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What is a Parent? New York Courts Continue to Define the Term in the Wake of BROOKE S.B.

By Christopher Chimeri

The presumption of legitimacy is a strong one, public policy being that children born during a valid marriage are a child of that union. (See, Family Court Act § 418.) But what say the policy-makers about children raised by unwed parents? Marriage equality only took effect in New York in 2011. Many families with parents identifying as LGBTQ were formed, in whole or in part, prior. Because of the seemingly endless permutations of family formation, the question posed in this article is evolving virtually monthly in New York Domestic Relations litigation.

To start, since 2011, New York requires a gender-neutral reading to parentage statutes. (See, Domestic Relations Law § 10-a.) However, it was not until 2016 that the New York State Court of Appeals overruled the infamous 1991 case, *Alison D. v. Virginia M.*, which held that an unwed, non-biologically related romantic partner to a biological parent did not, absent other legal grounds, have standing to petition for custody and visitation, those rights being reserved exclusively for "parents." *Brooke S.B.* 28 N.Y.3d 1 (2016). The focus in *Brooke S.B.*, however, was the issue of "standing to seek custody and visitation." Impliedly, because only "parents" have standing to seek custody and visitation under the DRL, the Court of Appeals was really being asked to declare what, other than biology, in case-specific inquiries, makes one a "parent?" The court, in setting a narrow test on the record before it, cautiously declared that in circumstances where a party can show, by clear and convincing evidence, that there was a pre-conception agreement to conceive and raise a child as co-parents, that person is a parent who has standing to seek custody or visitation rights. The court explicitly rejected "a test that will apply in determining standing as a parent for all non-biological, non-adoptive, non-marital "parents" who are raising children.

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However, relying on the state's highest court now allowing equitable doctrines to apply in proceedings to determine parentage, following *Brooke S.B.*, there have been several cases of note that indicate the trend in judicial scrutiny of conferring truly equal rights on petitioners in custody and visitation proceedings; that is, the inquiry turns not on gender or sexual identity, but on the child's best interests, as with heterosexual families.

In March 2017, Suffolk County's own Justice H. Patrick Leis III referred as a "logical extension" of *Brooke S.B.* when his court issued an unprecedented (for New York) tri-custody order, granting the custody petition brought by the divorcing wife of the child's biological father in *Dawn M. v. Michael M.,* 2017 N.Y. Slip Op. 27073 (Sup. Ct., Suffolk Co., March 8, 2017). "The Court of Appeals in *Brooke S.B.* stressed that its decision only addressed the ability of a person who was not a biological or adoptive parent to establish standing as a parent to petition for custody and visitation, and that the ultimate determination of whether to grant those rights rests in the sound discretion of trial courts in determining the best interests of the child," wrote Leis, who found, based on "the evidence adduced at trial, including the demeanor and credibility of all three witnesses, the in camera interview and the factual findings made by this court," it is clear that the best interests of J.M. will be served by granting plaintiff's application for shared legal custody with defendant."

Two months later, Rockland County Family Court Judge Rachel E. Tanguay found that in a lesbian couple, who had children and raised them together as a family for several years before parting, the co-parent was entitled to an Order of Filiation recognizing her parental status for all purposes. This appears a case of first impression in New York [whether an unwed same-sex partner may petition for an Order of Filiation]. The Family Court Judge aptly pointed out that "at first blush, it would appear that the Court of Appeals in *Brooke* was attempting to limit its holding to conferring standing to a party only. But, the central question was "broadening the definition of 'parent' to include non-biological, non-legal 'parent[s]' under certain circumstances." Justice Leis may concur too, as the right to petition for an Order of Filiation [declaring one to be a parent of a subject child] is certainly a "logical extension" of *Brooke*.

From a practical perspective, one may petition for an order of filiation, following which, if established, the petitioner can seek custody/visitation and proceed directly to an inquiry of "what is in the child[ren]'s best interests," or standing may be plead in the custody and visitation petition and, if challenged, the court will conduct a hearing on the issue. However, the net effect is the same. The court is called upon to determine, absent biology, whether the petitioner is, in fact, a parent to the child, which is no new concept, referring to decades of filiation proceedings surrounding child support.

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