Family Law Fall 2011

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ESSAY QUESTION

In Year 1, Theresa and Fiona, who are both women, had a commitment ceremony where they exchanged vows to love each other as intimate partners for eternity, with 100 guests there to celebrate. About two weeks before the ceremony, the women negotiated and signed a contract with terms that simply provided: "In the event we break up, we each agree to be governed by the economic rights and responsibilities as provided in the divorce laws of the state of Delavania." Neither Theresa nor Fiona was represented by counsel—they drafted the agreement themselves. However, they did exchange a written listing of their assets and incomes. At the time, Theresa was a nurse earning \$60,000 per year, and owned the home the couple lived in together after the ceremony. The home was worth \$300,000 with an outstanding mortgage of \$200,000. Theresa also had a money market bank account in her sole name with \$25,000 in cash. Fiona was a lawyer with 3 years post graduation experience, earning \$75,000 per year. She had no assets. Although she neglected to mention it in the listing she gave Theresa, Fiona had outstanding student loans of \$50,000.

Just after the ceremony, the couple began fluidly sharing their earnings and expenses. They opened a joint checking account as tenants in common, and both contributed their earnings from employment into this account. All expenses were paid out this account as well, including the mortgage on the house, and Fiona's law school debt payments. Every few months when money accumulated in the joint account that was not needed to cover expenses, Theresa transferred money from there to her money market account. Fiona agreed to this, because they both saw the money market account as a savings account for the future, and it paid interest.

Life was pretty good, but still, the couple felt something was missing. In Year 5, Theresa and Fiona agreed that they should have and raise a child together. So, through a fertility clinic, Theresa was inseminated with sperm from an anonymous donor that they selected together. She became pregnant and gave birth to a baby girl named Sunny that was the light of both women's lives. After Sunny's birth, with Fiona's full agreement, Theresa never went back to work. Instead she stayed at home to care for the child and also took on the role of keeper and manager of the family household. Both were terrific parents. Sunny was thriving and bonded deeply to them both. However, Theresa was clearly the primary caregiver.

Fiona's career was taking off and she was working 50 hours a week on average. She had become a near superstar personal injury attorney. After years of working on it, she won a big medical malpractice case and received a multi-million dollar contingency fee award. Fiona placed the fee proceeds into the couple's joint account. After that, clients sought her out, flooding her solo practice with new cases. She had enough cases now in the pipeline to keep her busy for years and years. Hopefully these cases too would pay off, and the contingency fees would keep coming in.

When Sunny was 5 years old, the couple attempted to have Fiona legally adopt Sunny. However, they were shocked to learn that Delavania did not permit "second parent" adoptions for same sex couples. Understandably, the women are very upset—especially Fiona.

QUESTION: Fiona comes to your law firm looking for your legal counsel. Taking the situation as it is, she wants to know what would likely happen if she and Theresa break up both in terms of economic rights and responsibilities, and in terms of her relationship with Sunny. Second, Fiona wants to know whether the ban on second parent adoption might be found to violate the U.S. constitution. Write a letter to Fiona that fully identifies and evaluates these and any other issues raised by the facts, and be sure to address all sides.

PLEASE NOTE: Assume that Delavania, a fictional state, has the same family law rules as Pennsylvania has with two exceptions: 1) there is the ban on second parent adoption; and 2) Delavania does not recognize common law marriages created within the state.