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A. LGBTQ FAMILIES: THE INITIAL INTERVIEW (3 pages)
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I. LGBTQ FAMILY LAW – An Overview

A. The Current Legal Landscape

1. The passage of the Marriage Equality Act in New York in 2011 changed the landscape for all New York LGBT families. There are now significant legal consequences for the children of LGBT parents who choose to marry and there are other equally significant consequences for the children of parents who choose not to marry. The combined effects of the new law in New York, the recent Supreme Court cases declaring DOMA unconstitutional for federal purposes, and the continued impact of state-specific DOMAs as one travels from state to state complicate our families’ lives in profound ways that we are just beginning to comprehend. In many ways it is a very exciting time to be practicing, but it is also incredibly complicated and challenging.

2. Simply put, for children born to or adopted by LGBT parents prior to the passage of Marriage Equality in New York, their security will depend on: 1) whether their parents married in other jurisdictions prior to the birth or adoption of their children; and 2) whether the parents had both the financial resources and comprehension of the legal issues to pursue a second parent
adoption in New York or elsewhere. For children born to or adopted by parents after the passage of the new law, the security of the relationships between the children and their previously un- legally recognized parent will depend on: 1) whether the parents were married at the time of the birth or adoption; and 2) whether the legal parent consented to a second parent adoption proceeding and one was completed.

B. What is Family?

1. Families are created in many ways. As lawyers for lesbian, gay, bisexual, transgender and queer or questioning (LGBTQ) clients, it is our duty to be open, to listen and to try to figure out how best to protect the families our clients create. Couples without and with children may define themselves as family. Family does not require children, nor marriage, nor romantic relationship. For the purposes of this discussion, we will assume that children are intended to be part of the family. It is important to understand that marriage is just one of the many ways that our clients acknowledge and memorialize their partnerships. By no means is it the only way.

2. One of the great challenges in this type of practice is to suspend your own judgment. People make interesting choices that present many kinds of legal challenges. Be thoughtful and creative and try to help your clients understand both the limitations and available protections of law and always be prepared for new issues, and new situations as well as for the law to change rapidly in this area.

C. Who are the Parents and How Are Families Created?

1. Many varieties of modern families:

   a. Unmarried partnered same sex couples;
   
   b. Married same sex couples;
   
   c. Couples where one or more of the parents is transgender;
   
   d. Same sex couples where one or both are or were married to an opposite sex spouse (the pitfalls of the un-divorced as well as hidden or "convenience" marriage);
   
   e. Single LGBTQ person;
f. LGBTQ person parenting with another person not his or her partner who may or may not be a biological parent of the child;
g. Biological father, his partner and or ovum donor/gestational carrier;
h. Biological mother, her partner and sperm donor;
i. Polyamorous triads of three or quads of four adults in relationship, with or without a child;
j. Non-romantic co-parents, such as a gay man and female best friend as biological parents, two single mothers co-parenting their children together;
k. Non-romantic partnerships of close friends;
l. Families created with the intention of the child having three or four co-parents, where sometimes two are biological parents and sometimes none are -- who gets the rights?

D. Surrogacy:

Often used by male same-sex couples. A surrogate parenting contract is defined in Domestic Relations Law (DRL) §121(4) as “any agreement, oral or written in which a woman agrees either to be inseminated with the sperm of a man who is not her husband or to be impregnated with an embryo that is the product of an ovum fertilized with the sperm of a man who is not her husband and the woman agrees to, or intends to, surrender or consent to the adoption of the child born as a result of such insemination or impregnation.”

1. Surrogacy is unenforceable in New York. Surrogate parenting contracts are hereby declared contrary to the public policy of this state and are void and unenforceable. (DRL §122) And:

DRL §123 (2) states:

a. A birth mother or her husband, a genetic father and his wife, and, if the genetic mother is not the birth mother, the genetic mother and her husband who violate this section shall be subject to a civil penalty not to exceed five hundred dollars (b) Any other person or entity
who or which induces, arranges or otherwise assists in the formation of a surrogate parenting contract for a fee, compensation or other remuneration or otherwise violates this section shall be subject to a civil penalty not to exceed ten thousand dollars and forfeiture to the state of any such fee, compensation or remuneration in accordance with the provisions of subdivision (a) of section seven thousand two hundred one of the civil practice law and rules, for the first such offense. Any person or entity who or which induces, arranges or otherwise assists in the formation of a surrogate parenting contract for a fee, compensation or other remuneration or otherwise violates this section, after having been once subject to a civil penalty for violating this section, shall be guilty of a felony.

2. Pre-birth parentage orders are used in other states to declare the intended legal parents before birth. Though commonly used to create legal status for LGBT partners in other states, they have uncertain recognition status in New York. Post-birth orders may be used in NY to declare parental status, but the biological parents have an opportunity to sign over legal rights after the birth, putting an adoptive lesbian mom at risk that a sperm donor will change his mind after the birth, or a non-biological gay dad at risk that a surrogate could change her mind after the birth.

3. Surrogacy often involves paying an egg donor and then a surrogate mother, as well as attorneys. Thus, it is a very expensive process not feasible for many gay couples.

4. Surrogacy is legal in NJ and some other states, and many NY resident gay couples get NJ lawyers for surrogacy, or go to other states in the country. Some lawyers practice in NY and NJ, and do all their surrogacy cases on their NJ letterhead. What are the ethical issues raised?

5. Legislative History indicates surrogacy for altruistic reasons may be an exception in some circumstances.

New York State enacted its current Surrogacy statute in 1992 based upon recommendations made by a “Task Force on Life and the Law” which recommended legislation declaring surrogacy contracts void and ban fees for surrogates and brokers for surrogates, it also concluded that existing laws on adoption and artificial insemination permit surrogate parenting when the arrangement is not commercial and remains undisputed, and the legislation it proposed would not prohibit the arrangements under these circumstances. Nor
would it override existing statutes permitting the payment of reasonable expenses to women arising from pregnancy when such expenses are paid in connection with an adoption and are subject to court approval. Does this open the door for gay men to create their families through surrogacy if the carrier has purely altruistic motives, such as a sibling or friend offering to be a gestational surrogate?

6. Recent Update: On April 16, 2013, a bill entitled the “Child-Parent Security Act” was introduced in the New York State Senate. The Act would amend New York State law to allow Surrogacy and also broaden the definition of family by redefining the manner in which a parent-child relationship can be demonstrated (See below regarding de facto parents). The text of the bill can be found here: http://assembly.state.ny.us/leg/?default_fld=&bn=S04617&term=2013&Summary=Y&Text=Y.

E. “Artificial” Insemination by Donor (AID):

Often used by female same-sex couples before a second parent adoption.

1. Two choices for clients:

   a. Anonymous donor through a sperm bank The contract between the sperm bank and the person purchasing sperm severs all rights and responsibilities of the donor. Enforceable in court—see below.

   b. Known Sperm Donor A lesbian couple or single woman seeking to become pregnant may find a close friend or relative of the non-biological mom to donate sperm. In this case, a Sperm Donor Agreement is necessary to clarify the intentions, rights, and responsibilities of all parties.

2. New York Domestic Relations Law § 73: “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, natural child of the husband and his wife for all purposes. Written consent shall be executed and acknowledged by both husband and wife and the physician who performs the technique shall certify that he had rendered the service.”

3. Case law on applicability to LGBTQ families.
a. The statute implicitly extinguishes the parental rights of the sperm bank donor. In the Matter of Adoption of Michael, 1996, 166 Misc. 2d 973, 636 N.Y.S. 2d 608, court held a sperm donor whose sperm is used to impregnate an unmarried woman is not entitled to notice of the step-parent adoption proceeding brought by a man who married the woman after the birth of the child.

b. McKinney's commentary states in cases where the sperm donor is anonymous (with mother not knowing the identity of donor and donor not knowing the identity of woman inseminated with his sperm) the assertion of paternity rights and responsibilities would be remote. If donor is known, the issue is more viable.

4. Case law relating to disputes between sperm donor and recipient(s) arising out of artificial insemination ("A.I"), also known as alternative fertilization:


   i. Facts – Sperm donor (Petitioner, or "P") sought an order of filiation and an order of visitation for an 11-year old child born as a result of A.I. with P. There was no written agreement between the parties but verbal agreements that P would make himself known to the child if the child asked about her biological origin. The child had no contact with P until she was 5 when she met him. Between the time child was 5 and 11 P visited with child several times a year, all contacts at complete discretion of child's parents. At some point P sought to see child without mothers, mothers refused, P brought action. After evaluations with psychiatrist, psychiatrist recommended that there be no declaration of paternity and no court ordered visitation. Respondent argued P should be equitably estopped from a declaration of paternity.

   ii. Family Court held: no legislation that resolves the dispute - equitable estoppel would be utilized - and has been utilized by the courts to decide paternity proceedings for families
whose reality is more complex than a one mother, one father biological model.

iii. On Appeal: Supreme Court, Appellate Division reversed with strong dissent. Ruling: The rights of the biological parent should not be terminated - Family Court deprived P of procedural due process. Dissent - biological fatherhood does not create an absolute right to an order of filiation.


i. Facts: Two gay men and two lesbians decide to have a baby. Lesbians agree to be inseminated twice by one of the gay men, and agree that the gay couple will have a role in the child's life, and executed a visitation agreement.

ii. Procedure: Father petitioned for increased visitation when lesbian couple broke up (no issue about mother's physical custody.

iii. Held: Father can have increased visitation.

iv. Rationale: Father is not a mere sperm donor. He is known to the children as their father and has had contacts with them their whole lives. No waiver or estoppel of rights of a parent. Plus court appointed officials believe increased visitation in the childrens' best interests.


i. Facts: Married father and physician donated sperm to a lesbian (resident of the same hospital) who gave donor assurances that he would have no rights, benefits, or responsibilities to the child. Lesbian mother was inseminated by her lesbian partner, also a physician. Father allowed his name to be put on the child's birth certificate. Father said he had spoken to the child
on the phone seven or eight times and seen the child once for a few hours, had sent presents, signed cards "Daddy."

ii. Procedure: Mother brought action for child support. Father requested genetic testing in a bizarre attempt to deny paternity. Law guardian for child moved to estop father from denying paternity. Mother urged court in a letter to order genetic testing.

iii. Held: Paternity test is NOT ordered and father estopped from denying paternity

iv. Rationale: Test not ordered when equitable considerations estop father from denying paternity. Movant has burden of showing father should be estopped. Movant has shown that child has only known respondent as father and father has sent child money, gifts, and cards signed "Daddy." Here, burden shifts to father to prove why he should not be estopped.

v. "Here, the respondent concedes that he has sent cards, money and gifts over the last fifteen years and that he allowed his name to be listed on the child's birth certificate as the father because he felt it was in the child's best interests that he would have an identity.' Further, the respondent has held himself out as the child's father. Allowing the respondent to deny paternity after eighteen years where the child has believed the respondent to be his father would have a traumatic effect upon the child and would be contrary to his best interests."


i. Not all men are permitted to seek declarations of their paternity. Men who anonymously donate sperm and sign waivers of parental rights are both protected from claims of support and barred from establishing legal paternity (see Matter of the Adoption of Michael, 166 Misc.2d 973, 636 N.Y.S.2d 608 [Sur. Court, Bronx County 1996] ), DRL 73 (when mother is married). Likewise, reading that statute in a gender neutral fashion, an anonymous egg donor signing a waiver would be similarly barred. It is only the egg donor who has a relationship with the gestational mother, who intends
both to create and raise the child (as evidenced by the side agreement here), and who signs a waiver only because there is no other way to accomplish the in vitro fertilization who can assert parental rights (K.M. v. E.G., 37 Cal.4th 130, 33 Cal.Rptr.3d 61, 117 P.3d 673 [2005], supra). Such an egg donor/genetic mother would be read into our statutory paternity proceedings in the same way as a non-anonymous sperm donor who signed no waiver and who established a relationship with the child (see Thomas S. v. Robin Y., 209 A.D.2d 298, 618 N.Y.S.2d 356 [1st Dept. 1994]).

5. **Donor Agreements are generally not enforceable in NYS courts:**

Donor agreements are generally **unenforceable** in New York court if one party to the agreement later challenges it. Courts generally look at the best interests of the child when deciding whether to assign parental rights and obligations to the donor. They will be more likely to uphold the agreement if a licensed physician was used in the insemination process, and the physician provides a certification of this. Caselaw shows courts protecting the child from donors who claim they are mere sperm donors and yet have held themselves out as fathers. The biological parents may duke it out in court on the basis of whatever agreement they had before the child was born, but the court is not concerned primarily with interpreting the parents’ contract. The court is concerned with the rights of the child---what the child wants, the child’s experience with both parents, etc. Whenever a child knows the sperm donor as his or her biological father, some parental responsibility or rights may attach.

6. **Donor agreements ARE enforceable in NYS, and courts will NOT recognize a donor as a parent IF:**

   a. Query: Would a court enforce a donor agreement [where parties agreed to minimal contact or visitation and/or support] if donor’s rights are terminated as part of a second parent adoption.

   b. The insemination process is between a donor and a married couple. In this case the married couple is most often assumed to be the legal parents of the child despite the insemination, even in same-sex marriages. OR

   c. The partner of the woman being inseminated adopts the child in a second parent adoption. In this case the legal rights of the donor are severed.
7. Counseling clients on Sperm Donor Agreements

a. Regardless of whether you represent the donor or the recipient, best to assume any written agreement will not be enforceable under current New York law.

b. However best practice is to encourage clients to enter into a written agreement setting forth issues such as:

i. Donor's rights (custody, visitation, decision-making) and responsibilities (financial support), if any. Often, agreement will state intent that donor is not a legal parent and will have neither of these rights and responsibilities.

ii. Whether the donor will have any relationship with the child at all, and clearly state what intention each party has.

iii. (Mediation between all parties helps clarify intentions and make sure everyone is in alignment. If the donor will have a relationship, an attorney-mediator may want to discuss specifically how often the donor may visit, what the donor and perhaps his parents will be called by the child, and when and how this process will be explained to the child.)

iv. The method of insemination, whether it will be performed by a fertility clinic.

v. Payment for sperm, if any.

vi. Agreement to participate in medical testing reasonably related to conception, fertility, HIV, STD and genetic or other defects - who pays.

vii. Authority to name child.

viii. Acknowledgment of paternity.

ix. Donor and recipient (and partners?) having unprotected sex during pendency of inseminations.

x. Revealing of donor's identity to the child and others.
xi. Who has authority to appoint guardian and who will be the guardian.

xii. Decision-making authority related to religion of child, education of child, circumcision of child.

xiii. Dispute resolution, counseling, mediation, arbitration or collaborative practice.

8. Potential (but unlikely) court challenges to donor agreements.

a. Donor may seek visitation or custody later, in violation of the intention of the agreement.

b. The mother(s) may seek child support from the donor, in violation of the intention of the agreement.

9. High degree of trust is essential:

a. Given the tenuous legal enforceability of donor agreements, it is essential that donors and moms have a high degree of trust and negotiate details in advance to clarify intentions.

b. Although these agreements are technically unenforceable, they are rarely challenged and many stable families result.

10. Representing the sperm donor:

a. Often, the issue for the donor is that he wants to maintain some degree of parental rights or perhaps to be promised that he will be the child’s guardian in the event of the death of the biological mother and her partner. What is the role of the attorney here — attorney or mediator?

b. Practice tips! Explore with client whether he (or his partner) are hoping for children of his own, or whether parents are pressuring donor for grandkids. These motivations are not ideal and could lead to disappointment, heartache, or problems in maintaining boundaries with moms. Also the donor must be transparent with his own partner. If married, his spouse should be a party to the agreement.
F. Egg Donors:

Typically, one lesbian partner will donate her egg to her partner. The facility handling the procedure will often require the donor to execute an agreement stating that she relinquishes all of her rights to her genetic material and to any child born as result. This is of course typically the opposite result from what is intended.

1. Who is the “mother” – in New York? The birth certificate will name ONLY the so called birth mother or gestational carrier. The couple must still adopt to create legal rights for both parents. Unless they are married…..but be careful, if the parental rights are created only by marriage, there is no protection in most states if the couple should separate outside of New York.

II Second Parent Adoptions:

A. Overview: Allows a second party to adopt a child without terminating the legal rights of the child’s “first” parent – the biological parent or parent who adopted the child first. As the term implies, it is only an option for adding a second parent, and is not available for a child who already has two legal parents.

1. Eligibility: In New York, second-parent adoption is available regardless of sex, gender, or marital status. This makes second-parent adoption an attractive option for same-sex couples seeking to form a family. Lesbian couples will often have one biological mother and one adoptive mother through second parent adoption. A gay man who has previously adopted a child could later consent to a partner adopting the child as a “second-parent.”

2. Risks to lesbian couples who don’t get second parent adoption: Many non-biological moms in lesbian couples have lost all legal connection to their child. Most famously, Alison D. v Virginia M, 77 NY2d 651 (1991), a lesbian couple with an intent to parent split up, and the non-birth mom had no standing to seek visitation and was ruled a legal stranger to the child, despite a mutual plan to have kids, joint physical care for the child and joint decision-making during the relationship and after the breakup. This is prevailing law! Without an adoption or a marriage, a non-biological mom has no legal rights to visit a child after a breakup.

B. Adoption Generally:
1. Adoption is the creation of a parent-child relationship, with all the rights and responsibilities thereof, through a judicial proceeding. Adoptive parent takes the child as his/her own, and acquires all the rights and responsibilities as if the child was biologically born unto him/her.

2. Adoption is a creature of statute (DRL Article 7) and strict adherence to the statutory provisions are required.

3. "Although there is no Supreme Court decision on point, federal courts that have considered the issue have held that a judicial order of adoption in one state must be afforded full faith and credit in every other state, and that there can be no ‘public policy’ exception to that mandatory recognition . . . This is also the view of most commentators”. In re Adoption of Sebastian, supra, 25 Misc. 3d at 584 (citations omitted).

   a. But see Adar v. Smith, 639 F. 3d 146 (5th Cir 2011), petition for certiorari recently denied, upholding Louisiana state registrar's refusal to recognize NY adoption decree by refusing to issue accurate birth certificate listing two fathers.

