LGBTQ

Recognition of LGBT Parenthood is the Trend, But Not Absolute

By Christopher J. Chimeri

A Kentucky Appellate Court recently rejected a lesbian co-parent custody and visitation claim, despite that such rights were recognized in the lower Family Court. Specifically, on Nov. 30, the Court of Appeals of Kentucky reversed a decision by a Jefferson Circuit Court Judge and ruled that T.W., the former romantic/life partner of T.D., is not entitled to joint custody and parenting time with a child born to T.D. during the women's relationship.

Why do we here in Suffolk County care about some intermediate appellate case from Kentucky? The case has majority and concurring opinions that each contain commentary that certain appellate courts, not just this bench in Kentucky, are interpreting the U.S. Supreme Court's marriage equality decision, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), to require a bright-line test for parentage, which, if such an interpretation were to gain traction, would substantially impede the clear intention of the SCOTUS decision and limit the rights of unwed LGBT parents. Many of the cases now coming before the various Family and Supreme courts in New York with LGBT parentage issues contain fact patterns that do not fit squarely within the typical molds of "mom, dad," and like labels. In these innumerable "cases of first impression," the *Amici* briefs and other literature often involved includes authority from many other jurisdictions. Indeed, once in "uncharted waters," courts are free to consider as persuasive authority from other jurisdictions. Accordingly, we must watch other jurisdictions besides New York.


Christopher J. Chimeri

At present, the only "bright line test" in New York for standing/parentage, besides a biological definition, is that resulting from *Brooke S.B. v. Elizabeth A.C.C.,* 28 N.Y.3d 1 (2016) (holding that to be entitled to visitation rights, a petitioner whom is neither a biological or an adoptive parent must prove, by clear and convincing evidence, a pre-conception agreement to co-parent), and that bright line test is extremely limited. The court left open the many other concepts, such as equitable estoppel, that can result in parentage. Rulings such as the case of *Delaney v. Whitehouse*, 2018 WL 6266774 (Ky. Ct. App., Nov. 30, 2018) can substantially narrow the rights of unwed LGBT parents.

What is concerning is that in the decision the Appellate Court accepted Judge McDonald's factual findings but wrangles their legal significance. The parties were in a romantic relationship and participated jointly in the decision to have a child, including the insemination process. "The parties treated each other as equal partners and clearly intended to create a parent-like relationship" between [the non-biological mother] and the child. The court also recognized that "they held themselves out as the parents of this child since before conception." Even after the child's birth, the two partners "participated in a union ceremony and held themselves out as a family unit with friends and family." Yet, the appeals court found it significant that "[T.D. and T.W.] made no efforts to formalize the custody status of the child at any point and the child bore only [T.D.]'s name. Although the parties did participate in a union ceremony after the child was born, that was not a legally cognizable marriage ceremony. Neither did the parties attempt to formalize their relationship after the decision of the United State Supreme Court in *Obergefell v. Hodges*" (it is noted in the decision that the union ceremony pre-dated *Obergefell* by a month).

That the parents "made no efforts to formalize the custody status" is the very reason courts are called upon. It should be universally recognized by now that for so many reasons, including cost, timing of relationships, and sometimes, the public's lack of understanding of complicated and illogical legal principles pertaining to parental rights, many LGBT families do not involve a lawyer in their family planning. Thus, for the court to painstakingly search out a distinction between a "parent-like" relationship and "parental rights" is concerning as more "cases of first impression" come before our courts.

In addition, the Kentucky Court found it significant that the biological mother, once

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TAX

Unwinding an Unwanted Transaction

By Louis Vlahos

This is part one of a two part series.

As kids playing ball, we learned about the "do-over" rule, pursuant to which the player in question was allowed to try again, without penalty, whatever it was that they were doing. As we got older and our games changed, some of us learned about "taking a mulligan," again without penalty.[1] It may not come as a surprise, therefore, that a variation of this principle has found its way into the tax law. It is called the "rescission doctrine," and although it has been recognized for many years, it has been applied only in limited circumstances.

However, as we entered the final month of 2018, I found myself facing two situations in which the application of the rescission doctrine afforded the only solution for avoiding some adverse tax consequences.

Requirements

In general, the tax law treats each taxable year of a taxpayer as a "separate unit" for tax accounting purposes, and requires that one look at a particular transaction on an "annual basis," using the facts as they exist at the end of the taxable year; in other words, one determines the tax consequences of the transaction at the end of the taxable year in which it occurred, without regard to events in subsequent years.

It is this basic principle of the annual accounting concept that underlies the rescission doctrine, and from which is derived the requirement, set forth below, that the rescission occur before the end of the taxable year in which the transaction took place.[2]


Louis Vlahos

According to the IRS,[3] the legal concept of "rescission" (i) refers to the canceling or voiding of a contract or transaction, that (ii) has the effect of releasing the parties from further obligations to each other, and (iii) restores them to the relative positions they would have occupied had no contract been made or transaction completed.

