sup> Finally, the bill includes an inseverability clause, directing that the entire bill shall be invalid if a court strikes down any part of it.<sup>64</sup> This exemption, which effectively relieves religious organizations from any legal obligations under the new law, was still not enough, however, to placate some opponents. Two upstate Republican assemblymen lost their seats in the next election.<sup>65</sup>

New York became the sixth, and the largest, state to legalize same-sex marriage. Within a year, according to Mayor Bloomberg, “Same sex-marriages in New York City have generated an estimated \$259 million in economic impact and \$16 million in City revenues.”<sup>66</sup> At least 8,200 same-sex marriage licenses were issued in that year, amounting to more than 10 percent of the total 75,000 marriage licenses issued in the City.

#### D. DOMA

Like all states, New York was bound by the federal DOMA,<sup>67</sup> which defined “marriage” under federal law as the legal union between one man and one woman as husband and wife, thereby excluding same-sex couples. This meant that same-sex couples in New York could not collect federal Social Security benefits or any other federal benefits as a married couple and that they were forced to claim different marital statuses for purposes of state and federal tax returns.<sup>68</sup> It also meant that Edith Windsor, a New York resident who was married in Canada to her same-sex partner, had to pay federal estate tax on her

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61. *Id.* at 182-83.

62. *Id.* at 189.

63. *Id.* at 183.

64. *Id.* at 181-182.

65. Thomas Kaplan, *Results for G.O.P. Backers of Gay Marriage: Two Victories and, It Appears, a Loss*, N.Y. TIMES (Sept. 24, 2012).

66. NYC Same-Sex Marriages Generate \$259 Million in Economic Impact, MIKEBLOOMBERG.COM (July 24 2012), available at <http://www.mikebloomberg.com/index.cfm?objectid=B9BB6B4E-C29C-7CA2-F1D74B44ADE35CC4>.

67. 1 U.S.C.A. § 7 (2012).

68. *Id.*

same-sex spouse's estate, a tax from which similarly situated heterosexual couples were exempt.<sup>69</sup>

Windsor challenged this in federal court and in *Windsor v. U.S.*,<sup>70</sup> the Second Circuit held that DOMA was unconstitutional:

While the Court acknowledges the Court of Appeals' decision in *Hernandez*, in light of subsequent state executive action and case law, the Court ultimately finds BLAG's argument unpersuasive. In 2009, all three statewide elected executive official—the Governor, the Attorney General, and the Comptroller—had endorsed the recognition of Windsor's marriage.<sup>71</sup>

On June 27, 2013, the U.S. Supreme Court agreed, holding that, “DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government.”<sup>72</sup>

The decision was immediately hailed as a civil rights landmark.<sup>73</sup> A smiling Edith Windsor spoke in the West Village, where it all began with the Stonewall Uprising 40 years ago.<sup>74</sup> As commentators quickly noted, however, the decision creates a “legal patchwork,” especially for couples in states that, unlike New York, do not recognize same-sex marriages entered into elsewhere.<sup>75</sup> Four days later, the 84-year old Ms. Windsor took her place in the backseat of a red Mustang convertible as a grand-marshal of the annual Gay Pride March down Fifth Avenue.<sup>76</sup>

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69. *Windsor v. U.S.*, 833 F. Supp. 2d 394, 397 (S.D.N.Y. 2012).

70. *Id.*

71. See *Godfrey v. Spano*, 13 N.Y.3d 358, 368 n. 3 (N.Y.2009) (describing 2004 informal opinion letters of the Attorney General and the State Comptroller which respectively concluded that “New York law presumptively requires that parties to such [same-sex] unions must be treated as spouses for purposes of New York law” and “[t]he Retirement System will recognize a same-sex Canadian marriage in the same manner as an opposite-sex New York marriage, under the principle of comity,” also citing a 2008 directive by the Governor to recognize same-sex marriages from other jurisdictions).

72. *U.S. v. Windsor*, 133b S.Ct. 2675, 2681 (2013).

73. Adam Liptak, *Supreme Court Bolsters Gay Marriage With Two Major Rulings*, N. Y. TIMES, June 26, 2013 at A1 (noting that, “Justice Anthony M. Kennedy announced the majority opinion striking down the federal law in a stately tone that indicated he was delivering a civil rights landmark.”).

74. *Id.*

75. See, e.g., Tara Siegel Bernard, *For Gay spouses, New Financial Benefits and Rights Will Vary*, N. Y. TIMES (June 26, 2013), at A22; Jeremy W. Peters, *Federal Court Speaks, But Couples Still Face State Legal Patchwork*, N. Y. TIMES (June 26, 2013), at A22.

76. David Dunlap, *A Gay Pride March With Added Spring in Its Step*, N. Y. TIMES (July 1, 2013), at A20.

## II. DIVORCE

Alexander Hamilton proposed New York's first divorce bill in 1787.<sup>77</sup> The only ground for divorce was adultery.<sup>78</sup> It remained the only ground, despite the repeated efforts of reformers, and massive and flagrant circumvention of the law,<sup>79</sup> for almost two hundred years.<sup>80</sup> It was not until 1967 that the New York divorce statute was finally amended to allow divorce on "the grounds of adultery, cruel and inhumane treatment, abandonment for two or more years, confinement in prison for three or more years, and living apart for a period of two years or more pursuant to an agreement or a judicial separation decree."<sup>81</sup>

### A. No-Fault

The first four fault grounds remained fundamentally unchanged for 45 years, although the period of separation was later reduced to one year.<sup>82</sup>

In 2011, New York became the last state to enact a unilateral no-fault law, allowing divorce where one party claims under oath that the marriage has been "irretrievably broken" for a period of at least six months.<sup>83</sup> No judgment of divorce can be granted until all economic issues arising out of the marriage, including counsel fees, have been resolved by the parties or decided by the court and incorporated into the final judgment.<sup>84</sup>