4. Different types of adoptions:

   a. Agency: The matching of the adoptive parent(s) to the biological parents(s) of a child for the purpose of adoption is made through a New York State licensed agency. The placement of the child for the purpose of adoption is made through the agency. See DRL section 112. Child is placed with agency after voluntary surrender or court ordered termination of parental rights by biological parents. (SSL 383, 384, 384-b)

   b. Private: Any adoption other than an agency placement is a private (independent) adoption. See DRL section 115. Parent or legal guardian may place out child for adoption. Except as noted, biological parents rights and obligations are terminated. May include:

      i. Step-parent: one spouse adopts the child/children of the other.

         a. Spouse of adopting step parent retains parental rights.

      ii. Unmarried couple/Second Parent: one partner adopts the
child/children of the other partner in a domestic relationship.

a. Partner/First Parent retains parental rights.

b. Child may be born or adopted by the first parent prior to the relationship, or a child born/adopted during the relationship.

c. International: adoption of child born and living in a foreign country.

5. Who may adopt: New York law DRL §110 provides:

a. Any adult unmarried person or an adult husband and his adult wife may adopt another person.

b. An unmarried adult.

c. Applications for adoption may not be denied on basis of sexual orientation. See e.g. 18 NYCRR 421.16(h); In re Adoption of Anonymous, 209 AD 2d 960 (Fourth Dept 1994).

d. Second Parent Adoption: unmarried partner of a child’s parent, gay or straight, can become the child’s second parent by means of adoption, without terminating rights of first parent/partner. Mtr. Of Jacob and Dana, 86NY2d 651 (1995).

e. Two unmarried adults living together may jointly adopt a child who is not the biological child of either of them. See e.g. In re Adoption of Emilio R, 293 AD2d 27 (1st Dept 2002); Adoption of Carolyn B., 774 NYS2d 227 (Fourth Dept 2004) (including joint adoption by unmarried same sex couples).

f. A married couple together.

i. One spouse cannot adopt a child without the other spouse's knowledge or over the other's objection.

g. An adult married person who is legally separated or has been living separate from spouse for a period of at least three years.

i. Consent of non-adopting spouse is not needed.
ii. Non-adopting Spouse is not deemed parent of child for any purpose.

h. Note: A recent codification of Matter of Jacob (L 2010, Chapter 509) to add “any two unmarried adult intimate partners together” to the list of persons who may adopt.

i. Query whether a non-intact family may complete an adoption, or two close but unmarried and unpartnered individuals, eg. a gay man and his straight female friend.

ii. Anecdotally, family court judges and surrogates have been unwilling to construe the term “intimate partners” broadly enough to include these types of families. Do we push for a broader definition of “intimate partner”? Intimacy is defined as “a close acquaintance or association, or a familiarity relating to or indicative of one’s deepest nature” Does this statutory amendment mean that three parent adoptions are not possible? Could the intimacy one experiences in raising a child be enough to satisfy this requirement, if the parents are not intimate partners?

i. Step parent: Spouses together may adopt a child born to either of them or either spouse may adopt child of other.

Although adoption severs the legal ties with biological family, in step parent and second parent adoption, biological/first adoptive parent retains parental rights and duties. DRL 117 [1] (d); Matter of Jacob, supra.

i. Moreover, intestate rights of child to inheritance and succession from both birth parents does not terminate upon the adoption. DRL 117 [1](e). See e.g., In re Davis, 27 AD3d 124 (2nd Dept 2006).

j. A foster parent who had cared for a child continuously for a period of 12 months or more may apply to the authorized agency for adoption. Will have preference and entitled to first consideration. SSL 383.

6. Whose Consent is Required? See generally DRL 111, which applies to all adoptions.
a. The adoptive child if over 14.

b. Parents or surviving parent of a child conceived/born of wedlock.

c. Mother of a child born out of wedlock.

d. Father of a child born out of wedlock where certain legal criteria have been met regarding his relationship to the child and/or the biological mother.

i. If child over 6 months old, consent required if father maintained substantial and continuous or repeated contact with the child by payment of support AND visiting monthly when physically/financially able to do so and not prevent from doing so by custodian OR regular communication with child or custodian if physically/financially unable to visit.

e. Father who lived with child for 6 months within 1 year of placement shall be deemed to have maintained substantial and continuous contact.

i. If child is under six months of age, consent required only if Father lived openly with child or mother for 6 months immediately preceding placement [held unconstitutional in Raquel Marie X., 76 NY2d 387 (1990)], openly held himself out as the father during 6 months preceding placement and paid a fair and reasonable sum for medical, hospital, nursing expenses for pregnancy, birth.

f. Person or authorized agency having lawful custody of child.

g. Parent’s consent not required where:

i. Parent abandoned child by failing to visit or communicate for a period of 6 months although able to do so;

ii. Parent surrendered rights pursuant to SSL 383-c or 384;

iii. Parent is mentally ill or mentally retarded to extent that the parent is presently and foreseeable future unable to care for
child;

iv. Parent executed irrevocable denial of paternity instrument after conception and acknowledged (as a deed would be);

v. Adoptive child over 18 if judge determines adoption in child's best interest and consent cannot be obtained.

7. Notice of Adoption:

a. Must be given to one whose consent is required but who has not provided consent (Domestic Relations Law § 111 sub 3. Note: Purpose is to allow appearance to contest allegations. These individuals are referred to as “notice fathers”, under DRL 110a.

b. DRL 111-a notice is to allow the person to give testimony regarding best interests only:

i. Any person adjudicated to be the father by a court of another state or territory of U.S. if the order is filed with the putative father registry;

ii. Any person who filed an un-revoked notice of intent to claim paternity;

iii. Any person recorded as “father” on birth certificate;

a. NOTE: Arguably should include mother of same-sex partner.

iv. Any person openly living with mother who is holding himself out to be the father;

v. Any person named by mother as the father in a written sworn statement (Example: DSS case, out-of-wedlock affidavit);

vi. Anyone married to the mother within 6 months after birth of child;

vii. Anyone who filed with putative father registry.
8. LGBTQ and Practice Considerations for Adoption:

a. Why adopt: Child will have entitlements to social security benefits from both parents; right to sue for wrongful death of either parent; right to inherit under rules of intestacy; eligibility for health insurance coverage under either parent’s policy.

b. Parent will have: Legal entitlement to making medical decisions for the child; input into child’s education; and perhaps of greatest importance is that legal parent can no longer pull rank (e.g. Alison D v. Virginia M, 155 A.D 2d 11, 552 N.Y.S. 2d 321 (1990); and prevent continuing relationship between partner and child in the event of break up.

c. Who are the adopting parents – special considerations for LGBTQ families- not every family is created the same way:

i. Married same sex couples – investigate how the court will treat the marriage and what new requirements may exist;

ii. Intact vs. not intact couples – law is well established for intact families, can a couple who planned for and conceived, or where one of them adopted a child, while the couple was together but who then separate still complete a second parent adoption? It depends....

iii. Parenting partners – not a couple - and what if they are not a couple, but are parenting together? It depends....

iv. Transgender parents – how does the court handle this without making any declaration as to the legal gender of the adoptive parent and how should you prepare your clients? What do you say, if anything, to the social worker?

9. Adoption of Adult - An adult may adopt another adult or an adult couple may adopt an adult provided that the nature of the relationship is that of parent/child. Very close scrutiny of these adoptions. See Matter of Robert Paul P 63 N.Y. 2d 233 – 1984 Court of Appeals case holding that adoption is not a means of obtaining legal status of nonmarital sexual relationship – adoption will be denied where adoption was found to be an attempted substitute for marriage. There must be parent-child relationship. However, if
you are able to demonstrate that the nature of the relationship is that of parent and child, even where all parties are adults, you may proceed. Know the facts—know your clients. You are an officer of the Court and may not participate in a fraud.

10. **Is adoption necessary to establish parentage when child born during marriage?**

   a. It shouldn’t be. In *Re Donna S*, 23 Misc3d 338 (Fam Ct., Monroe Co, 2009) same sex married spouse of biological mother not required to pre-certify as qualified adoptive parent of biological mother’s child for purpose of adopting. Based on marriage recognition, adoption may not be necessary of child born during marriage. “Simple execution of a consent should be sufficient to establish legal parent

   b. In re Adoption of Sebastian, 25 Misc3d 567 (Sur Ct., NY Co, 2009). Two women married in Netherlands and M1 was birth mom and M2 was genetic mom. In granting second parent adoption to Petitioner of child, Court noted that adoption should not be necessary for child born to marriage, but because M2 might have difficulty establishing standing in custody case if relationship terminates, court concluded in best interest of child to grant adoption

   c. Debra H. V. Janice R, supra., 14 NY3d 576 (2010) but adoption is necessary for portability! Appellate Division affirmed dismissal of motion to set aside second parent adoption on grounds that Respondent fraudulently concealed her prior use of an alias in the adoption papers; motion made during course of contested custody case between former same-sex partners.

   d. Turner v. Hembrooke, 12 AD3d 966 (Third Dept 2004). Case underscores that adoption orders can not be lightly set aside in custody disputes.

   e. C.M. v. C.H., 6 Misc. 3d 361 (Sup Ct. NY Co, 2004) where unmarried same sex couple had two children, born to Respondent, and Petitioner had adopted the first child, and the parties planned for Respondent to adopt the second child but did not do so before separating, court held petitioner only had standing to seek custody and/or visitation with respect to first child.
f. KB v JR, supra 887 NYS2d 516, custody dispute involving child born using ADI during marriage that was subsequently declared void.

g. For all the reasons already stated in In re Adoption of Sebastian
DOMA and super DOMA states require adoption so that parental
rights are portable, should your clients move to non-recognition state
or travel to or through a non-recognition state.

C. Beyond Two Parents: Are we Ready to Recognize More?

1. Less than full parent status models:
   Open – adoption Laws for Three Parent Families.
   There is a growing movement in the adoption area to allow for open
   adoption laws between the adoptive parents and the biological parents.
The biological parents terminate their legal rights and obligations, but
some states have enacted laws to provide for protection of contractual
visitation arrangements agreed upon by the parties. Penalties for non –
compliance can range from fines to court-ordered visitation. Similarly,
the laws can also protect the adoptive parents from having their baby
later re-claimed by a biological parent.

2. Adoptions Resulting in Three Parents
   New York State Domestic Relations Law does not specifically prevent
or prohibit an adoption that would result in a child having three parents.
Consider these arrangements, recent examples of three or more parent
households from my practice:
   (a) Married same sex male couple living with their female friend
who is the gestational mother of twins, created using genetic material from
one of the men, and a known egg donor. The three consider themselves
equal parents, Decision making, to the extent possible or practicable, is
made by all three. The mother has the children 50% of the time, and the
men, 50% of the time. Support arrangements for the children are shared in
proportion to each of their incomes. The non-biological male parent feels
most vulnerable, and all wish to complete a three parent adoption.
   (b) Unmarried same sex female couple raising their two children,
both of whom are the biological children of one of the women, and the
same father. The father lives in Europe but participates in parenting
through skype and frequent visits both here and abroad. He does not wish
nor do the women desire that he terminate his rights, but the non
biological female partner is the primary parent, and has no rights at all,
and feels vulnerable and at risk. All wish to complete a 3 parent adoption.

(c) Unmarried same sex partners, one of whom is the biological mother of two children along with known donor, who always wanted more rights than the women wanted to give. For many years the donor (and his partner) have shared in parenting the children, but he refused to consent to a second parent adoption as he feared his visitation rights, as reflected in their agreements, would not be honored. Recently, the women and their children moved out of the city three hours away. This has created much stress on the donor/father and his partner. The donor/father does not support his children, but feels entitled to more visitation than he is receiving. The women do not wish to demand child support as they would have to “admit” the donor is a parent. Meanwhile, the women are struggling with finances, a major factor in leaving the City. The donor has now threatened to sue for visitation rights in Massachusetts. If a three parent adoption was possible perhaps the parties would be able to arrange a more realistic visitation schedule and support arrangement which would be in the children’s best interests.

III. How Marriage Protects Children

A. Presumption of Legitimacy of a child born during a marriage

1. “The [common law rebuttable] presumption that a child born to a marriage is the legitimate child of both parents ‘is one of the strongest and most persuasive known to the law’.” Laura WW v Peter WW, 51 AD3d 211, 216 (Third Dept 2008), citations omitted. Here, the Husband was deemed legal parent of child born to wife by anonymous donor insemination (ADI), where written consent requirements of DRL 73 (see below) were not met. Court imposed rebuttable presumption of consent to ADI, thereby creating common law presumption of legitimacy for children conceived through ADI, and shifting burden to husband to demonstrate lack of consent by clear and convincing evidence.

2. See also In re Adoption of Sebastian, supra., 25 Misc. 3d 567, finding that child of a lesbian married couple has recognized and protected child/parent relationship with both mothers (gestational and genetic).

4. See also, State ex rel H v. P, 90 AD2d 434 (1st Dept 1982) in which the Court held that the wife was estopped from contesting husband’s parentage of child born during marriage based on presumption of legitimacy. Husband’s sterility did not disturb presumption where Wife had attempted to get pregnant though ADI, with husband’s consent, but Wife now claimed that she conceived as a result of an affair with an unnamed man.

B. Presumption of Who is a Parent?

There is a statutory presumption that a child born before or during a marriage is the child of both spouses. DRL 24, and FCA 417.

1. It is an evidentiary rebuttable presumption, which may be rebutted by clear and convincing evidence, such as a paternity test. Thus, statute is not helpful where parenthood is contested.
   
   a. See e.g. Crane v. Crane, 81 AD2d 1033 (4th Dept 1981), lv to appeal den, 54 NY2d 609.

2. However, the doctrine of equitable estoppel may be applied to preclude paternity testing if determined to be in the best interest of the child born to a married woman.

3. The court, on its own motion or motion of any party, when paternity is contested, shall order the mother, the child and the alleged father to submit to one or more genetic marker or DNA marker tests of a type generally acknowledged as reliable by an accreditation body designated by the secretary of the federal department of health and human services and performed by a laboratory approved by such an accreditation body and by the commissioner of health or by a duly qualified physician to aid in the determination of whether the alleged father is or is not the father of the child. No such test shall be ordered, however, upon a written finding by the court that it is not in the best interests of the child on the basis of res judicata, equitable estoppel or the presumption of legitimacy of a child born to a married woman. FCA 418, emphasis added.

4. FCA 418 applies to support proceedings. FCA 532, and 516-a, applying to paternity proceedings, contain identical language. There is no similar statutory provision pertaining to custody proceedings.

C. Minimal Statutory Awareness of A.R.T.

“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 [sic], shall be deemed the legitimate, birth child of the husband [sic] and his [sic] wife for all purposes” DRL 73 [1]

1. See Laura WW, supra., 51 AD3d 217, creating common law presumption that spouse consented to ADI occurring during intact marriage

2. See also, Beth R. V. Donna M., 19 Misc.3d 724 (Sup Ct., NY County, 2008) in which court implies that child born via ADI during same sex marriage “may require finding that she is the legitimate child of both parents”. (In this divorce action, where parties were married in Canada, court prevented by estoppel the birth mother from denying that her former spouse was a parent, ruling that policy concerns for the welfare of the child demanded that married parents be unable to reject their own parental status and its accompanying responsibilities. This argument was rejected in Debra H, supra. , affirming Alison D, supra.)

3. There must be a marriage for presumption to apply.
   a. See e.g., KB v. JR, 887 NYS2d 516 (Sup Ct., Kings Co 10/14/09). In this Integrated Domestic Violence Court case, Petitioner, a female to male transgendered person, married Respondent female in 1998 after undergoing gender reconciliation steps. Child was born during the marriage after both parties consented to Artificial insemination. Respondent left Petitioner, alleging he was physically abusive to her, leaving the then approx. 6 yo child with him. Petitioner filed for custody, Respondent cross-petitioned for custody and filed a family offense proceeding. Child remained with Petitioner throughout duration of proceedings, and upon evidence of Respondent’s unfitness. Respondent filed a matrimonial proceeding during the pendency of the family court proceedings, which resulted in a declaratory judgment issued on consent adjudging the marriage to be void. (One might question why Petitioner consented to this during pendency of custody proceeding) Then, Respondent alleged amongst other things that since marriage was void because Petitioner was “really a woman”, Petitioner had no standing in custody proceeding. Court held that, based on totality of circumstances, Petitioner sustained his burden of proof of extraordinary circumstances to proceed with hearing on best interests of child. Court also held that Respondent is equitably estopped from challenging his standing to seek custody. Court considered that Petitioner was legal parent at time of child’s birth as factor in totality of circumstances.
D. 2010 Development in the Law Places Children in two Camps

Recognition of parentage created by civil union law of sister state is required by principles of comity. (Alison D with a Marriage Twist!) Debra H. V. Janice R, 14 NY3d 576 (2010), cert den 131 S. Ct 908 (2011). Court held that NY is required to recognize the parentage of a child created by the Vermont Civil Union Law. Under Vermont statute, a child born to one partner of a civil union is considered the child of both spouses. Therefore, the non-birth mom had legal parenting rights. Vt Stat Ann tit 15, section 1204 (a) and (f). In Miller Jenkins v Miller Jenkins, 180 VT 441 (2006), a hotly litigated and highly publicized interstate lesbian custody dispute, Vermont’s highest court applied statute to child born by artificial insemination to party to civil union. In Debra H, child was born through ADI one month after couple entered civil union. The concurrence of Judge Graffeo notes that it is permissible to “predicate[] parentage on objective evidence of a formal legal relationship” between the parents/parties. Id at 606.

1. See also Dickerson v. Thompson, 88 AD3d 121, (3rd Dept 2011), noting that partner to intact civil union may have legal rights to children born to her partner, even after separation

2. And see, Wesley v. Smith-Lasofsky 105819/10, NYLJ 1202508854947 (Sup Ct, NY County, 7/18/11, Drager, JSC), Where Plaintiff adopted his niece after parties to civil union separated, defendant CU partner did not establish parental relationship with girl, and neither party sought to impose parental rights or obligations upon Defendant, court held that no such rights or obligations would be imposed

IV. How Marriage Equality Fails to Protect some of our Children

A. The Re-emergence of Illegitimacy

The Re-emergence of Illegitimacy - Alison D is still the law in NY Absent a Marriage. When the Court of Appeals chose to reassert Alison D rather than expand the concept of defacto parentage in the state of New York, a concept which is quite prevalent in most states which have adopted all or part of the Uniform Parentage Act, it separated our community’s children into two separate and distinct camps, that is, some of our children are worthy of protection based upon the marital or civil union status of their parents, or whether the parents were able to do a second parent adoption, and the rest of our children are illegitimate and not worthy of protection. As American University Washington College of Law’s Professor Nancy Polikoff blogged, soon after the Court of Appeal’s decision was handed down, “Beginning in 1968, the US Supreme court held in a series of cases that marriage of a child’s parents could not be a factor determining which children were eligible for, among other things, wrongful death recovery, worker’s compensation death benefits, and financial support and care by both parents. Today, however, that principle is under attack, in New York and in
Massachusetts...No court has yet extended to the children of same-sex couples the well-established principle that the law should not discriminate against children born outside marriage." (beyondstraightandgaymarriage.blogspot.com)

1. The passage of Marriage Equality in New York State does nothing to correct this issue, and in fact, requires LGBT New Yorkers to marry in order to protect their children. And what about all the children who were conceived or adopted before August of 2011? If their parents could not afford an adoption or if their parents did not have the foresight to travel outside of New York to marry, the stigma of illegitimacy will follow these children forever.

