Just 'TRI' it: Tri-Parent Custody Arrangements Arise in the Wake of Parentage by Estoppel

By Christopher J. Chimeri

The "legacy" of the Court of Appeals' 2016 decision in *Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1 (2016) (and its companion case, Jennifer L.D. v. Estrelitta A.C-C.) is that there are six pathways to parentage in New York state: (1) biology, (2) adoption, (3) equitable estoppel, (4) judicial estoppel, (5) presumption of legitimacy, and (6) pre-conception parentage agreement. But, what happens where two biological, adoptive, or judicially determined parents are in the picture and a third person petitions and meets one of the aforementioned six pathways?

Footnote 3 in *Brooke S.B.*, in which the court stated: "[w]e note that by the use of the term "either," the plain language of Domestic Relations Law § 70 clearly limits a child to two parents, and no more than two, at any given time" does not end the inquiry, and courts are presented with this issue presently, both at the trial and appellate level.

Suffolk County's own Justice H. Patrick Leis was the first to confront such an arrangement in the post-*Brooke* era. In *Dawn M. v. Michael M.*, 55 Misc. 3d 865 [Sup. Ct. Suffolk Cty. 2017], three parties were intimate with one another and they considered themselves a family and decided to have a child together (*id.* at 866). Two of the three parties engaged in unprotected sex to conceive the child but all three agreed that they "would all raise the child together as parents" (*id.* at 867). That court likewise granted a three-parent custody and visitation order, finding that "tri-custody is the logical evolution of the Court of Appeals' decision in Brooke S.B., and the passage of the Marriage Equality Act and Domestic Relations Law § 10-a which permits same-sex couples to marry in New York" (id. at 870).

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The Second Department, without directly speaking to 'tri-custody,' also permitted three individuals to have custodial rights to the same children. In a matter in which a biological mother, biological father and non-biological father all maintained custody/visitation petitions in the Family Court and in two separate opinions, the Second Department permitted first all petitions to proceed to trial and then, a decision to stand in which all three petitioners had parental access. *Matter of Frank G. v. Renee P.-F.*, 142 A.D.3d 928 (2d Dep't 2016), *In re Giavonna F. P.-G.*, 142 A.D.3d 931 (2d Dep't 2016), *lv. denied*, 32 N.Y.3d 910 (2016); *Matter of Renee P.-F. v. Frank G.*, 161 A.D.3d 1163 (2d Dep't 2018). In the numerous cases that make up *Frank G.*, a biological father and his partner entered into a surrogacy agreement (that was ultimately held invalid) with the non-biological partner's sister. The sister birthed twins and the children were raised as children of the biological father and the non-biological father. After the pair split, both the biological mother and the non-biological father sought custody in family court, the mother, alleging to be the biological mother of the children notwithstanding the surrogacy agreement, citing DRL § 124, and the non-biological, non-adoptive father, alleging facts that qualified him as a parent under the *Brooke S.B.* pre-conception agreement test. In one of many decisions involving this family, the Appellate Division held that [non-biological father] had standing to seek custody under *Brooke S.B.*, while also affirming the biological mother's parental rights, thus creating a tri-parent arrangement despite not using the term. The biological father appealed, arguing that Footnote 3 of *Brooke S.B.* prohibited this, but leave was denied.

Consideration of a third parent necessarily connotes reliance on either Family Court

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Opinion — LGBTQ Rights in the Legal Profession: It is political!

By Debra Brown

Even though there will be no parades or festive events this year, June is still LGBTQ Pride Month and it is always a wonderful time to stop and reflect on how far we have come and how far we still have to go. In February 2018, the former President of the SCBA, the Honorable Patricia Meisenheimer focused on diversity and inclusion in her President's Message in The Suffolk Lawyer. She stated: "A more diverse bar enables greater innovation and more civility in the legal profession by exposing its members to a wide variety of backgrounds, perspectives, life experiences, and talents." Numerous past presidents have addressed the lack of diversity in the SCBA and over the years there have been attempts to increase diversity among our members. I think it is safe to say that as a bar we know that we should be diverse and inclusive, yet it seems that we never quite get there.