A rescission may be affected by mutual agreement of the parties, by one of the parties declaring a rescission of the contract without the consent of the other (if sufficient grounds exist), or by applying to the court for a decree of rescission.

It is imperative, based on the annual accounting concept, that the rescission occur before the end of the taxable year in which the transaction took place.

If these requirements are satisfied, then the rescinded transaction is ignored for tax purposes, treated as though it never occurred.

Thus, a sale may be disregarded for federal income tax purposes where the sale is rescinded within the same taxable year that it occurred, and the parties are placed in the same positions as they were prior to the sale.[4]

If the foregoing requirements are not satisfied, the rescission will not be respected, the tax consequences of the original transaction will have to be reported, and the "unwinding" of the original transaction will be analyzed as a separate event that generated its own tax consequences.

Why rescind?

Whether the IRS will accept the parties' claimed rescission of a particular transaction will, of course, depend upon the application of the above criteria to the facts and circumstances of the particular case.

Although the IRS has stated that it is studying the issue of rescission, and it has not issued letter rulings on the subject since 2012,[5] there are a number of earlier rulings to which taxpayers may turn for guidance regarding the IRS's views.

These rulings illustrate some of the reasons for rescinding a transaction, as well as some of the means by which the rescission may be effectuated.

For example, the IRS has accepted the rescission of a transaction where the transaction was undertaken for a bona fide business reason, but without a proper understanding of the resulting tax consequences. When the parties realized what they had done, they sought to rescind the transaction and thereby avoid the unexpected adverse tax consequences;[6] in one ruling, the parties not only rescinded the transaction, but then "did it over" so as to achieve the desired result.[7]

The IRS has also looked favorably on the rescission of a transaction where, due to changed circumstances, the business purpose for the transaction no longer existed.[8]

Thus, it appears that either a legitimate tax purpose or a bona fide business purpose may be the motivating factor for a rescission.

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[1] I am not a golfer, and never will be, though I do enjoy the dinners that follow many golf outings.

[2] The rescission allows the taxpayer to view the transaction "using the facts as they exist at the end of the taxable year" – i.e., as though the transaction never occurred.

[3] Rev. Rul. 80-58.

[4] Stated simply: the property is returned to the seller and the cash is returned to the buyer.

[5] Rev. Proc. 2012-3. This no-ruling policy was reaffirmed in Rev. Proc. 2019-3.

[6] See, e.g., PLR 200309009 (rescinding a distribution of property that would have disqualified taxpayers from the low income housing credit). Moreover, it does not appear to matter whether the transaction to be rescinded was undertaken between unrelated persons or within a group of related taxpayers.

[7] PLR 201211009 (rescinded a stock sale that did not qualify for a Sec. 338(h)(10) election; substituted a new buyer for which the election would be available).

[8] See, e.g., PLR 200923010 (rescinding a spin-off where changes in the business environment and in management subsequent to the distribution negated the benefit of the spin-off).

Bench Briefs (Continued from page 4)

tion of the original parties to the restrictive covenant, or the surrounding circumstances, which would permit a trier of fact to do more than subjectively determine the scope of the restrictive covenant.

In *Birch Tree Partners LLC v. Windsor Digital Studio LLC,* Index No.: 1350/2010, decided on Feb. 2, 2018, the court granted the defendant's cross motion for summary judgment. The court determined that the defendant established a prima facie entitlement to summary judgment dismissing the complaint on the grounds that the restrictive covenant was ambiguous, that the plaintiff could not establish the application and scope of the restrictive covenant by clear and convincing evidence, and that it could not be found to have violated the subject restrictive covenant.

In response, the plaintiff contended that pursuant to the language of the restrictive covenant, the defendant could not erect a building or structure and that the defendant could not remove any desirable trees or vegetation which would injure the appearance of the strip or parcel and detract from its use as a screen between premises.

The court concluded that the plaintiff failed to submit any evidence or raise an issue of fact regarding the intention of the original parties to the restrictive covenant, or the surrounding circumstances, which would permit a trier of fact to do more than subjectively determine the scope of the restrictive covenant. The court further stated that when a restrictive covenant is equally capable of two interpretations, the interpretation which limits the restriction must be adopted. Accordingly, the court granted the defendant's cross-motion dismissing the complaint.