Like the reasons for the failure of earlier reform failures, the reasons for the delay were complex.<sup>85</sup> These reasons, and concrete proposals for addressing them, were set out in the *Miller Matrimonial Commission Report to the Chief Judge of the State of New York*.<sup>86</sup> Analysis by leading family law

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77. J. Herbie DiFonzo & Ruth C. Stern, *Addicted to Fault: Why Divorce Reform Has Lagged in New York*, 27 PACE L. REV. 559, 564 (2007). This Article provides a rich and detailed history of the tumultuous history of New York divorce. See also Isabel Marcus, *Locked In and Locked Out: Reflections on the history of Divorce Law Reform in New York State*, 37 BUFF. L. REV. 375 (1988); J. HERBIE DI FONZO, *BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH CENTURY AMERICA* 1997; See generally GROSSMAN & FRIEDMAN, *supra* note 19.

78. DiFonzo & Stern, *supra* note 77.

79. *Id.* at 579.

80. *Id.*

81. *Id.*

82. Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. REV. 79, 86 (1991) (discussing the change in New York law for the period of separation from two years to one year).

83. N.Y. DOM. REL. ART. 13 § 170(7).

84. *Id.*

85. See Joanna Grossman, *Will New York Finally Adopt True No-Fault Divorce? Recent Proposals to Amend the State's Archaic Divorce Law*, FINDLAW (Oct. 20, 2004), <http://writ.lp.findlaw.com/grossman/20041020.html>.

86. MILLER MATRIMONIAL COMM'N REP. TO THE CHIEF JUDGE OF THE STATE OF N.Y. (2006), available at [www.nycourts.gov/reports/matrimonialcommissionreport.pdf](http://www.nycourts.gov/reports/matrimonialcommissionreport.pdf).

scholars and practitioners followed, in a special Symposium on the *Miller Commission*.<sup>87</sup>

To understand these reasons, it is useful to examine how divorce historically affected families in New York, especially economically dependent women and children. As explained below, under New York's rigid common law title system, virtually all property acquired during a marriage remained the property of the title-holder, almost always the husband. Alimony awards, theoretically available to the "innocent" spouse, in fact were as rare in New York as they were everywhere else, and as inadequate.<sup>88</sup> Although there were good reasons for resisting no-fault, they became less compelling over time, as more women entered the workforce, and sought alternatives to unhappy marriages.

No-fault divorce was resisted in New York by a powerful, if unlikely, coalition of feminists, Catholics, and a vocal, if steadily shrinking minority of the matrimonial bar. Effective circumvention of the law, by exaggerated claims of 'cruel and inhumane treatment,' for example, probably contributed to the delay, although not to the extent that it had before.<sup>89</sup> The notorious stalemates characteristic of the New York legislature may also have been a contributing factor.<sup>90</sup>

Compromise became possible, for feminists at least, with the enactment of the new temporary maintenance statute, described below.

### B. The Get Statute

Couples married according to Jewish law must also be divorced in accordance with that law in order to be eligible for remarriage under Jewish law.<sup>91</sup> Under that law, according to the New York Practice Commentary,<sup>92</sup> a Jewish religious divorce, or "Get," is necessary for the wife in order to remarry, but a 'get' is not necessary for the husband, who can be granted a 'letter' by a rabbinical court, which will serve the same function. Thus, the wife requires the husband's consent to divorce, but he does not require hers. This is known as the *agunah* or "chained women" problem.<sup>93</sup>

In 1983, New York became the first—and still, the only—jurisdiction to enact a Get statute, which was amended in 1984. The Get Statute makes no reference to Jewish law. It is titled, "Removal of barriers to remarriage" and provides in pertinent part:

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87. Janet A. Johnson, *Symposium on the Miller Commission on Matrimonial Law: Editor's Overview*, 27 PACE L. REV. 539 (2007).

88. ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 422 (4<sup>th</sup> ed. 2011).

89. See DiFonzo & Stern, *supra* note 77 (describing the farce of staged adultery in New York).

90. Johnson, *supra* note 87.

91. Jill Wexler, *Gotta Get a GET: Maryland and Florida Should Adopt Get Statutes*, 17 J. L. & POL'Y 736 (2009).

92. Alan D. Scheinkman, *Practice Commentary*, DOM. REL. LAW § 253.

93. Wexler, *supra* note 91, at 736.

3. No final judgment of annulment or divorce shall thereafter be entered unless the plaintiff shall have filed and served a sword statement: (1) that, to the best of his or her knowledge, he or she has, prior to the entry of such final judgment, *taken all steps solely within his or her power to remove all barriers to the defendant remarriage following the annulment or divorce, or (ii) that the defendant has waived in writing the requirements of this subdivision.* (emphasis added)<sup>94</sup>

The Statute has been applied by several New York courts. In *Kaplinsky v. Kaplinsky*<sup>95</sup> for example, the Supreme Court held that it had authority to enforce its order holding husband in contempt for failure to deliver a Get to the wife by imposing a term of imprisonment and withholding all economic benefits from former husband until he purged himself of his contempt.<sup>96</sup>

Other courts, however, have held that application of the statute would require the appellate court to review and interpret religious doctrine and resolve parties' religious dispute in violation of the First Amendment.<sup>97</sup> As the *Practice Commentary* sensibly concludes, "ultimately, if religious law presents difficulties and allows for manipulation by a spouse, the ultimate answer would appear to lie with the religious, and not the temporal, authorities."<sup>98</sup>

### III. EQUITABLE DISTRIBUTION

Historically, New York courts divided marital property at divorce according to strict common law title rules. That is, the party in whose name title was held was considered the sole owner of that property. *Saff v. Saff*<sup>99</sup> is a striking example of the often harsh results. The parties were married during the Depression in 1936. She was a maid; he was unemployed; both worked at odd jobs. After several false starts, Mr. Saff co-founded Jamestown Fabricated Steel. By 1975, the year they were divorced, the company was worth over \$500,000. Although Mr. Saff admitted that he had assured her, "Baby girl, what's mine is yours, you're my wife," the New York court refused to hold him to his promises.<sup>100</sup>

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94. DOM. REL. LAW § 253.