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In 2019, the SCBA Board of Directors denied approval to the LGBTQ Law Committee to march in a local pride parade under a SCBA banner because, I am told, the SCBA did not want it to appear that they were taking a "political side." Nevertheless, the Executive Committee welcomed a meeting with LGBTQ Law Committee co-founders Hon. Chris Ann Kelley and Christopher Chimeri and approved the use of a banner at the vendor tables where the LGBTQ Law Committee displayed information about the Bar Association and some of its programs including the Lawyer Referral Service.

With all due respect, that answer regarding marching with an SCBA banner is unreasonable. The LGBTQ Law Committee marching with a banner is no more political than allowing the SCBA to financially support and table at a women's health symposium, which was approved in April 2009, or annual events in the Courthouse for Black History Month or Hispanic Heritage Month. Further, the State Bar has a proud history of addressing current political issues such as supporting full marriage equality and encouraging gun control. I find the SCBA Directors' reasoning paradoxical to the mission of the SCBA and to our core values as a profession.

I had to live in "the closet" when I was young because it was dangerous to my well-being to openly be a lesbian. I have watched those that didn't stay closeted suffer horrible

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Here in 2020: Mediation & Collaborative Divorce Processes in the LGBTQ Community

By Concetta G. Spirio

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The LGBTQ community has historically faced difficulty protecting themselves and denied rights taken for granted by the general public. Before the legalization of same-sex marriages, same-sex couples and their families had to cobble together a patchwork of legal documentation to obtain some of the legal protections afforded to opposite sex couples able to legally marry.

Once same-sex marriage became legalized across the United States (June 26, 2015), many people thought this solved all legal troubles facing the LGBTQ community. This did not solve all problems related to same-sex marriage. Consider that the law only deals with matrimonial issues from the date that a legal marriage occurs. Many in the LGBTQ community have been in long-term relationships far longer than the availability and existence of same-sex marriage. The law only recognizes the relationship from the date of a legal marriage.

Why is this a problem? If a couple were to go into court now, having had a 32 year committed relationship, but were only able to be legally married for the last 5 years (which is as far back as same-sex marriage has been deemed legal nationally), the court could only acknowledge the last 5 years of their relationship. All assets, including retirement assets that existed before the date of marriage would not be considered marital property and therefore not be accounted for in equitable distribution. This could have a disastrous effect on a couple that had planned their financial future together with their joint retirement in mind.

Is there an alternative to having your relationship treated as a test case in court? The answer is yes. That is why Mediation and Collaborative divorce processes, providing resolution of conflicts outside the court system, are extremely important to the LGBTQ community. Most attorneys and the public are familiar with Mediation, however most people, including attorneys, do not have a clear understanding of the Collaborative process or how it can be applied to not only matrimonial conflicts.

Like Mediation, the Collaborative process is an alternative to resolve a dispute. While Mediation involves a neutral third party helping two sides come to a resolution, in the Collaborative process, parties have a collaboratively trained team of professionals. This team approach not only involves collaboratively trained attorneys but also collaboratively trained financial and mental health professionals, who work as a team to help both parties reach a mutually agreeable resolution. It is not a "settlement conference."

The process is focused on the needs, wants, and concerns of the clients. For a di-

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Debra Brown

Ian Moss

The Suffolk Lawyer wishes to thank LGBTQ Special Section Editors Debra Brown and Ian Moss for contributing their time, effort and expertise to our June issue.

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familial and financial consequences. I have seen the collective nation, including the U.S. Supreme Court in *Bowers v. Hardwick*, deny me basic human rights. I have been rejected by family members and so-called friends. I have been told that I have a mental illness, evicted, lost employment all because of who I love. Fortunately, much of that is far behind me today (I have been with my spouse for 27 years; we have raised three children and have 11 grandchildren) but not everyone is so lucky. LGBTQ discrimination is far from over and it is plainly visible in the SCBA's denial of our Committee to march as an SCBA Committee at Pride.