B. The Supreme court decisions declaring the federal DOMA statute unconstitutional do not fix the portability issues between marriage states and non-marriage states, even for Married Clients.

1. Creation of parent child relationship based on same sex marriage may not afford sufficient protection of the relationship in states that don't recognize the marriage. See a detailed analysis of the “portability” issues of our marriages in Matter of Sebastian, (http://www.nyli.com/nylawyer/adgifs/decisions/041009glen.pdf) 25 Misc.3d 567, 879 N.Y.S.2d 677 (N.Y. Co. Sur. Ct. 2009), where only a court order of adoption granted to the non-biological co-parent could provide the protections of full faith and credit to the parentage of both parents in other states. Until our clients’ marriages are recognized in every state in the country (or at least the states your clients choose to travel to or through) it is important to advise them to adopt adopt adopt!!! Unless the rights and obligations of parenting flow directly from parent to child through an adoption, (instead of through marriage to your partner) the family unit might not be fully recognized in states that have mini-DOMAs or are otherwise disinclined to recognize same sex unions as a basis for co-parenthood.

2. With the Supreme Court DOMA decisions, recognition by the federal government of someone’s marriage based upon their “State of domicile” or their “State of Celebration” becomes critical. As of this writing the Obama administration has not published guidelines with respect to whether federal programs affecting families, will utilize one set of criteria or the other, or will vary the criteria from agency to agency. Here is a good example of how this issue impacts our families, even before the DOMA historic decisions is this 2007 opinion from the SSA: DOMA did not (and still does not) preclude a
non-biological child of a member of a Vermont CU from qualifying for Child Insurance Benefits under the Social Security Act. (Memorandum opinion for the acting general counsel of the Social Security Administration, dated 10/16/2007). “Although DOMA limits the definition of “marriage” and spouse” for purposes of federal law, the SSA does not condition eligibility for CIB on the existence of a marriage or on the federal rights of a spouse, but in the State’s recognition of a parent-child relationship, and specifically, the right to inherit as a child under state law. Just imagine how the state of celebration analysis will impact our families as they travel to or move to non-recognition states (as of this writing, 37 states)

C. Is “Marriage Equality” the end of the road in New York State for Equality for all Families?

1. There are a growing number of LGBTQ families who are creating families in even more unconventional ways, such as three parent and four parent households, single straight women and gay men parenting together, two lesbians and their straight male friend/donor parenting together, etc. Will there be a way for these children’s rights to be protected, if the model remains a two parent/married model? As usual the laws are a decade behind in the family creation area. Will the laws be able to protect the rights of these children? How will the marital presumption harm known donors who wish to parent? Will known donors be required to assert rights of paternity prior to birth, or will biology trump marriage for our families? Should the burden of proof be different for our community? How fair is it that a biological sperm donor can assert rights through biology but a non-biological co-parent has no standing, absent an adoption? How will our community become educated about these issues?

V. Parental Rights and Obligations

A. Rights of Parents:

Parents have a due process right to make decisions concerning the care, custody and control of their children. Troxel v. Granville, 530 US 57 (2000). This fundamental right includes directing the child’s upbringing, raising the child as she/he deems appropriate, making medical, legal and educational decisions for the child, deciding where the child resides, determining with whom the child associates, and managing the services and wages of the child, all without interference from the
state and/or third parties. These rights include, but are not limited to:

1. Right to consent to adoption, or at least a right to notice thereof. DRL 110. See section V below
2. Standing to seek custody or visitation pursuant to DRL section 70.

   a. If an individual has no legal relationship to the child, that individual is a legal stranger and must show extraordinary circumstances to have standing to seek custody/visitation before the court will even reach the analysis of what is in the child’s best interests. Bennet v. Jeffreys, 40 NY2d 543 (1976); Mtr of Ronald FF v. Cindy GG, 70 NY2d 141 (1987). Extraordinary circumstances include parental abandonment, persistent neglect, unfitness, extended disruption of custody and other equivalent circumstances. See also, Alison D. V Virginia M, 77 NY2d 651 (1991); Debra H v. Janice R, 14 NY3d 576 (2010).

   b. Note: while NY does not recognize the doctrine of de facto or psychological parenthood, statutes in other states a course conduct rather than rely on biology or adoptive relationships to assess the relationship between the parties and their children. Standing to seek custody/visitation is not as limited in these states. See discussion in Debra H, including concurring opinions.

   c. Note: Should the LGBTQ community be promoting the passage of some form of Uniform Parentage Act in order to protect the growing number of families that are not based upon a two parent model? Should we be pursuing a more broadly defined doctrine which recognizes the rights and obligations of known sperm donors, three parent and four parent households, step parents and other blended families. (See recent legislative bill on ART which includes a de facto parent definition, page 8 supra.)

3. Right to Presumptive custody in the event of death of other parent.

4. Rights of child to inherit from parent under rules of intestacy.

5. Right to the services and wages of their children.

6. Rights of child to Dependent Benefits, such as social security, worker’s
compensation and life insurance in the event of death or disability, and parent’s employer provided health insurance coverage; and

7. Mutual right to sue for wrongful death.

B. Obligations Associated with Parenthood.

1. Duty to support child financially.
   a. FCA 413 (child support standards act) sets forth a parent’s duty to support child under the age of 21, pursuant to statutory formula set forth therein, including employer provided health insurance benefits if available, or cash contribution if the child is eligible for medical assistance or the state’s child health insurance plan. See also DRL 240 [1b] applicable to matrimonial actions and custody proceedings.
   b. This duty may be imposed based on doctrine of equitable estoppel, even if parental rights have not been established, when the legal parent seeks child support and the situation warrants it. See FCA sections 418 (a) and 532 (a)
   c. HM v. ET 14 NY3d 521 (2010), holding that biological parent may seek child support from her former same sex partner in family court
   d. Mtr of Shondel J v. Mark D., 7 NY3d 320 (2006), where respondent held himself out as child’s biological father for first 4 ½ yrs of her life, and Petitioner mother sought child support after parties’ separation and respondent requested DNA testing, court held that father may be estopped from declining paternity and forced to pay child support when the child justifiably relied on man’s representation of paternity to the child’s detriment declined paternity requesting.

2. Duty to provide day to day care for and nurture child.
   a. State may not intervene unless conduct rises to the level of failure to exercise a
minimum degree of care that impairs child’s physical mental or emotional condition or places it in imminent danger of becoming impaired. See e.g. FCA Article 10.

i. e.g. Failure to obtain medical treatment though having financial and other means to do so,

ii. e.g. violation of compulsory education provisions of state education law article 65; and

iii. e.g. excessive corporeal punishment

b. May be held liable for own negligence in supervising child that results in injury to other.

C. Reconciling HM vs ET with Debora H.

What are we to make of the simultaneous decisions of HM vs. ET and Debra H? How do we reconcile as a community the notion that a parent may have no rights with respect to custody or visitation and yet is liable for the support of her child? If a biological parent refuses to consent to the adoption of her child by an unmarried co-partner, what recourse will the co-parent have?

D. New Development: Estrellita A. v. Jennifer D., 2013 NY Slip Op 23132 (April 2, 2013). Suffolk County family court judge, Teresa Whelan’s recent decision in Estrellita A. v Jennifer D. may just be the first case to begin chipping away at Alison D. Estrellita and Jennifer were registered as domestic partners in 2007. Thereafter, they decided to have a child, using an anonymous sperm donor. Jennifer became pregnant and a daughter, Hannah, was born in November 2008. The couple never completed a second-parent adoption and stopped residing together in September 2012. Jennifer then sued Estrellita in Suffolk County Family Court for child support asserting that she and Estrellita had a child in common.

The court conducted a hearing on the issues, and ruled in favor of Jennifer, the biological parent, ordering Estrellita to begin paying child support. Estrellita then filed a petition for custody of their daughter in the same court. Jennifer filed a motion to dismiss the court petition, claiming that, under the current cases in New York, Estrellita does not have the right to sue for custody as she is a legal “stranger” to the child, absent an adoption.

The court rejected this argument stating, in colloquial terms, that this is known as “having your cake and eating it too!” The court reasoned that Jennifer could not petition for child support from a person she described as “a person with whom I have a “child in
common”, be awarded child support, and then, when Estrellita sues for custody, make the claim that she has no standing to bring a custody or visitation proceeding as she is a “legal stranger” to the child.

Judge Whelan dismissed the motion and ordered that the parties appear before her as soon as possible to resolve the issues of custody and visitation. We shall see what happens next.

E. Rights and Obligations of Step Parents or Parents with No Standing

In general terms, step parents have no legal relationship to child and therefore do not possess parental rights or obligations, unless they adopt the child. For example, the step child cannot inherit from the step parent according to the rules for intestacy. If the step parent provides for the child in her will, she should do so in non-ambiguous language, and the inheritance tax rates apply.

a. e.g. step parents cannot consent to medical care for a child, unless explicitly authorized by the legal parent to do so in a written consent statement.

b. Step parent may not be able to cover child with her employer provided health insurance benefits unless the child is an income tax dependent of the married couple, depending on policy coverage.

c. NY does however impose certain obligation on step parents:

1. Upon separation from the child’s legal parent, step parent is obligated to support a step child who receives public assistance, limited to the amount of the public assistance grant for that child and subject to court’s discretion. FCA 415. See also Mtr of Rockland County Department of Social Services v. Alexander, 151 Misc2d 447 (Family Court, Rockland Co 1992).

2. Upon separation, the step parent may be equitably estopped from denying obligation to pay child support for step child.

3. In litigation between two legal parents, a step parent’s income may be considered to the extent he actually contributes to the child’s needs. Mtr of Dora TJ v. Jean-Paul AS, 224 AD2d 420 (2nd Dept 1996). The step -parent’s income may also be used to calculate monies available to a child for purposes of federal financial college aid assistance.
4. Step parent may also be determined to be a personal legally responsible for the child in a child protective proceeding, and subject to the jurisdiction of family court, liability and court ordered services. See FCA 1012 (g) defining the child's "custodian may include any person continually or at regular intervals found in the same household as the child when the conduct of such person causes or contributes to the abuse or neglect of the child.

VI Child Custody: Standards of Conduct: The GLAD Document

In 1999, a brochure was developed by Gay & Lesbian Advocates & Defenders (GLAD), in collaboration with a working group of lawyers, mediators, social workers and parents as well as Lambda, NCLR, Family Pride Coalition (now Family Equality) and the ACLU Lesbian and Gay Rights Project, setting forth Standards of Conduct same sex families should strive to follow. This brochure was recently updated and revised by various organizations and is once again being disseminated in the LGBTQ communities addressing the challenges our families face within the legal community. Families are created which are not recognized by the courts. Parents with legal rights “pull rank” on those with little or no rights when their families are breaking apart. I have attached it as an addendum to this outline and encourage its dissemination to all.

VII. Mediation and Collaboration - Why are Alternative Dispute Models Effective for LGBTQ Families?

A. Introduction.
For LGBTQ people, same-sex spouses and their children, alternative forms of dispute resolution such as Mediation and Collaborative Law may be the most advisable way to formalize family agreements regarding parenting, custody and support, and dissolve those families. Because these relationships and the ways in which the families are created may not reflect traditional norms, or follow statutory presumptions, Mediation or Collaboration is an effective framework in divorce or dissolution (for civilly unioned spouses), for prenuptial and postnuptial contracts, and for agreements regarding parenting arrangements.

B. LAW. This is not meant to be a comprehensive discussion of alternative dispute models. Attorneys must be thoroughly trained, and affiliate with like-minded attorneys, mental health professionals and financial advisors who have also been trained using these models. As part of that training, attorneys become knowledgeable about the ethical issues involved in drafting limited purpose retention agreements with their clients. Ethical issues of client confidentiality and privilege as well as the
zealous representation of clients is also discussed in great detail. Most practitioners continue their training by regularly attending workshops and participating in practice groups with other professionals.

C. What is Mediation. Mediation is a voluntary process in which the parties make decisions together based on their understanding of their own views, each other’s and the reality they face. Mediation occurs with one neutral mediator (generally either an attorney or trained social worker) working alone in meetings with the parties, and their role is to assist the parties in reaching an agreement. Mediators are not able, however, to meet privately with clients outside the mediation sessions to help them clarify and express concerns. In some divorce situations, the mediator will recommend that the parties also consult with a neutral child specialist to assist them in developing a parenting document which reflects their agreement with respect to the children of the marriage. The mediator drafts a document reflecting the parenting and financial agreements reached by the parties which they each review with their own counsel prior to signing. In some cases each of the parties seeks the advice of independent counsel before or during the process of mediation (which can occur over many sessions, depending on the complexities of the situation), but the parties agree to remain in the mediation process to reach decisions together.

D. Collaborative Law. Collaborative Law, a model which was created in the 1980’s by Stuart Webb, a Minnesota lawyer, as an alternative method of assisting divorcing couples to work as a team with trained professionals to resolve disputes respectfully, has expanded to apply the methods to commercial disputes, family business disputes, and probate disputes among families. It is an effective method to reach agreement in family creation arrangements which may not follow traditional family models, such as three parent arrangements, or parenting agreements between non-intact families.

1. What is Collaborative Law? Collaborative Law a way for a separating/divorcing couple to work as a team with trained professionals to resolve disputes respectfully, without going to court. While collaborative lawyers are always a part of Collaboration, some cp models provide child specialists, financial specialists and divorce coaches as part of the clients’ divorce team. Although Collaborative Practice comes in several models, it is distinguished from traditional litigation by its inviolable core elements. These elements are set out in a contractual commitment among the clients and their chosen collaborative professionals (generally called a “participation agreement”). The most important elements are as follows:

a. Agreement by the participants to negotiate a mutually acceptable settlement without using a court to decide any issues for the clients;
b. Agreement by the professionals to withdraw if either client goes to court;

c. Agreement by all participants to engage in open communication and information sharing; and

d. Agreement to create shared solutions that take into account the highest priorities of both clients.

2. The Collaborative Philosophy is built on a belief in human dignity and respect. Individuals may cease being partners, but they don’t cease being worthy human beings. Every part of the Collaborative Practice—from open communications to solutions-based negotiation to out-of-court settlement—is intended to foster respect. When respect is given and received, self esteem is likely to be preserved, making discussions more productive and an agreement more easily reached. This philosophy becomes even more critical when the parties involved may not have the full protection of the laws for their families. Use of the collaborative model may be the only way to preserve the self esteem of all involved, if the laws themselves exclude one of the parents from participating in the process altogether due to lack of legal standing.

a. Example: Sue and Joan have been together for 20 years and live in Ithaca, New York. Ten years ago they decided to start a family. They used anonymous sperm from a sperm bank and Sue gave birth to Henry. The couple was too busy raising Henry to complete a second parent adoption, and anyway, they were in love and knew they would stay together forever. Four years ago they were married in Massachusetts. A year later Joan gave birth to a girl, using the same anonymous sperm donor. Joan is now seeing Sara and wants a divorce. Joan wants joint custody of the two kids and is willing to support both kids. Sue comes to see you because her friends think the best strategy is for her to tell Joan she can’t see Henry anymore because Joan is a legal stranger to Henry. Her “Greek Chorus” of friends tells her she can then use Henry as “leverage” to get a bigger support settlement. After a lot of discussion about what makes the most sense for her and for her kids, Sue decides to proceed with the divorce using collaborative law. The child specialist works with the couple to develop an equitable parenting program for both children and second parent adoptions are completed by the women, one for each child, prior to the finalization of the divorce. Both attorneys help finalize the
financial and support aspects of the divorce.

3. Comparison of Mediation and Collaboration

a. One neutral mediator vs. two attorneys. In mediation there is one neutral mediator who works alone in meetings. In collaboration, each party has separate counsel, can meet separately with their counsel outside of the “four way meetings”, the term used to describe the meetings between the parties and the attorneys. (Five-way meetings occur if a neutral child specialist is included or a neutral financial specialist.

b. Independent Legal Advice outside of discussion vs. advice built into the discussion. In mediation, each party is free to seek the advice of an attorney, but the attorney does not participate in the settlement discussions. In collaborative law, the attorneys are present in the “four way” meetings and the two attorneys are guided by the participation agreement to assist the partners to reach a fully informed resolution.

c. Focus on Settlement vs. communication. In mediation, the parties and the mediator strive to reach a resolution in which both parties have their interests served. In collaboration, the focus is on teaching the parties how to communicate better during and after the divorce and will offer assistance in how to effectively participate in the four way negotiations so that real progress is made to reach settlement.

d. Costs. Generally the costs in mediation are less than in collaboration. The costs of collaboration can be extensive but are typically less than litigation. In a negotiated but uncontested (“settled”) matrimonial action, the costs may be less than collaboration, but collaborative professionals would wonder if agreements negotiated in a more adversarial manner would have lasting effect between the parties. Agreements reached using collaborative methods (where real and effective communication techniques are utilized and developed) could give the parties a framework for future disputes, thereby minimizing long term costs and a trip back to court.

e. Alternative Methods of Dispute Resolution are not Recommended in Every Situation. There are situations in which alternative dispute models may not (or cannot) work. This is true for LGBTQ families as well. Mediation and/or Collaboration may not be a good choice when:
i. One or both partners have a serious mental illness or drug or alcohol problem that is not under control;

ii. Domestic violence or other forms of coercion exists between the parties;

iii. Or both of the parties lack the ability to participate fully and freely in the discussions that will lead to resolution;

iv. One or both of the parties lack the capacity to make and keep commitments about behavior and follow-through.

v. One or both partners are prepared to lie in order to conceal information about finances.