95. *Kaplinsky v. Kaplinsky*, 603 N.Y.S.2d 574 (1993).

96. *Id.*

97. See e.g., *Sieger v. Sieger*, 829 N.Y.S.2d 649, 652 (2007) (holding that First Amendment religious entanglement doctrine precluded appellate jurisdiction, as to wife's claim, on appeal in divorce action relating to marriage of Orthodox Jews, that the "heter" obtained by husband from rabbinical court, which allowed him to remarry without first giving wife a "get," i.e., a religious divorce, had practical effect of preventing her remarriage, as statutory basis for precluding entry of final judgment in divorce action). See generally Brian Sites, *Religious Documents and the Establishment Clause*, 42 U.M. L. REV. 1 (2011) (discussing New York Law).

98. Scheinkman, *supra* note 92, at 253.

99. *Saff v. Saff*, 402 N.Y.S.2d 690 (1978).

100. *Id.* at 693.

Rather, the court found that the quoted words did not create a constructive trust, which was the only basis under New York law for awarding his wife of 40 years any portion of his considerable assets. Because there was no “express promise,” the Court found, there could be no constructive trust, a doctrine developed to avoid the inequities of common law title. Finding that Mrs. Saff was not in fact “penniless,” earning \$12,500 from a part time job at her husband’s company as well as \$3,600 per year in dividends, the court refused to award her any portion of Mr. Saff’s business.<sup>101</sup>

Dependent spouses in New York, who were overwhelmingly women until quite recently, were on notice that New York courts had no intention of “creating a judicial version of a community property law.”<sup>102</sup> On the contrary, the New York courts criticized such laws, under which all of the fruits of spousal labor during the marriage were deemed to be the shared ‘community’ property of both spouses, as inimical to important business interests. As the *Saff* court concluded: “The result sought by [the wife] here would foist an unwanted business partner on [the husband and his partner], a business partner who may be motivated by considerations unrelated to the best interests of Jamestown Steel, those who own it and those who are employed by it.”<sup>103</sup>

In addition to New York’s notoriously rigid common law approach to property, as Professor Marsha Garrison has pointed out, several influential analyses of the impact of divorce “have uniformly shown that women’s per capita income and standard of living tend to decline substantially following divorce, while those of men tend to increase.”<sup>104</sup> Divorce was correctly understood as a high-risk proposition for dependent spouses in New York. Resisting no-fault was one way for dependent spouses (at least, ‘innocent’ dependent spouses) to retain some leverage.

So reform in New York dragged on. New York was unable to draft its compromise equitable distribution statute until 1980, one of the last six common law states to do so.<sup>105</sup> The New York legislature had *Saff* and cases like it in mind when it enacted New York’s equitable distribution law.<sup>106</sup> Professor Garrison describes the resulting law as “a fairly typical equitable distribution statute”<sup>107</sup> The New York statute considers all property acquired by either spouse during the marriage, excluding gifts, inheritances, and personal

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101. *Id.* at 694.

102. *Id.*

103. *Id.*

104. Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York’s Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 633 (1991).

105. DiFonzo & Stern, *supra* note 77, at 587-88.

106. See Garrison, *supra* note 104, at 628; see also *O’Brien v. O’Brien*, 498 N.Y.S.2d 743, 747 (noting that “[r]eform of section 236 was advocated because experience had proven that application of the traditional common-law title theory of property had caused inequities upon dissolution of a marriage” and quoting *Assembly Memorandum 1980 N.Y. Legis. Ann.*, at 129-130; See also DiFonzo, *supra* note 78, at 588 (quoting *Governor’s Memorandum of Approval*, 1980 McKinney’s Session Laws of N.Y., at 1863).

107. Garrison, *supra* note 104, at 638.

injury awards, as marital property, subject to equitable distribution.<sup>108</sup> The statute sets out thirteen factors to be taken into account by the court, including the duration of the marriage, the parties other sources of income, and the contribution of one spouse to the earning ability of the other.<sup>109</sup> ‘Fault’ is not a listed factor, although *economic* fault (squandering marital assets at the race track) can be considered in New York (and everywhere else).

As Professor Grossman explains, New York also allows ‘egregious’ fault to be taken into account.<sup>110</sup> Citing New York cases in which the husband’s share of marital property had been reduced where the husband tried to murder his wife, or raped his step-daughter, or knocked his wife’s teeth out and broke her jaw by hitting her in the face with a barbell, Professor Grossman commended the New York courts for crafting a practical approach between the all-or-nothing extremes adopted in other states.<sup>111</sup>

The New York court was also mindful of dependent spouses when it decided that Dr. O’Brien’s medical degree was a marital asset subject to equitable distribution under the new law.<sup>112</sup> Marriage is an ‘economic partnership,’ the *O’Brien* Court held, and it can include inalienable assets such as a professional license. New York is the only state that recognizes such licenses as marital property subject to distribution.<sup>113</sup> In every other state, such licenses are regarded as inalienable ‘human capital,’ and not subject to distribution.