It is our view that the refusal by the board is a decision based in implicit bias. In order to make inroads in diversifying as a collective group we need to understand that we have implicit biases despite our good intentions. We must understand how our behaviors and decisions impact others. Sadly, we as a profession are also not devoid of outright bigotry and intolerance as well. Just a mere 10 years ago, I had a judge in Suffolk County tell me he could not grant my client's same-sex Judgment of Divorce because it was immoral and against the law (referring to sodomy laws already ruled unconstitutional). In the public sphere, hate crimes against the LGBTQ community have been on the rise. In 2018, the most recent year of data collection, hate crimes against LGBTQ people rose 6 percent from 2017.[1] The current administration has taken numerous steps to roll back advances made by the LGBTQ community (i.e., banning transgender individuals from serving in the military, submitting briefs around the country arguing against anti-discrimination protections for sexual orientation and gender identity).[2]

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As a member of the LGBTQ community I have marched in various parades for different reasons, depending on the times. Sometimes to make a political statement, sometimes to express joy and pride, but at all times to make sure that people saw me (us) just so people like the judge who denied my client his uncontested divorce and called LGBTQ folks immoral know we exist. Plain and simple. Because existing openly as a member of the LGBTQ community has always been a political act. It is the choice to demand acknowledgment for who we are, rather than be pushed to the margins of society, unnoticed and alone. Denying us the right to march in a local LGBTQ pride parade with a banner for the LGBTQ Law Committee perpetuates that invisibility. As such, the board's denial is not an apolitical act. Silence is never an apolitical position. It is a statement of support for the status quo with the trappings of civility. I hope that when we return to a time of public events that give the SCBA the opportunity to uphold its stated values of diversity and inclusion, and that by Pride 2021, they can take the position that I and others in the LGBTQ community have the right to exist in the open.

Debra A. Brown's opinions are her own and do not in any way reflect the opinions or beliefs of the Suffolk County Bar Association.

Note: Debra A. Brown has a general law practice with a concentration in matrimonial and family law and trust and estate matters in Amityville. For the past 18 years she has also been teaching public health at Stony Brook University. Currently she is a co-chair to the SCBA's LGBTQ Law Committee.

1. Retrieved April 29, 2020 at https://www.hrc.org/blog/hrc-responds-to-new-fbi-report-showing-spike-in-reported-hate-crimes-target
2. Retrieved April 29, 2020 at https://www.nytimes.com/2017/07/27/us/politics/white-house-lgbt-rights-military-civil-rights-act.html

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Act § 418(a), ("no genetic market shall be ordered in a filiation proceeding upon written finding 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"), or the common law applications of equitable estoppel. The Second and Third Departments, in *Joseph O. v. Danielle B, et al.*, 158 A.D.3d 767 (2d Dep't 2018) and *Matter of Shanna O. v. James P.*, 176 A.D.3d 1334 (3d Dep't 2019), respectively denied genetic marker tests to petitioning purported biological fathers because they were sperm donors. However, neither Appellate Division prohibited tri-parent arrangements nor spoke on whether, under different circumstances, a genetic marker test would have been proper.

Most recently, however, in *Tomeka N.H. v. Jesus R. and Brenda S.*, 2020 N.Y. Slip Op. 2015 (4th Dep't 2020), the court concluded, over a two-justice concurrence and a spirited dissent, that the same-sex partner (Tomeka) of a child's biological mother (Brenda) lacked standing to seek a tri-custodial arrangement with the biological mother (even with Brenda's consent) and the biological father (who objected). Tomeka and Brenda were engaged in 2009 but did not marry as it was not legally possible to do so in New York at the time. When their relationship ended, the mother conceived a child with biological father, who did nothing to establish his status for several years and barely saw the child. Conversely, even prior to birth, Tomeka, who had renewed her relationship with the biological mother, assumed all the duties and responsibilities of parentage, the women gave the child a hyphenated last name, and Tomeka held herself out as a mother for over 7 years even though she and Brenda again split in approximately 2012. In 2013, the mother filed a paternity petition against the father, who objected to a genetic marker but was unsuccessful and an order of filiation was entered. As between the biological parents, they had a joint custody order, but during all of which Tomeka continued in her role as a parent to the child. In 2017, Tomeka filed for custody and visitation rights, not to the exclusion of either biological parent and with Brenda's support, but the Family Court granted the father's motion to dismiss the petition for lack of standing, which the Fourth Department affirmed, relying on footnote 3.

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Tomeka is presently seeking Court of Appeals review.

Note: Christopher J. Chimeri is a partner with Quatela Chimeri PLLC, with offices in Hauppauge and Garden City, and he focuses on complex trial and appellate work in the matrimonial and family arena. He sits on the Board of Directors of the Suffolk County Matrimonial Bar Association and is a co-founder and immediate past co-chair of the Suffolk County Bar Association's LGBTQ Law Committee. From 2014-2020, he has been peer-selected as a Thomson Reuters Super Lawyers® "Rising Star."