4. WHY DO ALTERNATIVE DISPUTE MODELS MAKE SENSE FOR LGBTQ FAMILIES?

a. LGBTQ couples and families have been operating “under the radar” for decades, forming relationships, creating families, and dissolving those families and creating new ones. As Marriage Equality becomes a reality, some couples will choose to marry, and some will not. Some LGBTQ couples in long term relationships who now choose to marry have formed financial and emotional bonds in which they may or may not have intended to follow traditional concepts of marital or separate property. Forcing these “square peg” families into the “round holes of the law” may not be appropriate. In most cases, using mediation or collaborative methods to resolve disputes would give the practitioner an opportunity to encourage creativity in resolving conflict between parties in order to achieve a more equitable result for everyone.

b. LGBTQ couples have had to develop their own concepts of Marital and Separate Property. Even for couples who choose to marry, the lack of recognition of the marriage creates many problems in defining and categorizing assets and dividing employer benefits. Some couples have considered themselves “married” for years despite a lack of legal recognition. Others have shunned any formal notion of “commitment” or “marriage” despite living intertwined lives. Almost everyone is confused (including most attorneys and accountants) about what rights and obligations extend (or don’t extend) to LGBTQ couples, and
many couples have made financial choices based on laws in effect a decade ago without bothering to keep things current. Others have considered marriage a means of fighting for civil rights and did not make intentional choices to commingle assets or share in financial lives. Thinking “outside the box” to assist divorcing couples to equitably dissolve assets becomes critical. And utilizing mediation or collaboration to discuss and develop prenuptial agreements or postnuptial agreements would also be advisable.

Example: Dave and Homer were gay activists, and devoted all of their spare time to the Marriage Equality movement. They were married in Toronto years ago when gay people could marry. Later, when Marriage became an option in Massachusetts, they married there as well. They were in Chicago on vacation when marriage equality was passed in Iowa, rented a car, and drove to Iowa City where they were married on the first day the law went into effect. Years have passed and now Homer and his new boyfriend, Jose, went to City Hall in NYC to marry. In filling out the application to obtain a license he joked to his new beloved about how glad he was that all those other marriages he entered into with Dave really didn’t count. Jose goes ballistic and says, “What other marriages!! He refuses to marry Homer until he consults with an attorney. Dave, in hearing about Homer’s new boyfriend, consults his own attorney and now claims he has a right to Homer’s Condo, his bank account and the trust fund his grandfather set up for him. “Doesn’t Dave know that it didn’t mean anything in New York?” asks Homer?

Example: Beth and Ellen have been together 30 years and live in New York City. They met while they were in college, moved in together and have joint bank accounts and reciprocal wills. Their coop, purchased in 1990, is in Ellen’s name, and their country home, purchased in 2000, is in Beth’s name. In 1993 they had a commitment ceremony and exchanged rings in front of all their friends and Ellen’s family (Beth is estranged from her family). They recently married in New York State. Last week, Beth called you to say that Ellen wants a divorce. She advised you that Ellen has been waiting to marry so that she could divorce and claim an interest in their country home, since they purchased that property after their commitment
ceremony. Ellen considers that property a marital asset, at least that is what her friend, the accountant, has told her. Can you help her figure out what she should do or say? She doesn’t want this to go to court because her parents still don’t know she is lesbian. Her father is very religious and it would “kill him” if he heard about this whole business.

iii. Example: Carla and Penelope have been together for many years and consider marriage to be a less than satisfactory institution. Nevertheless, they have substantial assets and wish to protect them and preserve them for the couple. But they realize their relationship can be rocky and wish to be pragmatic about the realities of divorce. They want to make absolutely sure that their wishes with respect to marital and separate property are clear. They meet with their longstanding attorney who mediates a reasonable and equitable agreement regarding their assets, and drafts a prenuptial. They each take the agreement to separate counsel for further review. Final changes are incorporated and they sign the prenuptial prior to marrying on the steps of City Hall.

c. Because of the impact of DOMA on their financial lives, same sex couples, even married same sex couples, have made financial decisions based upon lack of federal benefits which may not be able to be “undone” now that DOMA has been rendered unconstitutional. Previous financial decisions within the couple create complicated marital settlements, even for the most well-intentioned parties. Working together in a collaborative or mediation setting helps all parties feel the results are equitable and fair for everyone.

i. Example: Trudy and Barbara have been together five years and live in Buffalo. Each has a good job and has been able to save money towards retirement. Trudy’s parents gave Trudy $30,000 for a party when they had a commitment ceremony in 2009. Trudy used $10,000 to pay for the party, and placed the remaining $20,000 in her own savings account. They have a child and completed a second parent adoption. They recently were married in Connecticut. When Trudy decided she wanted a divorce, Barbara agreed to work collaboratively though Barbara felt betrayed by Trudy, and did not want to divorce. They were able to work through all the financial issues, meet
with a child specialist to come up with a parenting plan and met with a financial neutral to work through the tax issues of the divorce. Barbara felt strongly that the gift Trudy received towards the commitment ceremony should have been considered a marital asset and wanted half of the savings account. After much discussion, Trudy was willing to consider this family gift a “marital” asset. After much discussion Trudy was also willing to give Barbara $30,000 from her 401K account, but the divorce settlement indicates these payments will be gifted to Barbara over many years so that there is no tax implication for Trudy.

Example: Carlos and Jonathan were partners for 20 years. When Carlos decided to buy an apartment using inherited assets from his family, their accountant suggested that they hold the property jointly so that they could minimize their capital gain exposure, sheltering $500,000 of gain, something a married couple could do, even if only one of the parties owns the property. They married in 2011, and are now divorcing. Jonathan claims the apartment is a marital asset and he is entitled to half its value. They decide to hire collaborative attorneys to assist them with the divorce settlement.

d. For many reasons, some LGBTQ people cannot or will not marry. Yet, they are very committed to each other and may want to dissolve their relationships with dignity and respect. In some cases children are being raised by parents who are no longer an intact family and for whom second parent adoption is not an option. Mediation and Collaboration will continue to be viable options for these individuals.

Example: Robin and Terry were together for ten years. During their relationship they had two children, Jack, 6, and Helen, 8. Terry conceived Jack using anonymous sperm from a sperm bank. Terry conceived Helen, using a known donor, Ted, who occasionally babysits for the kids and pays for their summer camp. The couple never completed a second parent adoption for either child. Recently the couple ended their relationship and now that they aren’t together anymore Ted is unwilling to terminate his rights, so that Robin can adopt Helen. This is because Robin has recently “come out” as a FTM.
transgendered male. Robin is now transitioning and wants his kids to refer to him as "Robert". Ted says he never wanted to "share the stage" with another man, and thinks this whole thing is "bad for his daughter". Both Robert (Robin) and Terry are furious with Ted, but Terry has her own issues of betrayal to resolve. In the meanwhile, the kids are acting out in school when they used to be at the top of their class. They are all willing to meet with a mediator to "air their differences" and hope that they can resolve some of these issues and to agree on a parenting plan of joint custody with minimal but stated visitation for the donor.

ii. Example: Stan and Bernie live together in Plattsburgh. Bernie is a professor at SUNY Plattsburgh and Stan is a stay at home Dad to their twin girls, Emma and Kate. They didn’t have the $120,000 to pay a surrogacy agency in Boston, so when Bernie’s best friend, Nancy, offered her services they were so very grateful. The only costs were the fertility clinic’s fee to inseminate Nancy with Bernie’s sperm. They were lucky and a year later, the girls were born. They didn’t bother terminating Nancy’s rights as a parent because she was living with them and helping to raise the girls. They were one big happy family. Stan and Bernie took the ferry across Lake Champlain and were married in Vermont as soon as it was possible. Sure, there were some “speed bumps” in their alternative family, but everyone was working out the issues. A few weeks ago, Bernie told Stan he wanted a divorce. Nancy is very worried that the divorce will interfere their careful arrangements. She begins to resent the situation more and more, but wants what is best for the girls. Stan and Bernie, while they have many issues to resolve, do not want to upset Nancy, especially since now that the girls are four and are ready for pre-school, they realize that Stan can’t even take the girls to the school to register them without Nancy, and anyway, how do they describe this family? It is time to figure all this out and make sense of their non-traditional arrangement. Someone suggests that they start with mediation.

e. For some families, alternative dispute models will help with issues of custody and parenting, especially when the parents choose to form families in nontraditional ways. Disputes over parenting occur much
more prevalently in the LGBTQ community because the factors which typically are considered in recognizing who is a parent (such as biology and genetics, or procreative intent, or parental conduct, or marital presumption) all must be considered. Same sex couples generally require the assistance of a third party in order to become parents, such as a known egg or sperm donor, or a traditional surrogate. Families who have formed very non-traditional families may wish to negotiate a resolution without having to involve a court action, where they have less control over the outcome of the case.

i. Example: Hector and Jason are married and have two kids, Miguel and Anna. Both children were conceived using a surrogate. Miguel is Hector’s biological child and the couple paid over $100,000 to a surrogacy agency who located an unknown egg donor and a gestational carrier, and made all the arrangements prior to Miguel’s birth. They really wanted another child but could not afford the agency fees. Hector’s sister, Carol, was willing to be a traditional surrogate for them. The couple was thrilled and Anna was born using Jason’s sperm and Carol’s egg. Because it was all in the family, they never saw an attorney about terminating Carol’s rights and her name is still on the child’s birth certificate. Unfortunately, they have decided to divorce and while the divorce is somewhat amicable, Hector’s sister is really upset that she may not be able to see her biological child as often as she can now. She is now demanding formal visitation.

ii. Example: Erica and Roxanna have two sons, age 4 and 3. Erica is the biological mother of both kids and their friend Dave is the known donor. They have a written agreement in which Dave sees the kids every 8 weeks, but Roxanna is being transferred by her company to Vermont and they are moving. Dave is furious. The women have never wanted to rock the boat and so never asked Dave to terminate his rights so that Roxanna could adopt, and now they fear he will use it against them that they didn’t move more quickly. They all agree to see a mediator to work through all these issues.

iii. Example: Raul and Herman are married in New York. Raul really wants to be a parent but is not quite ready to be a full time parent and anyway, he thinks a kid really needs a mother.
He places an ad on Craigslist, to find someone who might be willing to enter into a non-traditional way of parenting. Sarah, a straight single woman who has finally given up on finding the man of her dreams, responds to his ad and they start to talk. They each find a collaborative attorney to represent them in reaching agreement regarding support/visitation and other parenting responsibilities. The parties use standard custody and visitation models to reach agreement regarding a shared parenting plan. The collaborative process works well, as the initial disputes are minimal, although they were surprised when questions of religion and other cultural issues arose while in the process. The parties used the collaborative model to explore an interest based approach to resolving the issues. They continue to raise the child in this non-traditional manner.
<table>
<thead>
<tr>
<th>Question</th>
<th>Why is it being asked?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tell me about yourself</td>
<td>These questions help us understand the client’s “place” in the world, and how that might impact the work.</td>
</tr>
<tr>
<td>Please tell me a little about yourself and why you are here today. If the client self-identifies as LGB or T during the interview and “opens the door” to further questions, ask whether their gender expression or sexual orientation is a private (closeted) matter or an open (public) expression. Past relationships? with whom and what gender? Any legal relationships? Properly terminated? Any “immigration” marriages?</td>
<td></td>
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<tr>
<td>Tell me about your partner/spouse</td>
<td>It is important to understand the spouse’s “place” in the world as well. Does his or her gender expression create “stressors” for the couple or children of which you need to be aware? How your client describes her/his spouse may help you in understanding whether internalized homophobia or external overt discrimination plays a role in the relationship and the client’s feelings about custody/visitation and support.</td>
</tr>
<tr>
<td>Please tell me a little about your spouse. Ask very similar questions about the spouse.</td>
<td></td>
</tr>
</tbody>
</table>
Tell me about your emotional relationship.

Begin date, move in together date, domestic partnership, commitment ceremony, marriage or other marriage equivalent, prior relationships and whether any terminations of defined relationships occurred, when do you feel your moment of commitment began? Was this an emotional commitment only or a financial commitment? Would your spouse agree with your analysis?

Tell me about your financial relationship

How do you currently handle finances? Do you have a “yours mine and ours” arrangement? Total joint assets? Something in between? Has this always been the case, or did it change at some point? Was there a conscious decision to change the way you handled finances? Do you have a written agreement? When and why was it discussed and signed? Do you consider your marriage to be the benchmark for “relationship” versus “separate” assets or some other moment?

Would your spouse agree or was this always something you disagreed about? Were your financial decisions conscious or unconscious decisions?

Tell me about your children

How were your children created? Was the decision regarding who would be the Bio parent a conscious decision or one arrived at due to outside constraints, such as your age, infertility, pressure from family of origin to conceive, financial, in order for bio child to inherit family wealth? How did you decide upon the other genetic material? (One wouldn’t ask in this manner, but I am trying to make this generic)

If known egg/sperm donor, is this person

Establish time line of relationship and where commitment vs. marriage occurred. Does the couple agree or is this a stressor?

Their marriage may have lead to a financial restructuring or the marriage may be irrelevant to their financial arrangements.

Establish whether there may be a disconnect between when separate property vs. “marital assets” began to accrue for the couple and how to reconcile this disconnect with all the tax implications of separating assets acquired either before or after DOMA was rendered unconstitutional, etc.

Do legal relationships “jibe” with reality? How will the marital presumption assist or confuse the issue?

Ensure whether other genetic “parent” has any legal rights or obligations to the child.

Determine whether there are
participating in parenting? Is there a written agreement? Oral agreement? If so, what was the initial agreement, and has it changed over time? Are the parties in agreement with the changes or is there strife and/or discontent? Was there a second parent adoption for the children? If not, why not? Was the bio parent against it or was the issue one of time and finances? Was it not possible due to lack of consent from other genetic parent?

How do you handle parenting and child support?

Is one parent the “stay at home” parent? How was this decision determined and did the parents initially agree or did external restraints come more into play? (For example, did one of you have domestic partner benefits which enabled you both to take family leave, or did only one of you have this benefit? Did one of your employers cover health insurance for the child and another not?)

Did the agreement change over time?

Will the arrangement change if the couple is no longer together?

external roadblocks which will prevent the couple from legalizing their ties to their children. Should the other genetic parent participate in the collaborative process?

Intent is so important and whether the decision not to complete the adoption was a conscious decision by both parents. Educating the client about the state of the law is also important. Decisions might have been made based upon legal advice given accurate at the time, but no longer relevant or accurate.

All issues of parenting and child support are “loaded” for LGBTQ families based upon external factors and other cultural issues.

Understanding the “hows” and “whys” of the decisions made will help in the collaborative setting.

If only one parent is the legal parent of a child, issues of support and custody become complicated.
Protecting Families

Standards for LGBT Families

GLAD
EQUAL JUSTICE UNDER LAW

NCLR National Family Law Advisory Council
In 1999, a concerned group of activists, lawyers, mediators, social workers and mothers (Jenifer Firestone, Silvia Glick, Arline Isaacson, Joyce Kauffman, Sandra Lundy, Maureen Monks, and Diane Neumann) came together at the offices of Gay & Lesbian Advocates & Defenders in Boston to serve as a sounding board and editor to the author of the original document, Attorney Mary L. Bonauto of GLAD. See GLAD, Protecting Families: Standards for Child Custody in Same-Sex Relationships, 10 UCLA Women’s L. J. 151 (1999).

This most recent revision has been a collaborative effort among three groups: GLAD, NCLR, and NCLR’s National Family Law Advisory Council.

To view this publication online, including a list of individual endorsers, visit:

www.glad.org/protecting-families
We are incredibly proud of our community’s successes in creating families with children and doing the loving, joyful and challenging work of parenting. Bringing children into a family is a transformative experience and integrates us into the larger community. However, our children are vulnerable to being separated from their parents because the law does not always fully recognize our families.

There are steps you can – and should – take to protect your child’s relationship with his or her parents to prevent that devastation:

• **DO** obtain legal recognition of your parent-child relationships and make it a top priority! Being busy is not an excuse.

• **DO** work together to come to an agreement if your relationship ends, especially when you have children. Do not begin by fighting in court. Litigation can bankrupt you, deprive your child of one of his or her parents, and make law that will hurt others for years to come.

There is so much at stake for your children, for you, and for our larger community. PLEASE read on and consider this message.
Failure to Legally Protect Your Parental Relationships Could Result in Losing Those Relationships

You cannot fully protect your legal relationship to your children unless you take affirmative steps. The good news is that there are affirmative steps you can take in almost every state. Failure to take advantage of these steps creates the significant risk that your child will be unprotected because one of you is not seen as a “parent.” Imagine your child at the hospital and the non-biological or non-adoptive parent shows up first and is denied access to the child needing comfort or medical decision-making.

In an emergency, do you want to rely on the mercies of others who may be homophobic or transphobic? If one of you dies, do you want the child placed with extended family members or with the state while the survivor launches a court battle to maintain custody of your own child? You can avoid these outcomes!
What Can You Do About This?

CONTACT knowledgeable lawyers in your community to establish the best legal recognition possible in your state.

State law – and not federal law – determines who is a parent and each state has its own set of laws. And even people joined in marriage, civil union or domestic partnership (in states where these statuses are available) need to take additional steps to protect their children because those statuses could change and also may not be recognized in other states.

- In states where second parent adoption or parentage judgments are available, all non-biological parents should take one of these steps. This is the best way to ensure that you will be recognized as a parent nationwide.

- If you cannot adopt or get a parentage judgment it may be possible for you to do a co-guardianship or parenting agreement through the courts.

- If you cannot adopt or get a parentage judgment, you should:
- Be sure the biological or adoptive parent writes a will naming you as guardian for the child in the event of the parent's death.
- Be sure the biological or adoptive parent signs an authorization for you to consent to medical care.
- Enter into a written agreement clarifying your intention to jointly parent your children.

We want LGBT families and their children to be protected and are fighting every day to create the means to do so in every state in the nation. Find out what you can do in your state.

Go to the websites of organizations like Gay & Lesbian Advocates & Defenders; National Center for Lesbian Rights; Lambda Legal; the ACLU; the National LGBT Bar Association; Family Equality Council; Equality Federation; Human Rights Campaign; the National Gay and Lesbian Task Force; and COLAGE to find information and resources.

We believe (as with ducks) that if it looks like a family, if it holds itself out as a family, and if it functions like a family, then it is a family. But this position may not be respected in all states, so please do what you can to protect your children and your family now.
The Laws Do Not Always Protect Our Families

In our culture, we often turn to courts for resolution. Yet, many states lack a legal framework to recognize our families and may not apply the existing legal rules to resolve disputes about parental responsibilities or dividing property.

Even in those states with a legal framework, there are many novel issues that arise. As a result, many court rulings have disrespected our families and the relationships of one or both parents to the children. Going to court can be damaging to the real relationships that a family has nurtured for many years. It can also create a negative precedent of disrespect that will haunt other LGBT families for years to come.