The *O’Brien* Court based its decision on the specific working of the New York statute, which, as critics have noted, is actually quite unexceptional.<sup>114</sup> The New York Court affirmed *O’Brien* in 1995 in *McSparrow v. McSparrow*,<sup>115</sup> although New York Courts have limited *O’Brien*-type awards in other cases.<sup>116</sup> Some commentators have criticized New York’s “wildly inconsistent results”<sup>117</sup> but New York remains the only state in which

108. N.Y. DOM. REL. L. § 236 (5)(d).

109. N.Y. DOM. REL. ART. 13 § 236(5)(d)(1)-(14).

110. See Joanna Grossman, *The Cost of Hitting Your Wife with A Barbell: Fault and the Division of Marital Property*, FINDLAW (Aug. 14, 2001), available at <http://writ.news.findlaw.com/grossman/20010814.html>.

111. *Id.*

112. *O’Brien v. O’Brien*, 489 N.E.2d 712, 712-713 (N.Y. 1985); See Ira Mark Ellman, *O’Brien v. O’Brien: A Failed Reform, Unlikely Reformers*, 27 PACE L. REV. 949, 958-985 (2007) (noting that Loretta remarried while the appeal was pending and that Michael never became a surgeon, as the lower court had assumed).

113. ELLMAN ET AL., *supra* note 88, at 395.

114. *Id.*

115. *McSparrow v. McSparrow*, 662 N.E.2d 745, 748 (N.Y. 1995).

116. See, e.g., *McAlpine v. McAlpine*, 574 N.Y.S.2d 385, 386 (App. Div. 1991) (noting the husband’s work in the household and the wife’s failure to contribute to his success); *But see O’Brien v. O’Brien*, 489 N.E.2d 712; (*R’affd* in *McSparrow v. McSparrow*, 639 N.Y.S.2d 265, 268).

117. ELLMAN ET AL., *supra* note 88, at 397; See Alicia Brokars Kelly, *The Marital Partnership Pretense and Career Assets: The Ascendancy of Self Over the Marital Community*, 81 B.U. L. REV. 59, 80-83, 103 (2001); see also Alicia Brokars Kelly, *Rehabilitating Partnership Marriage As A Theory of Wealth Distribution At Divorce: In*

professional degrees or enhanced earning capacity are recognized as assets subject to equitable distribution.<sup>118</sup>

Despite decisions like *O'Brien*, however, New York's equitable distribution statute has not in fact produced parity at divorce. As Professor Garrison showed in her groundbreaking study:

The most important point to be drawn from the asset and net worth valuations, however, is the relative scarcity of valuable, individually owned assets. Less than half of the surveyed husbands owned property worth as much as \$2500 even in the relatively wealthy contested sample; only about a third of the group owned property worth \$10,000. Indeed, more than half of husbands had individual net worth of less than \$50. For this group, the equitable distribution law's promise of expanding the pool of assets by ignoring title was simply chimerical.<sup>119</sup>

As Lenore Weitzman had pointed out decades earlier in her controversial study of the economic impact of divorce, the wage-earner's income was for most families the "diamonds" of the family jewels.<sup>120</sup> If those diamonds were not available to dependent spouses, their post-divorce standard of living would inevitably plunge. A post-divorce income stream, or maintenance, was the key to assuring a wife's post-divorce standard of living. The *Miller Commission Report* explicitly recommended that the legislature 'abandon' *O'Brien*, while providing guidelines for the recognition of a spouse's contribution to the enhanced earning capacity of the other spouse.<sup>121</sup>

#### IV. MAINTENANCE

In 2010, New York enacted a new maintenance statute. Women's groups in New York had vigorously opposed unilateral no-fault for a long time. In addition to the emotional toll, frankly set out by Professor Melli,<sup>122</sup> they were concerned that economically dependent wives would be left with no leverage. The new maintenance law addresses that concern, albeit partially.

In addition to "immediately" imposing an effective freeze on the transfer or other disposition of any property held by either party, the new law sets out a formula for temporary maintenance.<sup>123</sup> Under this formula, the court is instructed to make two calculations. First, it "subtract[s] twenty percent of the

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*Recognition of A Shared Life*, 19 WIS. WOMENS L. J. 142, 158 (2004)(citing cases in Colorado and Connecticut where, despite occasional rulings holding professional degrees to be marital property subject to equitable division, no clear consensus has emerged.).

119. Garrison, *supra* note 104, at 657-658.

120. LENORE WEITZMAN, *THE DIVORCE REVOLUTION* 109 (The Free Press 1985).

121. Johnson, *supra* note 87, at 55.

122. See Melli, *supra* note 5, at 638.

123. *Id.* at n. 5 (noting that divorce is often the beginning of a new relationship).

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income of the payee from thirty percent of the income . . . of the payor.”<sup>124</sup> Second, the court multiplies “sum of the payor’s income . . . [and] the payee’s income by forty percent” and subtracts the income of the payee.<sup>125</sup> The guideline amount of temporary maintenance is the lower of the amounts.<sup>126</sup> There is a presumption that the lower income spouse should be granted maintenance in this amount.<sup>127</sup>

Courts have already noted problems with the new statute. Because it does not require the more complicated calculations required for a post-divorce maintenance award, it omits consideration of the parties’ preexisting arrangements. This can be addressed by arguing that the formula produces an “unjust and inappropriate” result, requiring a re-calculation. The court refused to apply the formula in *Scott M. v. Ilona M.*,<sup>128</sup> for example, holding that “the existence and duration of the pre-divorce joint household of both parties and (2) the child care expense obligation of the parties” should be taken into account.<sup>129</sup> In *Khaira v. Khaira*,<sup>130</sup> similarly, after noting that, “The new [formula for temporary maintenance] reflects a substantial change in the legislature’s approach to temporary maintenance . . . rather than aiming merely to ‘tide over’ the non-monied spouse, [it] creates a substantial presumptive entitlement,”<sup>131</sup> the court assumed that “all carrying charges” were to be included in the formula.<sup>132</sup>