Honorable John H. Rouse

Motion in limine *granted to the extent provided in the decision; preclusion from offering photographs of bollards and chains/cables that were not of the precise location where plaintiff tripped and fell; preclusion from offering evidence as to other trips and falls; preclusion from offering evidence of negligent supervision claim.*

In *C. S., an Infant by her Father and Natural Guardian, Paul Simon v. Comsewoque School District,* Index No.: 8029/2012, decided on Sept. 17, 2018, the court granted the motion *in limine* to the extent provided therein. With regard to photographs, plaintiff was precluded from publishing to the jury or offering into evidence photographs of bollards and chains/cables that were not of the precise location where the plaintiff tripped and fell. In considering whether to admit the photographs, the court was concerned that the jury would be confused by the unrelated photographs. As to evidence of other trips and falls, plaintiff was precluded from offering the notice of claim from another unrelated trip and fall and from offering any evidence of other trip and falls at the premises in the absence of a proffer of relevant and competent evidence. As top the claim for negligent supervision, the cause of action was included in the complaint, but was never made in the notice of claim. Plaintiff was precluded from offering evidence for the purposes of advancing a claim of negligent supervision.

Please send future decisions to appear in "Decisions of Interest" column to Elaine M. Colavito at elaine_colavito@live.com. There is no guarantee that decisions received will be published. Submissions are limited to decisions from Suffolk County trial courts. Submissions are accepted on a continual basis.

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Cybersecurity: the Standard of Care (Continued from page 6)

is to purchase a policy that is specific to cyber-related losses.

Don't rely on technology providers to protect you

With e-discovery becoming a fundamental element of federal court litigation, litigators have an additional duty to protect any confidential documents received during litigation whether or not there is a protective order outstanding. The attorney of record in the litigation has a non-delegable duty to oversee the cybersecurity practices of their litigation technology vendors.

The global standard for information security is ISO 27001 and it provides reasonable assurance that security best practices are being followed. Compliance, while important, is not security.

Professional responsibility for client data does not end when a transaction is completed, or a case is closed. Once documents are collected and digitized or received in electronic form, the data is in the firm's custody and control and will remain there. Data retention and destruction practices cannot be overlooked.

Be wary and beware

Regulatory agencies and law enforcement organizations such as the attorney general are not just interested in the cyber criminals, they are coming after the custodians of the data for failure to properly protect it.

Note: Victor John Yannacone Jr. is an advocate, trial lawyer, and litigator practicing today in the manner of a British barrister by serving of counsel to attorneys and law firms locally and throughout the United States in complex matters. He has been continuously involved in computer science since the days of the first transistors in 1955 and actively involved in design, development, and management of relational databases. He pioneered in the development of environmental systems science and was a cofounder of the Environmental Defense Fund. He can be reached at (631) 475–0231, or vyannacone@yannalaw.com, and through his website https://yannalaw.com.

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the parties split, did not allow T.W. "to continue to participate in parenting responsibilities with the child," which the court used to suggest that the co-parent was merely a friend or caretaker. In a union between man and woman, most courts would consider this a form of parental alienation or active interference with the relationship between one parent and the child.

Even worse for precedential value, the trial court had found that it was in the child's best interests that the parties have joint legal custody and that they share parenting time. The Appellate Court, upon divesting the non-biological mother of parentage, thus ignored the trial court's best interest conclusion.

Other arguments that "miss the boat," but are often espoused in favor of narrow decisions such as the Kentucky one here are such as, in words or substance, "because same sex couples can now marry, there is no longer any need for the law to recognize parental rights in unmarried co-parents," and "choosing not to marry or adopt when the opportunity is available should be deemed to fully contradict all allegations by anyone seeking rights to another person's child."

It is human nature, and resultantly, typical legal practice, to start with "definitions" or "classifications" and then address a problem, dispute or issue based on those labels. People generally seek bright lines that lead to clear-cut answers and the general public overwhelmingly looks to lawyers and courts daily for those absolutes. Lawyers are regularly criticized for answering a question beginning with "it depends," but sometimes, much to the chagrin of a lay person, it has to "depend," because not all situations are the same. Families have evolved and expanded — for the law to fail to adapt and evolve with the modern family would be a tragic abdication of responsibility by the judicial system as a whole,

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Party Admissions, Electronic Evidence (Continued from page 5)

them. There can be no objection to this (the usual, misplaced objection is that you're reading from something not in evidence; this is of course, a clever fallacy, since you can ask your witness anything you want; the answer is given freely by the witness, and can be yes, no, or I don't remember. Of course, if the witness does not remember, you are free to refresh their recollection with anything under the sun, including, you guessed it, the text message you were just asking about).

The proffer for this method (and to overcome the usual objections) is contained in the triumvirate of non-hearsay exceptions that are always on hand: a) state of mind exception; b) serves to complete a narrative; and c) goes to the ultimate issue: best interests of the child as to custody.

Note: Vesselin Mitev is a partner at Ray, Mitev & Associates, LLP, a New York litigation boutique with offices in Manhattan and on Long Island. His practice is 100 percent devoted to litigation, including trial, of all matters including criminal, matrimonial/family law, Article 78 proceedings and appeals.