What You Can Do About It

No matter what state law is, our first responsibility is to our children. Whether state law recognizes the relationship between the adults or not, you have the power to agree to maintain the parental relationships your children count on. If you're fortunate enough to reside in a state where the courts will affirm your custody agreements, it's important to obtain that legal protection. But if you separate and rely on the courts to determine what is best for your children, rather than coming up with your own negotiated resolution, you could bankrupt yourself financially and emotionally and destroy your child's relationship with another parent.
How the Standards Can Help

Respecting our own families requires us to honor our relationships with our children and with each other. The overarching aim of these standards is to help families remember the importance of ensuring that we protect the families we create and that our children continue to have meaningful relationships with the people they see as their parents, especially during times of crisis or a break-up.

We believe that, even in the midst of the emotional upheaval that inevitably accompanies the end of the adult relationship, families can do a great deal to resolve their differences in a manner that puts their children first.

We ask all lawyers who work with LGBT families to share these standards with their clients and explain the importance of showing respect for and protecting our families.

We encourage you to accept and use these standards as a guide to making sure that we protect our families however and wherever we can, at the beginning of our relationships when there is love and trust, and at the end of our relationships, when that love and trust has been ruptured. We owe this to our children.
Standards for LGBT Families

1. Support the Rights of LGBT Parents.

Our children deserve to be loved, and our families deserve to be protected. We must respect LGBT families and our children’s relationships with their parents. Even through the dissolution of our families, we must protect the best interests of our children and show respect for LGBT families.


Recognize and affirm the actual relationships between the parents and the children. You should sign written agreements and, where possible, establish legal protections of parental relationships. Regardless of whether you have taken these steps, agreements to share parenting or allow an important relationship to develop with another parent or significant adult should control, whether those agreements are written or not.


The well-being of our children depends on the continuity of their relationships with the significant adults in their lives. Abrupt termination of such relationships is damaging. Sustaining these relationships should be the primary goal of the resolution of any custody dispute.

4. Maintain Continuity For the Children.

Parents who are separating should start with the presumption that an arrangement which most closely resembles the children’s relationships with the people they regard as parents is best, taking into account, of course, whether there has been any abuse or neglect that interferes with a person’s ability to parent. All parents should continue to provide financial support for the children.
Standards for LGBT Families

5. Seek a Voluntary Resolution.

Using mediation will reduce the conflict and disruption that the children face. If the parents are at an impasse, consider retaining the services of a mediator knowledgeable about LGBT families who can help the parents reach an agreement.

If possible, have the agreement confirmed by a court. A court order approving the parents' agreement and setting out a custody or visitation arrangement is the best solution.


The end of a relationship is difficult and disruptive. Parents should avoid impulsive and expedient decisions which are likely to be harmful to the children. Seek professional assistance to help determine what will be best for the children.


Abusive relationships can and sometimes do occur in LGBT families. Allegations of abuse, whether true or false, have a serious impact on everyone in the family and should be carefully assessed. If abuse has occurred, seek assistance from domestic violence services and tell your attorney about the situation.

False allegations of abuse can and do occur and threaten to disrupt the children's relationship with their parents. Do not use false allegations of abuse as a tool to get an edge in the custody dispute.

Attorneys must explore allegations of abuse in order to determine whether abuse has actually occurred and, if it has, to determine an appropriate parenting plan.
Standards for LGBT Families

8. The Absence of Agreements or Legal Relationships Should Not Determine Outcome.

Whether or not legal steps have been taken should not be the only determining factor. Legal protections, in fact, are not available in many states. What matters is how the adults have viewed their relationships with their children over time. Respect for the children’s relationships with the adults they view as parents is paramount.

9. Treat Litigation as a Last Resort.

Litigation is the kind of winner-takes-all approach that can destroy existing relationships and undermine the trust needed to share parenting responsibilities. It is also costly and time consuming and, because court proceedings are usually open to the public, compromises the family’s privacy. Equally important, however, is that litigation can establish bad legal precedent and thereby institutionalize disrespect for LGBT families.

10. Refuse to Resort to Homophobic/Transphobic Laws and Sentiments.

It is wrong and unethical for parents or lawyers to take advantage of anti-LGBT laws. Do not resort to arguments that a person who is not a “legal” parent has no right to seek custody or visitation. The stress or angst over the end of a relationship can sometimes stir the flames of internalized homophobia or transphobia. A parent’s own anti-LGBT sentiments can have a negative impact on the children and should be confronted. The best interests of the children should control decisions concerning custody and visitation.

No one should reveal, or threaten to reveal, the sexual orientation or transgender status of an opposing parent in an attempt to harass or intimidate the other parent.
The following organizations have endorsed these standards

GLAD
EQUAL JUSTICE UNDER LAW

NCLR

ACLU
LESBIAN GAY BISEXUAL TRANSGENDER & AIDS PROJECT

Equality Federation

FAMILY EQUALITY COUNCIL

COLAGE

Lambda Legal

HUMAN RIGHTS CAMPAIGN

National Gay and Lesbian Task Force

The National LGBT Bar Association

An Affiliate of the American Bar Association

2011
The Supreme Court victory in United States v. Windsor striking down the discriminatory federal Defense of Marriage Act (DOMA) affirms that all loving and committed couples who are married deserve equal legal respect and treatment from the federal government. The demise of DOMA marks a turning point in how the United States government treats the relationships of married same-sex couples for federal programs that are linked to being married. At the same time, a turning point is part of a longer journey, not the end of the road. There is much work ahead before same-sex couples living across the nation can enjoy all the same protections as their different-sex counterparts.

Keep in Mind:
- The Supreme Court’s ruling in Windsor applies only to the federal government. It does not change discriminatory state laws excluding same-sex couples from state-conferring marriage rights.
- Federal agencies—large bureaucracies—may need and take some time to change forms, implement procedures, train personnel, and effectively incorporate same-sex couples into the spousal-based system.
- Until same-sex couples can marry in every state in the nation, there will be uncertainty about the extent to which same-sex spouses will receive federal marital-based protections nationwide. For federal programs that affect marital status based on the law of a state that does not respect marriages of same-sex couples, state law will likely pose obstacles for legally married couples and surviving spouses in accessing federal protections and responsibilities.
- Securing fair access to federal protections that come with marriage for all same-sex couples in the nation will take some time and work. In some situations, it may require Congressional action or formal rule-making by agencies.
- Before making a decision, it is essential that you consult an attorney for individualized legal advice. This is particularly important for people who are on certain public benefits, as getting married may jeopardize your eligibility without providing you the full measure of protections other married couples enjoy. In addition, couples who travel to another place to marry and then return to live in a state that does not respect their marriage may be unfairly unable to obtain a divorce, which can lead to serious negative legal and financial consequences. People must make careful decisions when and where to marry, even as we work together to end this injustice.
- We are committed to winning universal access to federal marital protections for married same-sex couples through ongoing public policy advocacy and, where necessary, strategic litigation. Contact our organizations if you have questions, for updates and to learn more about what you can do to achieve full equality for those who are LGBT.

This Guidance is intended to provide general information regarding major areas of federal marriage-based rights and protections based on how the various federal agencies have administered federal benefits. It should not be construed as legal advice or a legal opinion on any specific facts or circumstances, and does not create an attorney-client relationship. Past practice is no guarantee of future developments. While laws and legal procedure are subject to frequent change and differing interpretations in the ordinary course, this is even more true now as the federal government dismantles DOMA and extends federal protections to same-sex couples. None of the organizations publishing this information can ensure the information is current or be responsible for any use to which it is put.

No tax advice is intended, and nothing therein should be used, and cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code.

Contact a qualified attorney in your state for legal advice about your particular situation.

SOCIAL SECURITY SPOUSAL AND FAMILY PROTECTIONS

This guidance addresses Social Security spousal benefits: when one spouse retires; in the event of disability; and when one spouse has passed away. Access to each of these benefits was blocked or affected by the federal Defense of Marriage Act (DOMA). Now that DOMA has been declared unconstitutional by the United States Supreme Court, this guidance summarizes these benefits, who qualifies, special concerns, possible reductions in benefits, how to apply, and how to appeal if your claim is denied.

For more information, visit the Social Security Administration website, www.socialsecurity.gov.

What is the Social Security Retirement Spousal Benefit?

The "retirement spousal benefit" (the spousal benefit) is a benefit for a non-earning or lower-earning spouse that allows him or her to collect an amount that is equal to half of the other spouse's Social Security benefit. People are only eligible for a spousal benefit when their own benefit is less than half of their retired spouse's benefit, or when they seek to delay their own application for Social Security benefits based on their own work record. For more information, consult the SSA's "Retirement Planner: Benefits for You & A Spouse," www.socialsecurity.gov/retire2/applyingfiling.htm.

- One-earner couples receive a spousal benefit of an extra 50% of the worker's retirement benefit while both spouses are alive.
- For two-earner couples who worked long enough to qualify for Social Security benefits, a lower-earning spouse can receive his or her own benefit plus a spousal benefit to bring his or her total benefit up to 50% of the higher benefit.
- If you are at retirement age and your spouse has applied for Social Security benefits (even if he or she files and suspends), you can choose to file and receive benefits on just your spouse's Social Security record and delay filing for benefits on your own record up until age 70.

For more information, consult:
the SSA's page, "Delay my Social Security retirement and receive spouse's benefits," http://ssaservicehelp.ssa.gov/app/answers/detail/a_id/1944/ka/can%20%20In%20%20%20%20in%20%20%20%20/bc/wpcontent %20themes%20il/:%20trtirement%20Rtatement

This series of fact sheets produced together by:
American Civil Liberties Union | Center for American Progress | Family Equality Council | Freedom to Marry | Gay & Lesbian Advocates & Defenders
What is the Social Security Disability Spousal Benefit?
Social Security pays benefits to people who cannot work (are unable to engage in substantial gainful activity) because they have a medical condition that is expected to last at least one year or result in death. For more information, consult the SSA's Disability Planner, Social Security Protection if You Become Disabled, http://www.ssa.gov/displan/index.htm, and publication, "Disability Benefits," www.socialsecurity.gov/pubs/EN-05-10029.pdf.

When a worker qualifies for Social Security disability benefits, the spouse may be eligible for a monthly benefit of up to 50% of the disabled worker's benefit. The requirements are very similar to the retirement spousal benefit discussed above.

What is the Surviving Spouse Benefit?
After a spouse's death, Social Security allows the surviving spouse to keep collecting his or her own Social Security payment or to collect the full payment of the deceased spouse. A surviving spouse can also use the survivor's benefit to delay retiring on his or her own record, thereby earning delayed retirement credits and increasing his or her own benefit. For examples and more information, see SSA's "Survivors Planner: How Much Would Your Survivors Receive?", www.socialsecurity.gov/survivorplan/onyourown5.html, and GLAD's publication, "Social Security Benefits and The Defense of Marriage Act," www.glad.org.

Note: In calculating a survivor benefit, reductions for early retirement, maximum family benefits, and the Government Pension Offset apply, but the Windfall Elimination Provision (WEP) does not apply to survivor benefits. See below: "What Factors Could Reduce My Benefits?"

What is the Lump-Sum Death Benefit?
There is a one-time death benefit of $255 payable to a surviving spouse, or, if there is no spouse, to a minor child—if certain conditions are met. If no spouse or child meeting these requirements exists, the lump-sum death payment will not be paid. For more information, consult the SSA's "Lump-sum death payment," http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/2023/1/lump-sum-death-payment.

What is the Child's Benefit?
Social Security can also help a worker's "children" when one or both parents are disabled, retired or deceased.

Because Social Security provides an important economic safety net, "child" is defined broadly and is based on state law recognition of the parent-child relationship. Please refer to the Social Security website for the numerous tests of who can be a "child."

Who Qualifies for Social Security Spousal Benefits
This chart outlines the basic requirements for each type of Social Security benefit available to spouses and is discussed in more detail below. You must meet each requirement listed under a given benefit in order to qualify for the benefit. The Social Security website provides further details.

<table>
<thead>
<tr>
<th>Requirement</th>
<th>Spousal Retirement Benefit</th>
<th>Spousal Disability Benefit</th>
<th>Survivor's Benefit</th>
<th>Lump-Sum Death Benefit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Age</td>
<td>62 or any age if you have a qualifying &quot;child&quot; of the worker in your care who is under age 16 or disabled</td>
<td>62 or any age if you have a qualifying &quot;child&quot; of the worker in your care who is under age 16 or disabled</td>
<td>62 or any age if you have a qualifying &quot;child&quot; of the worker in your care who is under age 16 or disabled</td>
<td>62 or any age if you have a qualifying &quot;child&quot; of the worker in your care who is under age 16 or disabled</td>
</tr>
<tr>
<td>Duration</td>
<td>You have been married for at least 12 months prior to applying for spousal benefits</td>
<td>You have been married for at least 12 months prior to applying for spousal benefits</td>
<td>You have been married for at least 12 months prior to applying for spousal benefits</td>
<td>You have been married for at least 12 months prior to applying for spousal benefits</td>
</tr>
<tr>
<td>Recognition</td>
<td>The wage earner's state of domicile (primary residence) at the time of your application would consider you married or able to inherit personal property from each other without a will as would a spouse</td>
<td>The wage earner's state of domicile (primary residence) at the time of your application would consider you married or able to inherit personal property from each other without a will as would a spouse</td>
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</tr>
<tr>
<td>SS Work Credits</td>
<td>Your spouse worked and paid into the system long enough to qualify for this particular benefit</td>
<td>Your spouse worked and paid into the system long enough to qualify for this particular benefit</td>
<td>Your spouse worked and paid into the system long enough to qualify for this particular benefit</td>
<td>Your spouse worked and paid into the system long enough to qualify for this particular benefit</td>
</tr>
</tbody>
</table>

This series of fact sheets produced together by:
Q. I am married and my spouse resides (or resided at the time of passing away) in a state that recognizes marriages between spouses of the same sex. If I meet the other criteria, am I eligible for spousal-based benefits?

A. Yes. The Social Security law uses the wage earner's "place of domicile" as the relevant state law for assessing who is a spouse for benefits purposes. The Social Security law states that a person is considered a spouse if the courts of the state at the time of application would find that the couple was validly married.

Q. I joined in a Civil Union or Registered Domestic Partnership, my spouse resides (or resided at the time of passing away) in that state, and I meet the other criteria. Am I eligible for spousal-based benefits?

A. Although this is untested, we believe the answer should be yes. The Social Security law uses the wage earner's "place of domicile" as the relevant state law for assessing who is a spouse for benefits purposes. The Social Security law states that a person is considered a spouse if the courts of the state at the time of application would find that the couple was validly married.

Q. My spouse resides (or at the time of passing away resided) in a state that does not recognize marriages of same-sex couples, but we married in another state and I meet all of the other criteria. Am I eligible for the spousal-based benefits?

A. Under existing law, the Social Security statute uses the wage earner's "place of domicile" as the relevant state law for assessing who is a spouse for benefits purposes. This will likely result in the agency denying crucial benefits to married same-sex couples and widows and widowers until the law is changed. Our organizations will be working urgently to attain respect for all marriages, though it will take legal changes.

Q. I am divorced. Can I obtain benefits based on my former marriage? What happens to those benefits if I remarry?

A. A divorced spouse of a retired, disabled or deceased worker—assuming the marriage lasted at least 10 years and that the divorced spouse is not married to someone else and meets age and other requirements—is entitled to receive benefits based on the earnings record of a former spouse. This includes the retirement spousal benefit, the disability spousal benefit, and the survivor's benefit. For information about access to benefits and how marrying will affect benefits from a former spouse, consult the SSA's "Retirement Planner: Benefits for Your Divorced Spouse," www.socialsecurity.gov/retire2/yourdivorcedspouse.htm.

What Factors Could Reduce My Benefits?

The most common factors that can reduce benefits are discussed below:

**Early retirement.** If you start retirement benefits early, before the full retirement age set for you by Social Security, your monthly benefits are reduced. The full retirement age for people born between 1943 and 1954 is 66. You can calculate the benefits of early or later retirement on the Social Security website, www.socialsecurity.gov/OACT/quickcalc/early-late.html. For more information, consult the SSA's publications, "Retirement Benefits," "When To Start Receiving Retirement Benefits" and "Retirement Planner: Other Things to Consider."
Maximum Family Benefits Limit (Family Cap) If your or your spouse's children are also eligible for or receiving Social Security based on the same worker's earnings, your spousal benefit may be subject to a cap on total family benefits under a single earnings record. For more information, consult the SSA's "Formula For Family Maximum Benefit," www.ssa.gov/oact/cola/familymax.html.

Windfall Elimination Provision ("WEP"). Where a worker worked for an employer that did not withhold Social Security taxes from the worker's salary, such as a federal, state or local government agency, a nonprofit organization or another country, the pension based on that work may reduce the worker's Social Security benefits because of Social Security's Windfall Elimination Provision ("WEP"). Since the spousal benefit is derived from the worker's benefit, WEP affects the spousal benefit as well. While benefits are lowered because of the WEP, they are never totally eliminated. For more information, consult the SSA's "WEP eliminating a monthly Social Security benefit," www.ssa.gov/OPP/info answered/detail/a_id/13546/wep eliminating-a-monthly-social-security-benefit; www.socialsecurity.gov/pubs/10054.pdf.

Government Pension Offset ("GPO"). The GPO applies directly to reduce spousal benefits if you receive a pension from a federal, state, or local government based on work where you did not pay Social Security taxes. If the GPO applies to you, your Social Security benefits will be reduced by two-thirds of your government pension. For more information, consult the SSA's publication, "Understanding Pension Offset," www.socialsecurity.gov/pubs/10007.pdf.

What Can I Do To Protect and Preserve My Rights While the Social Security Administration Sorts Out If My Marriage or Other Relationship "Counts" for Benefits Purposes?
If you meet all of the qualifications for a benefit, you can apply for Social Security benefits now to preserve the start date for your benefits based on the date of your application. However, if the wage earner lives or lived in a state that does not recognize your legal relationship (marriage, civil union, registered domestic partnership), you will likely be denied benefits if you apply. Our organizations are working to ensure that all marriages respected, but it will take legal changes.

How Do I Apply for Social Security Spousal Benefits and How Do I Appeal If Benefits Are Denied?
GLAD's publication, "Social Security Benefits and The Defense of Marriage Act," www.glad.org, outlines the application and appeals process in detail. Some of the important tips from that publication:

Apply in Person! You can apply for Social Security benefits in person on your own at your local Social Security Administration Office.

What to bring. Provide a copy of your marriage, civil union or RDP certificate in support of your application and, if you are applying for survivor benefits, a copy of your spouse's death certificate. Make sure you get a dated copy of your application (or some other dated receipt) as evidence that you actually applied should you need this later.