## V. CHILD SUPPORT

In New York, as in every state, a parent has a duty to support her or his minor children whether s/he is a mother or father, whether the parents are married or not, and whether a child is in the parent’s custody or not. In New York, support may include the educational costs, including college, for “any unemancipated child under the age of twenty-one.”<sup>133</sup> Child support is calculated by combining the incomes of the parents, and setting child support at between seventeen and thirty-five percent of that sum, depending on the number of children.<sup>134</sup>

Health care, childcare and educational costs are treated as “add on” expenses.<sup>135</sup> A “self-support reserve,” set at one hundred thirty-five percent of the federal poverty income guidelines for a single person, is adjusted

124. N.Y. DOM. REL. ART. 13 § 236 5-a c(1)(a) (McKinney 2010).

125. *Id.* at 5-a c(1)(b)-(c).

126. *Id.* at 5-a c(1)(d).

127. *Id.* at 5-a b(6)(8), c(1)(d).

128. *Scott v. Ilona*, 915 N.Y.S.2d 834, 841 (Sup. Ct. 2011).

129. *Id.* at 841.

130. *Khaira v. Khaira*, 938 N.Y.S.2d 513 (Sup. Ct. 2012).

131. *Id.* at 197.

132. *Id.* at 199-200.

133. N.Y. DOM. REL. ART. 13 § 240 1-b(b)(2) (McKinney 2010).

134. *Id.* at 1-b(b)(2)(3)(i)(ii)(4).

135. *Id.* at 1-6(b)(1)(2).

annually.<sup>136</sup> As with temporary maintenance, support may deviate from the presumptive amount only if it is “unjust or inappropriate.”<sup>137</sup> Such a finding may be based on a broad range of factors, including the non-monetary contributions of the parents.<sup>138</sup> Child support is presumptively capped at a combined parental income of \$136,000, but a court may either apply the percentage to an amount above the cap, or simply note the factors considered in setting the higher award.<sup>139</sup>

Child support guidelines in New York assume that one parent has primary physical custody. When custody is more equally shared, this can result in sharply reduced payments by the lesser-time parent. In their influential article, *The Economics of Shared Custody: Developing an Equitable Formula for Dual Residence*,<sup>140</sup> Professor Melli and Patricia R. Brown first described the “cliff effect,” i.e., the large reduction in child support that occurs when parents have roughly equal residential responsibility for a child.<sup>141</sup> As Professor Melli explained in a later article:

The large amount of reduction that gives rise to the cliff effect is unfair for two reasons. First, by counting the total time with the child, the lesser-time parent receives double credit for the time calculated in the basic child support order for visitation—approximately 20%. Second, the formula provides for a sharp reduction from just below to just above 35% time. By increasing the amount of time spent in residential care by 5%, a lesser-time parent can reduce child support by 40%.<sup>142</sup>

In *Base v. Rossuff*,<sup>143</sup> New York’s highest court addressed the “cliff” issue, extensively citing Professor Melli’s work. Noting that the New York legislature had deliberately been silent with respect to the question of offsets for shared residential responsibility, the court concluded that the intent was to leave the matter to the parties.<sup>144</sup> Failing their agreement, adjustments were left to be decided in the discretion of the trial court.<sup>145</sup> The court explicitly quoted Professor’s Melli’s warning about the cliff, and the risks to those with primary

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136. *Id.* at 1-b (b)(5)(vii)(H)(6).

137. *Id.* at 1-b(g).

138. *Id.* at (f)(5).

139. *Cassano v. Cassano*, 651 N.E.2d 878, 881 (1995).

140. Marygold S. Melli & Patricia R. Brown, *The Economics of Shared Custody: Developing an Equitable Formula for Dual Residence*, 31 HOUS. L. REV. 543, 565 (1994).

141. *Id.* at 565-66.

142. Marygold S. Melli, *The American Law Institute Principles of Family Dissolution, the Approximation Rule and Shared-Parenting*, 25 N. ILL. U. L. REV. 347, 360-61 (2005).

143. 697 N.E.2d 1009, 1013 (N.Y. 1998).

144. *Id.* at 1013-14.

145. *Id.*

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custody, providing invaluable guidance to future courts.<sup>146</sup> New York apparently grasped the importance of this issue better than the ALI.<sup>147</sup>

Child support is enforced in New York through income withholding (the default) as well as the suspension of driving privileges;<sup>148</sup> state professional, occupational and business licenses;<sup>149</sup> or suspension of recreational license.<sup>150</sup> But payors still shirk their obligations. New York recently had the dubious distinction of being the home state to the Most Wanted Deadbeat Parent, Robert D. Sand, who left the country for almost twenty years to avoid paying child support.<sup>151</sup> Another New York father, a Brooklyn doctor, took his wife and three children on a vacation to Bangladesh, where he announced that he had no intention of returning to New York.<sup>152</sup> Upon their return to New York, the wife and children discovered that he had sold their brownstone and transferred all of their bank accounts to Bangladesh. Both fathers are now in jail.<sup>153</sup> They are among the 23 parents in New York who owe child support of \$1 million or more.<sup>154</sup>

Bureaucratic mistakes and intransigency can add to collection difficulties. A single mother recently sought help from the *New York Times*, complaining about the “seemingly impenetrable” bureaucracy:

An order was issued by family court on Nov. 30, 2012, specifying that the support collection unit of the O.C.S.E. was to assess the father's arrears at \$12,568 plus the previously calculated arrears, which were \$7,439. Instead of adding the new arrears to the old, as instructed by the court order, the O.C.S.E. substituted the new arrears of \$12,568 for the previously calculated arrears of \$7,439. An amended order was issued on Jan. 8, 2013, in an attempt to be clearer for the O.C.S.E.'s employees.

The amended order came only after I spent five hours speaking with eight different people in two different buildings.

But the new order didn't help. Yet again, the O.C.S.E. simply substituted the new arrears of \$12,568 for the previously calculated arrears of \$7,439.

I have spent the past four months doing everything within my power to rectify this situation, and I have failed. If I were to seek legal counsel to help me, I'd be spending thousands of dollars to try to get

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146. *Id.*

147. Melli, *supra* note 142, at 360-61 (criticizing the ALI for failing “to address the cliff effect in cases where it reduces child support at the 35-40% range of residential care”).

148. N.Y. DOM. REL. ART. 13 § 244-b (a)-(b).

149. N.Y. DOM. REL. ART. 13 § 244-c (a)-(b).

150. N.Y. DOM. REL. ART. 13 § 244-d (a)-(b).

151. Mosi Secret, *Huge Child Support Debt Doesn't Ensure Time in Jail*, N.Y. TIMES (Dec. 31, 2012) at A15.

152. *Id.*

153. *Id.*

154. *Id.*

a state bureaucracy to do its job enforcing a court order. The \$7,439 that I am trying to get would be spent in legal fees.<sup>155</sup>

The reporter emailed the City's public advocate, but it took his office several weeks to get the mistake corrected by an unapologetic Human Resources Administration.

#### VI. PRE-MARITAL AND SEPARATION AGREEMENTS

The general rule on premarital agreements is that they can be upheld 1) if they are in writing and, 2) if they do not encourage divorce.<sup>156</sup> New York is strict with respect to the first requirement, specifying not only a "writing" but a writing "subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded"<sup>157</sup> In addition, the agreement must be "fair and reasonable" when it is entered into, and "not unconscionable at the time of entry of final judgment."<sup>158</sup> New York may be less concerned with the second requirement; i.e., that the agreement does not encourage divorce.

It is doubtful, for example, that Donald Trump's premarital agreement with Marla Maples would have been upheld under this standard.<sup>159</sup> Under the terms of that agreement, if Donald and Marla divorced within five years of their marriage, Marla would receive between \$1million and \$5 million in settlement. If they divorced later, she would instead receive a percentage of his reputed \$2.5 billion net worth.<sup>160</sup> Since "even . . . a small percentage [of \$2.5 billion] is a lot of money," according to an acquaintance, Donald filed for divorce eleven months before their agreement expired. It could have been far too expensive to do otherwise.

New York courts have held parties to their agreements, even when faced with extraordinary facts and the most creative legal arguments. Steven Simkin and Laura Blank had been married more than 30 years when they divorced in 2006.<sup>161</sup> Both lawyers, they had amassed roughly \$13.5 million in assets.<sup>162</sup> Agreeing to an equal split, Mr. Simkin took the bulk of his share in the form of their investment account with Bernard Madoff.<sup>163</sup> Ms. Blank took her share in cash. In 2008, when Mr. Simkin learned that his investment was worthless, he

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155. David Segal, *A Shortage of Child Support, But a Surplus of Blame*, N.Y. TIMES (May 25, 2013), available at <http://www.nytimes.com/2013/05/26/your-money/tracking-a-child-support-mix-up-in-new-york.html>.

156. ELLMAN ET AL., *supra* note 88, at 810.

157. N.Y. DOM. REL. ART. 13 § 236 (B)(3) (McKinney 2010).

158. *Id.*

159. See Judith Newman, *Marla Maples Finds Her Groove*, N.Y. TIMES (Nov. 14, 2012), available at <http://www.nytimes.com/2012/11/15/fashion/for-marla-maples-a-return-to-new-york.html> (Marla describes life post-Donald).

160. *Id.*

161. *Simkin v. Blank*, 968 N.E.2d 459, 460 (N.Y. 2012).

162. Peter Lattman, *Court Rejects a Madoff Victim's Effort to Redo His Divorce Settlement*, N.Y. TIMES (Apr. 4, 2012), at B3.

163. 968 N.E.2d at 461.

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asked Ms. Blank to revise their settlement.<sup>164</sup> When she refused, he sued, arguing that the agreement had been based on a “mutual mistake” of fact.<sup>165</sup> New York’s highest court rejected this argument, upholding the agreement and noting that Mr. Simkin’s “situation, however sympathetic, is more akin to a marital asset that unexpectedly loses value after dissolution of a marriage.”<sup>166</sup>

## VII. PARENTAGE IN NEW YORK

New York has rejected the Uniform Parentage Act, setting out its own standard in the New York Family Court Act.<sup>167</sup> Article 5 § 511 addresses “paternity” proceedings, i.e., litigation to determine a person’s legal father and compel support.<sup>168</sup> Such proceedings may be brought by the mother, by a person alleging to be the father, by the child, child’s guardian, or by a welfare authority. Conspicuously absent is the mother’s husband. Section 522 does not confer standing to bring suit declaring that the petitioner is not the father, which would effectively constitute a “non-paternity” action.

A New York court recently held that paternity may be unclear under this statute where the man claiming to be the father is neither the genetic father nor the mother’s husband or partner.<sup>169</sup> Dr. Jonathan and his partner, Leann Leutner, relied on donor sperm and in vitro fertilization to have a baby.<sup>170</sup> Their son was born in July 2012, while they were living together in New York. Five months later, Leann took the baby and moved to New Jersey, where she committed suicide.<sup>171</sup>

Jonathan could have filed an acknowledgement of paternity under New York law or, with Leann’s consent; he could have been listed as the baby’s father on the birth certificate.<sup>172</sup> But he did none of these things.<sup>173</sup> Under the New York statute, accordingly, there is no presumption that he is the baby’s father.<sup>174</sup> Leann’s sister is also seeking custody and the matter is currently pending before a New York court, which will presumably determine custody under the “best interest of the child” standard.<sup>175</sup>

164. *Id.*

165. *Id.*

166. *Id.* at 464.