If you are told you cannot apply. You may be told that you cannot apply for marriage-based benefits based on your marriage, civil union or RDP. You need to persist politely until you are permitted to complete an application. If necessary, you can explain that you simply wish to preserve your legal rights.

Insist on a Written Denial. It is possible that a Social Security representative will tell you orally that your application is denied. If that happens, politely insist on a written denial, which Social Security is required to give you. This is important in order to assure your right to appeal.

Addressing Delays. If you do not receive a decision on your application from Social Security within two weeks, write to Social Security and request a decision.

Appeal Denials to Keep Benefits Claim Alive. When your application for any Social Security benefit is denied, you must appeal the denial to try to keep your claim for benefits "open" or "alive" and possibly obtain benefits based on the date of application. The time limit for filing an appeal is 60 days from the Notice of Denial.

- Follow the Directions. The Social Security Administration will tell you your options at each stage of the appeals process. You have an absolute right to appeal the denial of your benefits. For more information from Social Security about the appeals process, consult the SSA's publication, "Your Right To Question The Decision Made On Your Claim," www.socialsecurity.gov/pubs/LN-03-10058.pdf.
- Try to keep your appeal pending as long as possible. Because it is likely that it will take some amount of time for the post-DOMA issues to sort themselves out, keep your appeal pending as long as possible so that the agency and legal processes can do what they need to do to clarify the rules. To extend your appeal process, wait until any deadline nears to file the next challenge to your denial (but be sure not to miss the 60 day deadline for each step of the appeal process). You can apply again if the law changes.

Question About Grant of Benefits. If your application for benefits is granted and you think it should not have been under existing legal standards, contact an attorney. If you improperly receive benefits, the government can require you to pay those back.

Timing. There is no deadline for applying for a spousal benefit (except the lump-sum death benefit) though benefits begin based on the date you filed an application.

FOR MORE INFORMATION, CONTACT
GAY & LESBIAN ADVOCATES & DEFENDERS
www.glad.org

LAMBDA LEGAL
www.lambdalegal.org

NATIONAL CENTER FOR LESBIAN RIGHTS
nclrights.org

AMERICAN CIVIL LIBERTIES UNION
www.aclu.org/light
Bill S2921-2011

Allows a person acting as de facto parent to apply to the supreme court for a writ of habeas corpus

Allows a person acting as de facto parent to apply to the supreme court for a writ of habeas corpus to have a minor child brought before the court.

Details

- Versions S2921-2011
- Sponsor: DUANE
- Committee: CHILDREN AND FAMILIES
- Law Section: Domestic Relations Law
- Law: Amd §70, Dom Rel L

Actions

- Jan 4, 2012: REFERRED TO CHILDREN AND FAMILIES
- Feb 3, 2011: REFERRED TO CHILDREN AND FAMILIES
AN ACT to amend the domestic relations law, in relation to allowing a person acting as de facto parent to apply to the supreme court for a writ of habeas corpus

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. Subdivision (a) of section 70 of the domestic relations law, as amended by chapter 457 of the laws of 1988, is amended and a new subdivision (c) is added to read as follows:

(a) Where a minor child is residing within this state, either parent OR DE FACTO PARENT may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent OR DE FACTO PARENT for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order. In all cases there shall be no prima facie right to the custody of the child in either parent OR DE FACTO PARENT, but the court shall determine solely what is for the best interest of the child, and what will best promote [its] HIS OR HER welfare and happiness, and make award accordingly.

(C) FOR PURPOSES OF THIS SECTION, DE FACTO PARENT SHALL MEAN A PERSON WHO (I) HAS A RELATIONSHIP WITH SUCH MINOR CHILD THAT WAS FORMED WITH THE CONSENT OF THE LEGAL PARENT AND FOSTERED BY SUCH LEGAL PARENT; (II) LIVED WITH SUCH MINOR CHILD; (III) PERFORMED PARENTAL FUNCTIONS FOR SUCH MINOR CHILD TO A SIGNIFICANT DEGREE; AND (IV) FORMED A PARENT-CHILD BOND WITH SUCH MINOR CHILD. A RELATIONSHIP BASED UPON PAYMENT BY THE LEGAL PARENT SHALL PRECLUDE A PERSON FROM ESTABLISHING DE FACTO PARENT STATUS.

S 2. This act shall take effect immediately.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [] is old law to be omitted.
STATE OF NEW YORK

4617

2013-2014 Regular Sessions

IN SENATE

April 16, 2013

Introduced by Sen. HOYLMAN -- read twice and ordered printed, and when printed to be committed to the Committee on Children and Families

AN ACT to amend the family court act, in relation to establishing the child-parent security act; and to repeal section 73 and article 8 of the domestic relations law, relating to legitimacy of children born by artificial insemination and surrogate parenting contracts

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The family court act is amended by adding a new article 5-C to read as follows:

ARTICLE 5-C
CHIL-PARENT SECURITY ACT

PART 1 GENERAL PROVISIONS (581-101 - 581-103)

2 JUDGMENT OF PARENTAGE (581-201 - 581-206)
3 CHILD OF ASSISTED REPRODUCTION OR ARTIFICIAL INSEMINATION (581-301 - 581-307)
4 GESTATIONAL AGREEMENT (581-401 - 581-411)
5 PAYMENT TO DONORS AND GESTATIONAL CARRIERS (581-501 - 581-502)
6 FORMATION OF LEGAL PARENT-CHILD RELATIONSHIP AFTER BIRTH OF CHILD (581-601)
7 MISCELLANEOUS PROVISIONS (581-701 - 581-703)

PART 1
GENERAL PROVISIONS

SECTION 581-101. SHORT TITLE.

581-102. PURPOSE.

581-103. DEFINITIONS.

A. "ARTIFICIAL INSEMINATION" MEANS INSERTION OF SPERM INTO FEMALE REPRODUCTIVE ORGANS BY ANY MEANS OTHER THAN SEXUAL INTERCOURSE, INCLUDING INTRAUTERINE INSEMINATION, WITH THE INTENT TO CAUSE A PREGNANCY.

B. "ASSISTED REPRODUCTION" INCLUDES ALL FERTILITY TREATMENTS IN WHICH BOTH EGGS AND SPERM ARE HANDLED. IN THE FOREGOING CONTEXT, THE TERM INCLUDES, BUT IS NOT LIMITED TO IN-VITRO FERTILIZATION AND TRANSFER OF EMBRYOS INCLUDING DONATED GAMETES OR DONATED EMBRYOS.
(C) "ART PROVIDER" MEANS ANY ENTITY WHICH ASSISTS WITH ASSISTED REPRODUCTIVE TECHNOLOGY.

(D) "ASSISTED REPRODUCTIVE TECHNOLOGY" OR "ART" IS ANY MEDICAL OR SCIENTIFIC INTERVENTION, INCLUDING, BUT NOT LIMITED TO, ASSISTED REPRODUCTION, PROVIDED FOR THE PURPOSE OF ACHIEVING LIVE BIRTH THAT RESULTS FROM ASSISTED CONCEPTION. ASSISTED CONCEPTION MEANS THE FORMATION OF A HUMAN EMBRYO OUTSIDE THE BODY WITH THE INTENT TO PRODUCE A LIVE BIRTH.

(E) "CHILD" MEANS A LIVE BORN INDIVIDUAL OF ANY AGE WHOSE PARENTAGE MAY BE DETERMINED UNDER THIS ACT OR OTHER LAW.

(F) "COLLABORATIVE REPRODUCTION" INVOLVES ARTIFICIAL INSEMINATION WITH DONOR SPERM AND ANY ASSISTED REPRODUCTION IN WHICH AN INDIVIDUAL OTHER THAN THE INTENDED PARENT PROVIDES GENETIC MATERIAL OR AGREES TO ACT AS A GESTATIONAL CARRIER. IT CAN INCLUDE, BUT IS NOT LIMITED TO, (1) ATTEMPTS BY THE INTENDED PARENT TO CREATE A CHILD THROUGH MEANS OF A GESTATIONAL ARRANGEMENT, WITH OR WITHOUT THE INVOLVEMENT OF A DONOR, AND (2) ASSISTED REPRODUCTION INVOLVING A DONOR WHERE A GESTATIONAL CARRIER IS NOT USED.

(G) "COMPENSATION" MEANS PAYMENT OF ANY VALUABLE CONSIDERATION FOR TIME, EFFORT, PAIN AND/OR RISK TO HEALTH IN EXCESS OF REASONABLE MEDICAL AND ANCILLARY COSTS.

(H) "DONOR" MEANS AN INDIVIDUAL WHO PRODUCES EGGS OR SPERM USED FOR ASSISTED REPRODUCTION OR ARTIFICIAL INSEMINATION, WHETHER OR NOT FOR CONSIDERATION. DONOR ALSO INCLUDES AN INDIVIDUAL OR INDIVIDUALS WITH DISPOSITIONAL CONTROL OF AN EMBRYO WHO PROVIDE IT TO ANOTHER PERSON FOR THE PURPOSE OF GESTATION AND RELINQUISHES ALL PRESENT AND FUTURE PARENTAL AND INHERITANCE RIGHTS AND OBLIGATIONS TO A RESULTING CHILD. THE TERM DOES NOT INCLUDE AN INTENDED PARENT WHO PROVIDES GAMETES TO BE USED FOR ASSISTED REPRODUCTION OR ARTIFICIAL INSEMINATION.

(I) "EMBRYO" MEANS A CELL OR GROUP OF CELLS CONTAINING A DIPLOID COMPLEMENT OF CHROMOSOMES OR GROUP OF SUCH CELLS, NOT A GAMETE OR GAMETES, THAT HAS THE POTENTIAL TO DEVELOP INTO A LIVE BORN HUMAN BEING IF TRANSFERRED INTO THE BODY OF A WOMAN UNDER CONDITIONS IN WHICH GESTATION MAY BE REASONABLY EXPECTED TO OCCUR.

(J) "EMBRYO TRANSFER" MEANS ALL MEDICAL AND LABORATORY PROCEDURES THAT ARE NECESSARY TO EFFECTUATE THE TRANSFER OF AN EMBRYO INTO THE UTERINE CAVITY.

(K) "GAMETE" MEANS A CELL CONTAINING A HAPLOID COMPLEMENT OF DNA THAT HAS THE POTENTIAL TO FORM AN EMBRYO WHEN COMBINED WITH ANOTHER GAMETE. SPERM AND EGGS ARE GAMETES. A GAMETE MAY CONSIST OF NUCLEAR DNA FROM ONE HUMAN BEING COMBINED WITH THE CYTOPLASM, INCLUDING CYTOPLASMIC DNA, OF ANOTHER HUMAN BEING.

(L) "GAMETE PROVIDER" MEANS AN INDIVIDUAL WHO PROVIDES SPERM OR EGGS FOR USE IN ASSISTED REPRODUCTION OR ARTIFICIAL INSEMINATION.

(M) "GESTATIONAL AGREEMENT" IS A CONTRACT BETWEEN INTENDED PARENTS AND A GESTATIONAL CARRIER INTENDED TO RESULT IN A LIVE BIRTH WHERE THE CHILD WILL BE THE LEGAL CHILD OF THE INTENDED PARENTS.

(N) "GESTATIONAL CARRIER" MEANS AN ADULT WOMAN, NOT AN INTENDED PARENT, WHO ENTERS INTO A GESTATIONAL AGREEMENT TO BEAR A CHILD WHO WILL BE THE LEGAL CHILD OF THE INTENDED PARENTS SO LONG AS SHE HAS NOT PROVIDED THE EGG USED TO CONCEIVE THE RESULTING CHILD.

(O) "GESTATIONAL CARRIER ARRANGEMENT" MEANS THE PROCESS BY WHICH A GESTATIONAL CARRIER ATTEMPTS TO CARRY AND GIVE BIRTH TO A CHILD CREATED THROUGH ASSISTED REPRODUCTION SO LONG AS THE GESTATIONAL CARRIER HAS NOT PROVIDED THE EGG USED TO CONCEIVE THE RESULTING CHILD.

(P) "HEALTH CARE PRACTITIONER" MEANS AN INDIVIDUAL LICENSED OR CERTIFIED UNDER TITLE EIGHT OF THE EDUCATION LAW ACTING WITHIN HIS OR HER SCOPE OF PRACTICE.

(Q) "INTENDED PARENT" IS AN INDIVIDUAL WHO MANIFESTS THE INTENT AS
Provided in this act to be legally bound as the parent of a child resulting from assisted reproduction or collaborative reproduction.

(r) "In-vitro fertilization" means the formation of a human embryo outside the human body.

(s) "Medical evaluation" means an evaluation and consultation with a health care provider regarding the anticipated pregnancy.

(t) "Parent" means an individual who has established a parent-child relationship under this act or other law and includes, but is not limited to: (1) a child's birth parent who is not a gestational carrier or the spouse of the gestational carrier; (2) a child's genetic parent who is not the donor; (3) an individual who has legally adopted the child; (4) an individual who is a parent of the child pursuant to a legal presumption; (5) an individual who is a parent of the child pursuant to an acknowledgment or judgment of parentage pursuant to article two of this act or other law; (6) an individual who is a parent of the child pursuant to article three, four, or six of this act.

(u) "Participant" means an individual who provides a biological or genetic component of assisted reproduction or artificial insemination, an intended parent, and the spouse of an intended parent or gestational carrier. Gestation is a biological component within the meaning of this definition.

(v) "Record" means information inscribed in a tangible medium or stored in an electronic or other medium that is retrievable in perceivable form.

(w) "Retrieval" means the procurement of eggs or sperm from a gamete provider.

(x) "Spouse" means an individual married to another, or who has a legal relationship entered into under the laws of the United States or of any state, local or foreign jurisdiction, which is substantially equivalent to a marriage, including a civil union or domestic partnership.

(y) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(z) "Time of transfer" means the time at which a gamete or embryo is transferred into the body of a woman with the intent to produce live birth.

(aa) "Transfer" means the placement of an embryo or gametes into the body of a woman with the intent to achieve pregnancy and live birth.

PART 2

Judgment of Parentage

Section 581-201. Judgment of Parentage.


S. 4617


S 581-201. Judgment of Parentage. (a) A civil proceeding may be maintained to adjudicate the parentage of a child under the circumstances set forth in this article. This proceeding is governed by the New York Civil Practice Law and Rules.
(B) A JUDGMENT OF PARENTAGE MAY BE ISSUED PRIOR TO BIRTH BUT SHALL NOT
BECOME EFFECTIVE UNTIL THE BIRTH OF THE CHILD.
(C) A JUDGMENT OF PARENTAGE SHALL BE ISSUED BY THE COURT UPON THE
PETITION OF (1) A CHILD, OR (2) A PARENT, OR (3) A PARTICIPANT, OR (4)
THE SUPPORT/ENFORCEMENT AGENCY OR OTHER GOVERNMENTAL AGENCY AUTHORIZED
BY OTHER LAW, OR (5) A REPRESENTATIVE AUTHORIZED BY LAW TO ACT FOR AN
INDIVIDUAL WHO WOULD OTHERWISE BE ENTITLED TO MAINTAIN A PROCEEDING BUT
WHO IS DECEASED, INCAPACITATED, OR A MINOR, IN ORDER TO LEGALLY ESTAB-
LISH THE CHILD-PARENT RELATIONSHIP UNDER THE FOLLOWING CIRCUMSTANCES:
(1) A CHILD BORN THROUGH ASSISTED REPRODUCTION OR ARTIFICIAL INSEMINA-
TION UNDER PART THREE OF THIS ARTICLE; OR
(II) A CHILD BORN PURSUANT TO A GESTATIONAL CARRIER ARRANGEMENT UNDER
PART FOUR OF THIS ARTICLE; OR
(III) A CHILD WHOSE PARENTAGE CAN BE ESTABLISHED PURSUANT TO PART SIX
OF THIS ARTICLE.
581-202. PROCEEDING FOR JUDGMENT OF PARENTAGE OF A CHILD BORN
THROUGH ASSISTED REPRODUCTION OR ARTIFICIAL INSEMINATION. (A) A
PROCEEDING FOR A JUDGMENT OF PARENTAGE MAY BE COMMENCED:
(1) IF THE INTENDED PARENTS RESIDE IN NEW YORK STATE, IN THE COUNTY
WHERE THE INTENDED PARENTS RESIDE ANY TIME AFTER PREGNANCY IS ACHIEVED
OR IN THE COUNTY WHERE THE CHILD WAS BORN OR RESIDES; OR
(2) IF THE INTENDED PARENTS AND CHILD DO NOT RESIDE IN NEW YORK STATE,
UP TO NINETY DAYS AFTER THE BIRTH OF THE CHILD IN THE COUNTY WHERE THE
CHILD IS BORN.
(B) THE PETITION FOR A JUDGMENT OF PARENTAGE MUST BE VERIFIED AND
INCLUDE THE FOLLOWING:
(1) A STATEMENT THAT THE INTENDED PARENTS HAVE BEEN RESIDENTS OF THE
STATE FOR AT LEAST NINETY DAYS OR IF THEY ARE NOT NEW YORK STATE RESI-
DENTS, THE CHILD WAS BORN IN THE STATE; AND
(2) A STATEMENT FROM THE GESTATING MOTHER THAT SHE BECAME PREGNANT AS
A RESULT OF THE DONATION OF THE GAMESES OR EMBRYOS AND A REPRESENTATION
OF NON-ACCESS DURING THE TIME OF CONCEPTION; AND
(3) A STATEMENT THAT THE INTENDED PARENTS CONSENTED TO ASSISTED
REPRODUCTION OR ARTIFICIAL INSEMINATION PURSUANT TO SECTION 581-304 OF
THIS ARTICLE; AND
(4) WHERE THE GAMESES OR EMBRYOS WERE RECEIVED FROM A GAMESE OR EMBRYO
STORAGE FACILITY, AN ATTACHED STATEMENT FROM THE FACILITY HAVING CUSTODY
OF THE GAMESES OR EMBRYOS DEMONSTRATING THE DONATIVE INTENT OF THE
GAMESE OR EMBRYO DONOR.
(C) THE FOLLOWING SHALL BE DEEMED SUFFICIENT PROOF OF A DONOR'S DONA-
TIVE INTENT:
(1) IN THE CASE OF AN ANONYMOUS DONOR, A STATEMENT FROM THE GAMESE OR
EMBRYO STORAGE FACILITY WITH CUSTODY OF THE GAMESES OR EMBRYOS THAT THE
DONOR RELINQUISHED ANY PARENTAL OR PROPRIETARY INTEREST IN THE GAMESES
OR EMBRYOS AT THE TIME OF DONATION; AND
(2) IN THE CASE OF A DONATION FROM A KNOWN DONOR, A NOTARIZED STATE-
MENT FROM THE GAMESE OR EMBRYO DONOR ACKNOWLEDGING THE DONATION AND
CONFIRMING THAT THE DONORS HAVE NO PARENTAL OR PROPRIETARY INTEREST IN
THE GAMESES OR EMBRYOS. IN THE ABSENCE OF A NOTARIZED STATEMENT FROM THE
DONOR, THE DONOR SHALL BE SERVED BY MAIL AT THE DONOR'S LAST KNOWN
ADDRESS WITH NOTICE OF THE PROCEEDING. FAILURE TO RESPOND TO SAID NOTICE
SHALL BE CONSIDERED A DEFAULT AND NO FURTHER NOTICE SHALL BE REQUIRED.
(D) WHERE A PETITION DEMONSTRATES THE CONSENT OF THE INTENDED PARENTS
PURSUANT TO SECTION 581-304 OF THIS ARTICLE, THE DONATIVE INTENT OF THE
GAMESE OR EMBRYO DONORS AND THAT THE PREGNANCY RESULTED FROM THE
DONATION, THE COURT SHALL ISSUE A JUDGMENT OF PARENTAGE:
(1) DECLARING, THAT UPON THE BIRTH OF THE CHILD, THE INTENDED PARENTS
ARE THE ONLY LEGAL PARENTS OF THE CHILD; AND
(2) ORDERING THE INTENDED PARENTS TO ASSUME SOLE RESPONSIBILITY FOR
THE MAINTENANCE AND SUPPORT OF THE CHILD IMMEDIATELY UPON THE BIRTH OF
THE CHILD; AND