167. N.Y. FAMILY CT. ACT § 511 (McKinney 2009).

168. *Id.* at Sec.522.

169. See Ginia Bellafante, *When the Law Says a Parent Isn’t a Parent*, N.Y. TIMES (Feb. 2, 2013), <http://www.nytimes.com/2013/02/03/nyregion/a-custody-battle-after-the-law-says-a-parent-isnt-a-parent.html>.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. See generally Janet L. Dolgin, *Attitudes About Human Embryos, Embryonic Stem Cell Research, and Related Matters*, 37 Hofstra L. Rev. 319 (2008); Joanna Grossman, *The Adoptability of Abandoned Babies: A Recent New York Case Interprets the State’s “Baby Moses” Law*, FindLaw (Oct. 09, 2001) available at <http://writ.news.findlaw.com/grossman/20011009.html>; New York enacted the

Another New York story about a baby of questionable parentage had a happier ending. In 2000, Peter Mercurio's partner, Danny, found an abandoned newborn wrapped in a sweatshirt behind the turnstiles on the A/C/E Eighth Avenue subway line. He called 911 and the infant was turned over to Family Services.<sup>176</sup> Three months later when Danny appeared in family court to explain how he had found the baby, the judge abruptly interrupted him to ask if he would be interested in adopting the baby. "Yes," said Danny, "But I know it's not that easy." "Well, it can be," the judge told him.<sup>177</sup>

Apparently, the baby's biological mother had been found and had consented to his adoption.<sup>178</sup> The infant was placed with the gay couple as foster parents and the adoption was finalized. Eleven years later, after New York passed the Marriage Equality Act authorizing same-sex marriages,<sup>179</sup> the couple's son, Kevin, suggested that they contact the judge who had brought them together as a family to perform the marriage ceremony. She was happy to do so.<sup>180</sup>

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Abandoned Infant Protection Act in July 2000 to save the lives of unwanted, newborn infants. McKinney's Social Services Law §372-g (July 18, 2000).

The law was amended in August 2010 to encourage any person abandoning a baby to do so in a manner that does not harm the baby. The amendments provide that parents who abandon their infant in a safe way, as prescribed by the law, will not be held criminally liable. The 2010 changes also increased the time frame in which an infant could be abandoned under the Act. Previously, an infant could be abandoned only in the first five days of its life, now the law applies to infants 30 days old or younger. An Amendment to the Abandoned Infant Protection Act of 2000 LAWS OF NEW YORK, 2010 CHAPTER 447, N.Y. State Div. of Crim. Justice Servs., <http://criminaljustice.state.ny.us/legalservices/c447.htm>; See also generally Carol Sanger, *Infant Safe Haven Law: Legislating In The Culture of Life*, 106 Colum. L. Rev. 753 (2006); Susan L. Pollet, *Safe Haven Laws- Do Legal Havens To Abandon Babies Save Lives?*, 32 Westchester B.J. 71(2005); See also Andrew Schepard & J. Herbie DiFonzo, Hofstra's Family Law With Skills Course: Implementing FLER (The Family Law Education Reform Project) 49 Fam. Ct. Rev. 685, 695 (2011) (describing surrogacy simulation exercise for New York law students, although surrogacy contracts have been barred in New York); Art. 8, N.Y. Dom. Rel. Art. 13 § 122 (McKinney 2010).

176. Peter Mercurio, *We Found Our Son in the Subway*, N.Y. TIMES (Feb. 28, 2013, 12:30PM), <http://www.opinionator.blogs.nytimes.com/2013/02/28/we-found-our-son-in-the-subway/>.

177. *Id.*

178. Mary Mohler, *Adoption Stories: Miracle on 14th Street*, PARENTS MAGAZINE, <http://www.parents.com/parenting/adoption/stories/adoption-stories-miracle-on-14th-street/>; Jon Campbell, *Baby Found in Subway: Gay Couple Adopt Abandoned NY Baby, Making Film*, CHRISTIAN POST (Mar. 1, 2013, 7:34PM), <http://www.christianpost.com/news/baby-found-in-subway-gay-couple-adopt-abandoned-ny-baby-making-film-91093/>.

179. See *supra* Part I.C.

180. Mercurio, *supra* note 176.

## VIII. COHABITATION

The number of unmarried couples cohabiting in the United States increased from roughly 523,000 to 4,880,000 between 1970 and 2000.<sup>181</sup> By 2010, 6.6 % of Americans, and 6.7 % of New Yorkers, were cohabiting. While some countries view cohabitation as a legal status with attendant rights and obligations,<sup>182</sup> no state in this country has taken that approach. (Cohabiting couples in a common law marriage, of course, are in fact *married* and their marriage can only be terminated by death or divorce. Parties cannot enter into a common law marriage in New York, although New York recognizes such marriages if they are entered into in a state which permits them.

As the Court held in *Morone v. Morone*,<sup>183</sup>

New York courts have long accepted the concept that an express agreement between unmarried persons living together is as enforceable as though they were not<sup>184</sup> living together provided only that illicit sexual relations were not part of the consideration of the contract. . . . The theory of these cases is that while cohabitation without marriage does not give rise to the property and financial rights which normally attend the marital relation, neither does cohabitation disable the parties from making an agreement within the normal rules of contract law.<sup>185</sup>

Thus, absent an express agreement between the cohabitating parties, they have no legal obligations to each other, and presumably, no obligations to third parties, such as hospitals. Nevertheless, Governor Andrew Cuomo recently sought (and received) permission from the state's Joint Commission on Public Ethics to bring his girlfriend, Sandra Lee, along on state aircraft.<sup>186</sup> According to the Commission's advisory opinion, "the first family may travel with the governor on state aircraft without the need for the governor to reimburse the state. The first family is defined to include the . . . domestic partner of a governor."<sup>187</sup> New York, however, does not have a domestic partner statute. In 1993, New York City offered legal recognition for gay couples, who were able to register as domestic partners,<sup>188</sup> but there is no indication that the governor and Lee ever registered as domestic partners under the City Ordinance.