(3) ORDERING THAT UPON THE BIRTH OF THE CHILD, A COPY OF THE JUDGMENT
OF PARENTAGE BE SERVED ON THE (I) DEPARTMENT OF HEALTH OR NEW YORK CITY
DEPARTMENT OF MENTAL HEALTH AND HYGIENE, OR (II) REGISTRAR OF BIRTHS IN
THE HOSPITAL WHERE THE CHILD IS BORN AND DIRECTING THAT THE HOSPITAL
REPORT THE PARENTAGE OF THE CHILD TO THE APPROPRIATE DEPARTMENT OF
HEALTH IN CONFORMITY WITH THE COURT ORDER. IF AN ORIGINAL BIRTH CERTIF-
ICATE HAS ALREADY ISSUED, THE COURT SHALL ISSUE AN ORDER DIRECTING THE
APPROPRIATE DEPARTMENT OF HEALTH TO AMEND THE BIRTH CERTIFICATE IN AN
EXPEDITED MANNER AND SEAL THE PREVIOUSLY ISSUED BIRTH CERTIFICATE.

S 581-203. PROCEEDING FOR JUDGMENT OF PARENTAGE OF A CHILD BORN PURSU-
ANT TO A GESTATIONAL CARRIER ARRANGEMENT. (A) THE PROCEEDING MAY BE
COMMENCED AT ANY TIME AFTER THE GESTATIONAL AGREEMENT HAS BEEN EXECUTED
BY ALL OF THE PARTIES. ANY PARTY TO THE GESTATIONAL AGREEMENT NOT JOIN-
ING IN THE PETITION MUST BE SERVED WITH NOTICE OF THE PROCEEDING. FAIL-
URE TO RESPOND TO THE NOTICE SHALL BE CONSIDERED A DEFAULT AND NO
FURTHER NOTICE SHALL BE REQUIRED.

(B) THE PETITION FOR A JUDGMENT OF PARENTAGE MUST BE VERIFIED AND
INCLUDE THE FOLLOWING:

(1) A STATEMENT THAT THE GESTATIONAL CARRIER OR THE INTENDED PARENTS
HAVE BEEN RESIDENTS OF THE STATE FOR AT LEAST NINETY DAYS AT THE TIME
THE GESTATIONAL AGREEMENT WAS EXECUTED; AND

(2) A CERTIFICATION FROM THE ATTORNEYS REPRESENTING THE PETITIONERS
THAT THE PARTIES ARE ELIGIBLE TO PARTICIPATE IN THE GESTATIONAL CARRIER
ARRANGEMENT AS REQUIRED BY SECTION 581-404 OF THIS ARTICLE AND THAT THE
GESTATIONAL AGREEMENT CONTAINS THE REQUIRED TERMS UNDER SECTION 581-405
OF THIS ARTICLE; AND

(3) A STATEMENT THAT THE PARTIES ENTERED INTO THE GESTATIONAL AGREE-
MENT KNOWINGLY AND VOLUNTARILY.

(C) WHERE A PETITION SATISFIES SUBDIVISION (B) OF THIS SECTION, THE
COURT SHALL ISSUE A JUDGMENT OF PARENTAGE, WITHOUT ADDITIONAL
PROCEEDINGS OR DOCUMENTATION:

(1) DECLARING, THAT UPON THE BIRTH OF A CHILD BORN DURING THE TERM OF
THE GESTATIONAL AGREEMENT, THE INTENDED PARENTS ARE THE LEGAL PARENTS OF
THE CHILD; AND

(2) DECLARING, THAT UPON THE BIRTH OF A CHILD BORN DURING THE TERM OF
THE GESTATIONAL AGREEMENT, THE GESTATIONAL CARRIER, AND HER SPOUSE, IF
ANY, ARE NOT THE LEGAL PARENTS OF THE CHILD; AND

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(3) ORDERING THE GESTATIONAL CARRIER AND HER SPOUSE, IF ANY, TO TRANS-
FER THE CHILD TO THE INTENDED PARENTS IF THIS HAS NOT ALREADY OCCURRED;

(4) ORDERING THE INTENDED PARENTS TO ASSUME SOLE RESPONSIBILITY FOR
THE MAINTENANCE AND SUPPORT OF THE CHILD IMMEDIATELY UPON THE BIRTH OF
THE CHILD; AND

(5) ORDERING THAT UPON THE BIRTH OF THE CHILD, A COPY OF THE JUDGMENT
OF PARENTAGE BE SERVED ON THE (I) DEPARTMENT OF HEALTH OR NEW YORK CITY
DEPARTMENT OF MENTAL HEALTH AND HYGIENE, OR (II) REGISTRAR OF BIRTHS IN
THE HOSPITAL WHERE THE CHILD IS BORN AND DIRECTING THAT THE HOSPITAL
REPORT THE PARENTAGE OF THE CHILD TO THE APPROPRIATE DEPARTMENT OF
HEALTH IN CONFORMITY WITH THE COURT ORDER. IF AN ORIGINAL BIRTH CERTIF-
ICATE HAS ALREADY ISSUED, THE COURT SHALL ISSUE AN ORDER DIRECTING THE
APPROPRIATE DEPARTMENT OF HEALTH TO AMEND THE BIRTH CERTIFICATE IN AN
EXPEDITED MANNER AND SEAL THE PREVIOUSLY ISSUED BIRTH CERTIFICATE.

(D) THE AGREEMENT OF THE INTENDED PARENTS TO PAY REASONABLE COMPEN-
SATION TO THE GESTATIONAL CARRIER IN EXCESS OF REASONABLE MEDICAL AND
ANCILLARY COSTS SHALL NOT BE A BAR TO THE ISSUANCE OF A JUDGMENT OF

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PARENTAGE.

S 581-204. PROCEEDING FOR JUDGMENT OF PARENTAGE OF A CHILD WHOSE PARENTAGE IS ESTABLISHED PURSUANT TO SECTION 581-601 OF THIS ARTICLE. A PROCEEDING FOR A JUDGMENT OF PARENTAGE MAY BE COMMENCED BY VERIFIED PETITION TO ESTABLISH PARENTAGE UNDER SECTION 581-601 OF THIS ARTICLE AT ANY TIME IN THE COUNTY OF RESIDENCE OF THE CHILD OR OF A PARENT, INCLUDING A PERSON ASSERTING TO HAVE FORMED A PARENT-CHILD RELATIONSHIP WITH A CHILD UNDER SECTION 581-601 OF THIS ARTICLE. UPON A DETERMINATION OF PARENTAGE UNDER SECTION 581-601 OF THIS ARTICLE, THE COURT SHALL ISSUE A JUDGMENT OF PARENTAGE DECLARING THE PARENTS OF THE CHILD FOR ALL LEGAL PURPOSES.

S 581-205. JUDGMENT OF PARENTAGE FOR INTENDED PARENTS WHO ARE SPOUSES. NOTWITHSTANDING OR WITHOUT LIMITATION ON PREMISES OF PARENTAGE THAT APPLY, A JUDGMENT OF PARENTAGE MAY BE OBTAINED UNDER THIS PART BY INTENDED PARENTS WHO ARE EACH OTHER’S SPOUSE.

S 581-206. JURISDICTION. PROCEEDINGS PURSUANT TO THIS ARTICLE MAY BE INSTITUTED IN THE SUPREME, FAMILY OR SURROGATE’S COURT EXCEPT FOR PROCEEDINGS PURSUANT TO SECTION 581-204 OF THIS PART MAY BE INSTITUTED IN THE SUPREME OR FAMILY COURT.

PART 3

CHILD OF ASSISTED REPRODUCTION OR ARTIFICIAL INSEMINATION

SECTION 581-301. SCOPE OF ARTICLE.

581-302. STATUS OF DONOR.

581-303. PARENTAGE OF CHILD OF ASSISTED REPRODUCTION OR ARTIFICIAL INSEMINATION.

581-304. CONSENT TO ASSISTED REPRODUCTION OR ARTIFICIAL INSEMINATION.

581-305. LIMITATION ON SPOUSES' DISPUTE OF PARENTAGE OF CHILD OF ASSISTED REPRODUCTION AND ARTIFICIAL INSEMINATION.

581-306. EFFECT OF DISSOLUTION OF RELATIONSHIP OF SPOUSES OR WITHDRAWAL OF CONSENT.

581-307. EFFECT OF DEATH OF INTENDED PARENT.

S 581-301. SCOPE OF ARTICLE. THIS ARTICLE DOES NOT APPLY TO THE BIRTH OF A CHILD CONCEIVED BY MEANS OF SEXUAL INTERCOURSE.

S 581-302. STATUS OF DONOR. A DONOR IS NOT A PARENT OF A CHILD CONCEIVED BY MEANS OF ASSISTED REPRODUCTION OR ARTIFICIAL INSEMINATION EXCEPT AS PROVIDED IN SECTION 581-303 OF THIS PART.

S 581-303. PARENTAGE OF CHILD OF ASSISTED REPRODUCTION OR ARTIFICIAL INSEMINATION. (A) AN INDIVIDUAL WHO PROVIDES GAMETES FOR ASSISTED REPRODUCTION OR ARTIFICIAL INSEMINATION WITH THE INTENT TO BE A PARENT OF THE CHILD, OR CONSENTS TO ASSISTED REPRODUCTION OR ARTIFICIAL INSEMINATION AS PROVIDED IN SECTION 581-304 OF THIS PART, IS A PARENT OF THE RESULTING CHILD FOR ALL LEGAL PURPOSES.

(B) UPON APPLICATION BY ANY PARTICIPANT, THE COURT SHALL ISSUE A JUDGMENT OF PARENTAGE TO ANY PARTICIPANT WHO IS A PARENT PURSUANT TO THIS ACT.

S 581-304. CONSENT TO ASSISTED REPRODUCTION OR ARTIFICIAL INSEMINATION. (A) WHERE THE INTENDED PARENT WHO GIVES BIRTH TO A CHILD BY MEANS OF ASSISTED REPRODUCTION OR ARTIFICIAL INSEMINATION IS A SPOUSE, THE CONSENT OF BOTH SPOUSES TO THE ASSISTED REPRODUCTION OR ARTIFICIAL INSEMINATION IS PRESUMED AND NEITHER SPOUSE MAY CHALLENGE THE PARENTAGE OF THE CHILD, EXCEPT AS PROVIDED IN SECTION 581-305 OF THIS PART.

(B) CONSENT TO ASSISTED REPRODUCTION OR ARTIFICIAL INSEMINATION BY AN INDIVIDUAL WHO INTENDS TO BE A PARENT AND IS NOT THE SPOUSE OF THE INTENDED PARENT WHO GIVES BIRTH TO A CHILD BY MEANS OF ASSISTED REPRODUCTION OR ARTIFICIAL INSEMINATION MUST BE IN A SIGNED RECORD WHICH ACKNOWLEDGES THE INTENDED PARENTS' JOINT PARTICIPATION AND INTENTION TO
PARENT TOGETHER.

(C) THE FAILURE OF A PERSON TO SIGN A RECORD EVIDENCING HIS/HER
CONSENT AS PROVIDED IN SUBDIVISION (B) OF THIS SECTION SHALL NOT
PRECLUDE A FINDING THAT SUCH CONSENT EXISTED IF THE COURT FINDS BY CLEAR
AND CONVINCING EVIDENCE THAT AT THE TIME OF THE CHILD'S CONCEPTION OR
BIRTH, BOTH THE INTENDED PARENT WHO GIVES BIRTH TO THE CHILD AND SUCH
PERSON RESIDED IN THE SAME HOUSEHOLD AS INTIMATE PARTNERS, AND HELD
THEMSELVES AND EACH OTHER OUT AS THE PARENTS OF THE INTENDED CHILD.

S 581-305. LIMITATION ON SPOUSES' DISPUTE OF PARENTAGE OF CHILD OF
ASSISTED REPRODUCTION AND ARTIFICIAL INSEMINATION. (A) EXCEPT AS OTHER-WISE PROVIDED IN SUBDIVISION (B) OF THIS SECTION, NEITHER SPOUSE MAY
CHALLENGE THE PRESUMPTION OF PARENTAGE OF THE CHILD UNLESS:
(1) WITHIN TWO YEARS AFTER LEARNING OF THE BIRTH OF THE CHILD A
PROCEEDING IS COMMENCED TO ADJUDICATE PARENTAGE; AND
(2) THE COURT FINDS BY CLEAR AND CONVINCING EVIDENCE THAT EITHER
SPOUSE DID NOT CONSENT FOR THE NON-GESTATING SPOUSE TO BE A PARENT OF
THE CHILD.

(B) A PROCEEDING FOR A JUDGMENT OF PARENTAGE MAY BE MAINTAINED AT ANY
TIME IF THE COURT DETERMINES THAT:
(1) THE SPOUSE DID NOT PROVIDE GAMETES FOR, OR CONSENT TO, ASSISTED
REPRODUCTION OR ARTIFICIAL INSEMINATION BY THE INDIVIDUAL WHO GAVE
BIRTH; AND
(2) THE SPOUSE AND THE INDIVIDUAL WHO GAVE BIRTH HAVE NOT COHABITED
SINCE THE SPOUSE KNEW OR HAD REASON TO KNOW OF THE PREGNANCY; AND
(3) THE SPOUSE NEVER OPENLY HELD OUT THE CHILD AS HIS OR HER OWN.

(C) THE LIMITATION PROVIDED IN THIS SECTION APPLIES TO A SPOUSAL
RELATIONSHIP THAT HAS BEEN DECLARED INVALID AFTER ASSISTED REPRODUCTION
OR ARTIFICIAL INSEMINATION.

S 581-306. EFFECT OF DISSOLUTION OF RELATIONSHIP OF SPOUSES OR WITHDRAWAL OF CONSENT. AN INDIVIDUAL WHO WITHDRAWS CONSENT PRIOR TO TRANSFER IS NOT A PARENT.

S 581-307. EFFECT OF DEATH OF INTENDED PARENT. EXCEPT AS OTHERWISE PROVIDED IN THE ESTATES, POWERS AND TRUSTS LAW, IF AN INDIVIDUAL WHO CONSENTED IN A RECORD TO BE A PARENT BY ASSISTED REPRODUCTION OR ARTIFICIAL INSEMINATION DIES BEFORE THE TRANSFER OF EGGS, SPERM, OR EMBRYOS, THE DECEASED INDIVIDUAL IS NOT A PARENT OF THE RESULTING CHILD UNLESS THE DECEASED INDIVIDUAL CONSENTED IN A SIGNED RECORD THAT IF ASSISTED REPRODUCTION OR ARTIFICIAL INSEMINATION WERE TO OCCUR AFTER DEATH, THE DECEASED INDIVIDUAL WOULD BE A PARENT OF THE CHILD.

PART 4
GESTATIONAL AGREEMENT

SECTION 581-401. GESTATIONAL AGREEMENT AUTHORIZED.

581-402. ELIGIBILITY.

581-403. REQUIREMENTS OF GESTATIONAL AGREEMENT.

581-404. TERMINATION OF GESTATIONAL AGREEMENT.

581-405. GESTATIONAL AGREEMENT: EFFECT OF SUBSEQUENT SPOUSAL RELATIONSHIP.

581-406. FAILURE TO OBTAIN A JUDGMENT OF PARENTAGE.

581-407. DISPUTE AS TO GESTATIONAL AGREEMENT.

581-408. INSPECTION OF RECORDS.

581-409. EXCLUSIVE, CONTINUING JURISDICTION.

S 581-401. GESTATIONAL AGREEMENT AUTHORIZED. (A) IF ELIGIBLE UNDER THIS ARTICLE TO ENTER INTO A GESTATIONAL AGREEMENT, A GESTATIONAL CARRIER, HER SPOUSE IF APPLICABLE, AND THE INTENDED PARENTS MAY ENTER INTO A GESTATIONAL AGREEMENT WHICH WILL BE ENFORCEABLE PROVIDED THE GESTATIONAL AGREEMENT MEETS THE REQUIREMENTS OF THIS ARTICLE.

(B) A GESTATIONAL AGREEMENT SHALL NOT APPLY TO THE BIRTH OF A CHILD

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CONCEIVED BY MEANS OF SEXUAL INTERCOURSE.

(C) A GESTATIONAL AGREEMENT MAY PROVIDE FOR PAYMENT OF COMPENSATION UNDER PART FIVE OF THIS ARTICLE.

(D) A GESTATIONAL AGREEMENT MAY NOT LIMIT THE RIGHT OF THE GESTATIONAL CARRIER TO MAKE DECISIONS TO SAFEGUARD HER HEALTH.