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181. Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L. J. 309, 313 (2008).

182. *Id.* at 324 (describing laws in Australia, Canada and New Zealand addressing cohabitation).

183. 413 N.E.2d 1154, 1156 (N.Y. 1980).

184. ELLMAN ET AL., *supra* note 88.

185. See Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 817-18 (2005).

186. Danny Hakim, *Cuomo Cleared To Bring Girlfriend When He Rides State Planes* N.Y. TIMES (April 13, 2013), at A15.

187. *Id.*

188. 133B S.Ct. at 2683.

The New York Public Health Statute does provide in pertinent part that:

2. For purposes of this section only, “domestic partner” means a person who, with respect to another person:
  - (a) is formally a party in a domestic partnership or similar relationship with the other person, entered into pursuant to the laws of the United States or of any state, local or foreign jurisdiction, or registered as the domestic partner of the other person with any registry maintained by the employer of either party or any state, municipality, or foreign jurisdiction. . . .

Its explicit limitation, “this section only,” however, would prevent reliance on this statute for purposes of the Governor’s query. The basis for the Commission’s determination, accordingly, is unclear.

#### CONCLUSION

This cursory overview of New York family law highlights some of its quirks. From squabbles about ULC ministers to Edith Windsor’s bittersweet triumph (after all, she couldn’t share it with the woman with whom she had shared her life), marriage continues to matter in New York.<sup>189</sup> Divorce matter, too, and New York has finally adopted no-fault divorce, although the new temporary maintenance law, along with the requirement that all economic issues be resolved before the entry of judgment, makes it look more like no-fault with training wheels; i.e., it is a no-fault law clearly concerned about economically vulnerable spouses.<sup>190</sup> This concern is also apparent in the *O’Brien* approach to enhanced earning capacity in equitable distribution although, as the *Miller Report* suggested, this approach seems to be falling out of favor.

New York’s new temporary maintenance statute is one of the few in the country to replace the trial court’s discretion with a formula, as has long been the practice in the context of federally mandated child support guidelines. New York, like every other state, has seen some improvement in child support collection with the federalization of child support,<sup>191</sup> although its deadbeat

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189. See *supra* Part I.

190. See *supra* Part II.

191. The rate of collection by state agencies has been increasing. In fiscal year 2000, eighteen billion dollars in child support was collected by the states, an increase of sixty-five percent over the twelve billion dollars collected in fiscal year 1996. See HHS Role in Child Support Enforcement, U.S. DEP’T OF HEALTH & HUMAN SERV. (July 31, 2002), <http://archive.hhs.gov/news/press/2002pres/cse.html>. Payments to States for Child Support Enforcement and Family Support Programs, DEP’T OF HEALTH AND HUMAN SERV. ADMIN. FOR CHILDREN AND FAMILIES (Feb. 28, 2013), <http://www.acf.hhs.gov/sites/default/files/olab/cse.pdf>. See generally “Full Faith and Credit for Child Support Orders Act,” which requires each state to enforce a child support order, by a court of another state, that is consistent with the Act, according to the order’s own terms, and not to permit a modification of such an order except in accordance with the Act. 28 U.S.C.A. § 1738B (West 1994).

parents might be a little flashier than most,<sup>192</sup> and its bureaucracies even more maddening.<sup>193</sup>

Parentage in New York, as elsewhere, is getting more complicated.<sup>194</sup> But New York's unusually high median age at first pregnancy, along with growing numbers of same-sex couples, including, in both groups, disproportionate numbers of high-income professionals, may well lead to more cases of problematic in vitro parentage, like that in dispute in *Sporn*.<sup>195</sup> Finally, the growing proportion of cohabiting couples, including the governor and his girlfriend, raises new questions about what kinds of relations are legally cognizable, and for what purposes?<sup>196</sup>

These examples suggest some of the ways in which New York has shaped its family law. How, exactly, has this happened? Professors Carbone and Cahn cite Bill Bishop's influential book, *The Big Sort*, which documents the process through which "regions have become more distinct – and different from each other – as the like-minded have become more likely to move closer to each other."<sup>197</sup> New York's reputation as liberal and diverse, accordingly, attracts those who value liberalism and diversity, and thus New York becomes more so. Perhaps, as Alter observes,<sup>198</sup> people change their behavior according to their environment. Maybe LeSeur's poetic notion of a mutually-constitutive relationship between the 'body' and the 'landscape' accounts for the ways in which its family law has become distinctively *New York* family law. Whatever the explanation, New York family law is as idiosyncratic as the people who live here, and it is as readily identifiable as the Valentine's Day heart on the Empire State Building,<sup>199</sup> or the rats and pigeons who answer the princesses' call in *Enchanted*,<sup>200</sup> or the Borscht Belt hotel in *Dirty Dancing*.<sup>201</sup> And just as New York shapes its family law, its family law shapes New York.

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192. *See supra* Part V.

193. *Id.*

194. *See supra* Part VII.

195. *Id.*

196. *See supra* Part VIII.

197. *Id.* at 30.

198. Alter, *supra* note 2.

199. SLEEPLESS IN SEATTLE (TriStar Pictures 1993).

200. ENCHANTED (Walt Disney Pictures 2007).

201. DIRTY DANCING (Vestron Pictures 1987).