S 581-404. ELIGIBILITY. (A) A GESTATIONAL CARRIER SHALL BE ELIGIBLE TO ENTER INTO AN ENFORCEABLE GESTATIONAL AGREEMENT UNDER THIS ARTICLE IF SHE HAS MET THE FOLLOWING REQUIREMENTS AT THE TIME THE GESTATIONAL AGREEMENT IS EXECUTED:

1. SHE IS AT LEAST TWENTY-ONE YEARS OF AGE; AND
2. SHE HAS COMPLETED A MEDICAL EVALUATION WITH A HEALTH CARE PRACTITIONER RELATING TO THE ANTICIPATED PREGNANCY; AND
3. SHE HAS UNDERGONE LEGAL CONSULTATION WITH INDEPENDENT LEGAL COUNSEL REGARDING THE TERMS OF THE GESTATIONAL AGREEMENT AND THE POTENTIAL LEGAL CONSEQUENCES OF THE GESTATIONAL CARRIER ARRANGEMENT; AND
4. SHE HAS, OR THE GESTATIONAL AGREEMENT STIPULATES THAT PRIOR TO THE EMBRYO TRANSFER, SHE WILL OBTAIN, A HEALTH INSURANCE POLICY THAT COVERS MAJOR MEDICAL TREATMENTS AND HOSPITALIZATION, AND THE HEALTH INSURANCE POLICY HAS A TERM THAT EXTENDS THROUGHOUT THE DURATION OF THE EXPECTED PREGNANCY AND FOR EIGHT WEEKS AFTER THE BIRTH OF THE CHILD; THE POLICY MAY BE PROCURED AND PAID FOR BY THE INTENDED PARENTS ON BEHALF OF THE GESTATIONAL CARRIER PURSUANT TO THE GESTATIONAL AGREEMENT.

(B) THE INTENDED PARENTS SHALL BE ELIGIBLE TO ENTER INTO AN ENFORCEABLE GESTATIONAL AGREEMENT UNDER THIS ARTICLE IF HE, SHE, OR THEY HAVE MET THE FOLLOWING REQUIREMENTS AT THE TIME THE GESTATIONAL AGREEMENT WAS EXECUTED:

1. HE, SHE, OR THEY HAVE UNDERGONE LEGAL CONSULTATION WITH INDEPENDENT LEGAL COUNSEL REGARDING THE TERMS OF THE GESTATIONAL AGREEMENT AND THE POTENTIAL LEGAL CONSEQUENCES OF THE GESTATIONAL CARRIER ARRANGEMENT; AND
2. HE OR SHE IS AN ADULT PERSON WHO IS NOT IN A SPOUSAL RELATIONSHIP, OR ADULT SPOUSES TOGETHER, OR ANY TWO ADULTS WHO ARE INTIMATE PARTNERS TOGETHER, EXCEPT WHERE THE INTENDED PARENT AND HIS OR HER SPOUSE:

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(I) ARE LIVING SEparate AND APART PURSUANT TO A DEGREE OR JUDGMENT OF SEPARATION OR PURSUANT TO A WRITTEN AGREEMENT OF SEPARATION SUBSCRIBED BY THE PARTIES THERETO AND ACKNOWLEDGED OR PROVED IN THE FORM REQUIRED TO ENTITLE A DEED TO BE RECORDED; OR

(II) HAVE BEEN LIVING SEparate AND APART FOR AT LEAST THREE YEARS PRIOR TO EXECUTION OF THE GESTATIONAL AGREEMENT, THEN THE SPOUSE OF THE INTENDED PARENT IS NOT REQUIRED TO BE A PARTY TO THE GESTATIONAL AGREEMENT AND SHALL NOT HAVE PARENTAL RIGHTS OR OBLIGATIONS TO THE CHILD.

S 581-405. REQUIREMENTS OF GESTATIONAL AGREEMENT. (A) A GESTATIONAL AGREEMENT SHALL BE DEEMED TO HAVE SATISFIED THE REQUIREMENTS OF THIS ARTICLE AND BE ENFORCEABLE IF IT MEETS THE FOLLOWING REQUIREMENTS:

1. IT SHALL BE IN A SIGNED RECORD VERIFIED BY THE INTENDED PARENTS, THE GESTATIONAL CARRIER, AND HER SPOUSE, IF ANY; AND
2. IT SHALL BE EXECUTED PRIOR TO THE COMMENCEMENT OF ANY MEDICAL PROCEDURES IN FURTHERANCE OF THE GESTATIONAL CARRIER ARRANGEMENT OTHER THAN MEDICAL EVALUATIONS NECESSARY TO DETERMINE ELIGIBILITY OF THE PARTIES PURSUANT TO SECTION 581-404 OF THIS PART; AND
3. IT SHALL BE EXECUTED BY A GESTATIONAL CARRIER MEETING THE ELIGIBILITY REQUIREMENTS OF SUBDIVISION (A) OF SECTION 581-404 OF THIS PART AND BY THE GESTATIONAL CARRIER'S SPOUSE, IF ANY; AND
4. IT SHALL BE EXECUTED BY INTENDED PARENTS MEETING THE ELIGIBILITY REQUIREMENTS OF SUBDIVISION (B) OF SECTION 581-404 OF THIS PART; AND
5. THE GESTATIONAL CARRIER AND THE INTENDED PARENTS SHALL HAVE BEEN REPRESENTED BY SEPARATE, INDEPENDENT COUNSEL IN ALL MATTERS CONCERNING THE GESTATIONAL CARRIER ARRANGEMENT AND THE GESTATIONAL AGREEMENT; AND

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(6) IF THE GESTATIONAL AGREEMENT PROVIDES FOR THE PAYMENT OF COMPEN-
SATION TO THE GESTATIONAL CARRIER, THE COMPENSATION SHALL HAVE BEEN
PLACED IN ESCROW WITH AN INDEPENDENT ESCROW AGENT PRIOR TO THE GESTA-
TIONAL CARRIER'S COMMENCEMENT OF ANY MEDICAL PROCEDURE OTHER THAN
MEDICAL EVALUATIONS NECESSARY TO DETERMINE THE GESTATIONAL CARRIER'S
ELIGIBILITY; AND

(7) THE GESTATIONAL AGREEMENT MUST INCLUDE THE FOLLOWING TERMS:
(I) AS TO THE GESTATIONAL CARRIER AND HER SPOUSE, IF ANY:
(A) THE AGREEMENT OF THE GESTATIONAL CARRIER TO UNDERGO EMBRYO TRANS-
FER AND ATTEMPT TO CARRY AND GIVE BIRTH TO THE CHILD; AND
(B) THE AGREEMENT OF THE GESTATIONAL CARRIER AND HER SPOUSE, IF ANY,
TO SURRENDER CUSTODY OF ALL RESULTING CHILDREN TO THE INTENDED PARENTS
IMMEDIATELY UPON THE BIRTH; AND
(C) THE RIGHT OF THE GESTATIONAL CARRIER TO UTILIZE THE SERVICES OF A
HEALTH CARE PRACTITIONER OF HER CHOOSING, AFTER CONSULTATION WITH THE
INTENDED PARENTS, TO PROVIDE HER CARE DURING THE PREGNANCY; AND

(II) AS TO THE INTENDED PARENT OR PARENTS:
(A) THE AGREEMENT TO ACCEPT CUSTODY OF ALL RESULTING CHILDREN IMME-
DIATELY UPON BIRTH REGARDLESS OF NUMBER, GENDER, OR MENTAL OR PHYSICAL
CONDITION; AND
(B) THE AGREEMENT TO ASSUME SOLE RESPONSIBILITY FOR THE SUPPORT OF THE
CHILDREN IMMEDIATELY UPON THE CHILDREN'S BIRTH; AND

(C) THE AGREEMENT THAT THE RIGHTS AND OBLIGATIONS OF THE INTENDED
PARENT OR PARENTS UNDER THE GESTATIONAL AGREEMENT ARE NOT ASSIGNABLE.

S 581-406. TERMINATION OF GESTATIONAL AGREEMENT. (A) AFTER ISSUANCE
OF A JUDGMENT OF PARENTAGE PURSUANT TO SECTION 581-203 OF THIS ARTICLE,
BUT BEFORE THE GESTATIONAL CARRIER BECOMES PREGNANT BY MEANS OF ASSISTED
REPRODUCTION, THE GESTATIONAL CARRIER, HER SPOUSE, IF ANY, OR EITHER OF
THE INTENDED PARENTS MAY TERMINATE THE GESTATIONAL AGREEMENT BY GIVING
NOTICE OF TERMINATION IN A RECORD TO ALL OTHER PARTIES AND ANY LIABILITY
RESULTING THEREFROM WILL BE DETERMINED PURSUANT TO SECTION 581-408 OF
THIS PART.

(B) AN INDIVIDUAL WHO TERMINATES A GESTATIONAL AGREEMENT UNDER THIS
SECTION SHALL FILE NOTICE OF THE TERMINATION WITH THE COURT. ON RECEIPT
OF THE NOTICE, THE COURT SHALL VACATE THE JUDGMENT OF PARENTAGE ISSUED
UNDER THIS ARTICLE.

S 581-407. GESTATIONAL AGREEMENT: EFFECT OF SUBSEQUENT SPOUSAL
RELATIONSHIP. AFTER THE EXECUTION OF A GESTATIONAL AGREEMENT UNDER THIS
ARTICLE, THE SUBSEQUENT SPOUSAL RELATIONSHIP OF THE GESTATIONAL CARRIER
DOES NOT AFFECT THE VALIDITY OF A GESTATIONAL AGREEMENT, HER SPOUSE'S
CONSENT TO THE AGREEMENT SHALL NOT BE REQUIRED, AND HER SPOUSE SHALL NOT
BE THE PRESUMED PARENT OF THE RESULTING CHILD.

S 581-408. FAILURE TO OBTAIN A JUDGMENT OF PARENTAGE. WHERE THE
INTENDED PARENTS OR THE GESTATIONAL CARRIER FAIL TO OBTAIN A JUDGMENT OF
PARENTAGE PURSUANT TO SECTION 581-203 OF THIS ARTICLE, THE PARENTAGE OF
A CHILD BORN AS THE RESULT OF A GESTATIONAL CARRIER ARRANGEMENT WILL BE
DETERMINED BASED ON THE BEST INTERESTS OF THE CHILD TAKING INTO ACCOUNT
GENETICS AND THE INTENT OF THE PARTIES.

S 581-409. DISPUTE AS TO GESTATIONAL AGREEMENT. (A) ANY DISPUTE WHICH
IS RELATED TO A GESTATIONAL AGREEMENT OTHER THAN DISPUTES AS TO PARENT-
AGE SHALL BE RESOLVED BY THE SUPREME COURT, WHICH SHALL DETERMINE THE
RESPECTIVE RIGHTS AND OBLIGATIONS OF THE PARTIES. IF A GESTATIONAL
AGREEMENT DOES NOT MEET THE REQUIREMENTS OF THIS ARTICLE, THE AGREEMENT
IS NOT ENFORCEABLE.

(B) EXCEPT AS EXPRESSLY PROVIDED IN THE GESTATIONAL AGREEMENT, THE
INTENDED PARENT OR PARENTS AND GESTATIONAL CARRIER SHALL BE ENTITLED TO
ALL REMEDIES AVAILABLE AT LAW OR EQUITY IN ANY DISPUTE RELATED TO THE
GESTATIONAL AGREEMENT.
(C) THERE SHALL BE NO SPECIFIC PERFORMANCE REMEDY AVAILABLE FOR A 
BREACH BY THE GESTATIONAL CARRIER OF A GESTATIONAL AGREEMENT TERM THAT 
REQUIRES HER TO BE IMPREGNATED.
S 581-410. INSPECTION OF RECORDS. THE PROCEEDINGS, RECORDS, AND IDEN-
TITIES OF THE INDIVIDUAL PARTIES TO A GESTATIONAL AGREEMENT UNDER THIS 
ARTICLE SHALL BE SEALED EXCEPT UPON THE PETITION OF THE PARTIES TO THE 
GESTATIONAL AGREEMENT OR THE CHILD BORN AS A RESULT OF THE GESTATIONAL 
CARRIER ARRANGEMENT.
S 581-411. EXCLUSIVE, CONTINUING JURISDICTION. SUBJECT TO THE JURIS-
DICTIONAL STANDARDS OF SECTION SEVENTY-SIX OF THE DOMESTIC RELATIONS 
LAW, THE COURT CONDUCTING A PROCEEDING UNDER THIS ARTICLE HAS EXCLUSIVE, 
CONTINUING JURISDICTION OF ALL MATTERS ARISING OUT OF THE GESTATIONAL 
AGREEMENT UNTIL A CHILD BORN TO THE GESTATIONAL CARRIER DURING THE PERI-
OD GOVERNED BY THE AGREEMENT ATTAINS THE AGE OF ONE HUNDRED EIGHTY DAYS.

PART 5
PAYMENT TO DONORS AND GESTATIONAL CARRIERS
SECTION 581-501. REIMBURSEMENT.
S 581-501. REIMBURSEMENT. (A) A DONOR WHO HAS ENTERED INTO A VALID 
AGREEMENT TO BE A DONOR, MAY RECEIVE REIMBURSEMENT FROM AN INTENDED 
PARENT OR PARENTS FOR ECONOMIC LOSSES INCURRED IN CONNECTION WITH THE 
DONATION WHICH RESULT FROM THE RETRIEVAL OR STORAGE OF GAMETES OR EMBR-
YOS. (B) PREMIUMS PAID FOR INSURANCE AGAINST ECONOMIC LOSSES DIRECTLY 
RESULTING FROM THE RETRIEVAL OR STORAGE OF GAMETES OR EMBRYOS FOR 
DONATION MAY BE REIMBURSED. S 4617

S 581-502. COMPENSATION. (A) COMPENSATION MAY BE PAID TO A DONOR OR 
GESTATIONAL CARRIER BASED ON SERVICES RENDERED, EXPENSES THAT HAVE BEEN 
OR WILL BE INCURRED, TIME, AND INCONVENIENCE. UNDER NO CIRCUMSTANCES MAY 
COMPENSATION BE PAID TO PURCHASE GAMETES OR EMBRYOS OR TO PAY FOR THE 
RELINQUISHMENT OF A PARENTAL INTEREST IN A CHILD. (B) THE COMPENSATION, IF ANY, PAID TO A DONOR OR GESTATIONAL CARRIER 
MUST BE REASONABLE AND NEGOTIATED IN GOOD FAITH BETWEEN THE PARTIES, AND 
SAID PAYMENTS TO A GESTATIONAL CARRIER SHALL NOT EXCEED THE DURATION OF 
THE PREGNANCY AND RECUPERATIVE PERIOD OF UP TO EIGHT WEEKS AFTER THE 
BIRTH OF THE CHILD. (C) COMPENSATION MAY NOT BE CONDITIONED UPON THE PURPORTED QUALITY OR 
GENOME-RELATED TRAITS OF THE GAMETES OR EMBRYOS. (D) COMPENSATION MAY NOT BE CONDITIONED ON ACTUAL GENOTYPIC OR PHENO-
TYPOIC CHARACTERISTICS OF THE DONOR OR OF THE CHILD.

PART 6
FORMATION OF LEGAL PARENT-CHILD RELATIONSHIP AFTER BIRTH OF CHILD
SECTION 581-601. DETERMINATION OF PARENTHOOD.
S 581-601. DETERMINATION OF PARENTHOOD. (A) A PERSON SEEKING TO QUAL-
IFY FOR A JUDGMENT OF PARENTAGE UNDER THIS PART IS REFERRED TO HEREIN AS 
"PETITIONER". (B) THE COURT SHALL ISSUE A JUDGMENT OF PARENTAGE TO A PETITIONER WHO 
DEMONSTRATES THE FOLLOWING BY CLEAR AND CONVINCING EVIDENCE:
(1) THE PARENT OR PARENTS OF A CHILD CONSENTED TO THE PETITIONER'S 
FORMATION OF A PARENT-CHILD RELATIONSHIP WITH THE CHILD, SUCH CONSENT TO 
BE EXPRESSED IN WRITTEN FORM, INCLUDING BUT NOT LIMITED TO, ANY OF THE 
FOLLOWING EXAMPLES: A SIGNED LETTER AGREEMENT, AN EXECUTED CONTRACT, A 
BIRTH ANNOUNCEMENT, A RELIGIOUS CEREMONY DOCUMENT, OR A SCHOOL OR 
MEDICAL RECORD; AND
(2) PETITIONER RESIDED IN THE SAME HOUSEHOLD WITH THE CHILD FOR A 
LENGTH OF TIME SUFFICIENT, GIVEN THE AGE OF THE CHILD, TO HAVE ESTAB-
lished with the child a bonded, dependent relationship parental in
nature; and

(3) Petitioner performed parental functions for the child to a signif-
icant degree; and

(4) Petitioner formed a parent-child bond with the child.

(C) Petitioner under this part shall not include a grandparent of such
minor child, a person whose relationship with the child is based on
payment by the parent, or a person who has not at any time been an inti-
mate partner with a parent of the child.

(D) Petitioner qualifying as a parent under this section shall be
deemed to be the legal parent of such child for all purposes.

(E) A judgment of paternity shall be issued pursuant to section
581-204 of this article confirming establishment of a parent-child
relationship as provided in this part.

PART 7
MISCELLANEOUS PROVISIONS

SECTION 581-701. REMEDIAL.

581-702. SEVERABILITY.

581-703. PARENT UNDER SECTION SEVENTY OF THE DOMESTIC RELATIONS
LAW.

S 581-701. REMEDIAL. THIS LEGISLATION IS HEREBY DECLARED TO BE A
REMEDIAL STATUTE AND IS TO BE CONSTRUED LIBERALLY TO SECURE THE BENEFI-
CIAL INTERESTS AND PURPOSES THEREOF FOR THE BEST INTERESTS OF THE CHILD.
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S 581-702. SEVERABILITY. THE INVALIDATION OF ANY PART OF THIS LEGIS-
LATION BY A COURT OF COMPETENT JURISDICTION SHALL NOT RESULT IN THE
INVALIDATION OF ANY OTHER PART.

S 581-703. PARENT UNDER SECTION SEVENTY OF THE DOMESTIC RELATIONS LAW.
THE TERM "PARENT" IN SECTION SEVENTY OF THE DOMESTIC RELATIONS LAW SHALL
INCLUDE A PERSON ESTABLISHED TO BE A PARENT UNDER THIS ARTICLE OR ANY
OTHER RELEVANT LAW.

S 2. Section 73 of the domestic relations law is REPEALED.

S 3. Article 8 of the domestic relations law is REPEALED.

S 4. This act shall take effect on the one hundred twentieth day after
it shall have become a law. Effective immediately, the addition, amend-
ment and/or repeal of any rule or regulation necessary for the implemen-
tation of this act on its effective date is authorized to be made on or
before such date.