Custody Rights of Non-Biological Partners

By Joel R. Brandes

New York custody determinations have always been based upon our public policy that courts should do what is in the best interest of the child. [1] However, custody determinations have been subordinated to the right of biological parents to bring up their children as they see fit, absent interference from the state unless the child's best interests would be endangered.[2] This public policy has been eroded in recent years to accommodate “increasingly varied familial relationships.” [3]

Forty-five years ago, in Bennett v. Jeffreys,[4] the Court of Appeals held that the courts are powerless to supplant parents except for grievous cause or necessity.[5] It held that unless there was proof of "abandonment, unfitness, persistent neglect, unfortunate or involuntary extended disruption of custody, or other equivalent but rare extraordinary circumstances which would drastically affect the welfare of the child," a person who was not a biological parent had no standing to apply for custody in the face of opposition by a biological parent. A finding of extraordinary circumstances gives the petitioner standing and triggers the court's right to make a disposition that is in the child's best interests.

In Matter of Ronald FF. v. Cindy GG.[6] the Court of Appeals declined to extend the "extraordinary circumstances" rule to allow a nonbiological individual to have visitation with a child against the wishes of the custodial parent.

Bennett’s policy was reaffirmed in Alison D. v. Virginia M.,[7] where the Court of Appeals affirmed a judgment that dismissed a proceeding by same-sex partner to obtain visitation rights with a child was born by artificial insemination of the respondent, after the couple's decision to raise a family together. When the child was two years old, the

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[1] See DRL §§70 and 240; Finlay v. Finlay, 240 NY 429 (1925)

[2] Stanley v Illinois, 405 US 645, 651 (1972)

[3] See Matter of Brooke S.B., v Elizabeth A. C.C., 28 N.Y.3d 1, 39 N.Y.S.3d 89 (2011)

[4] 40 N.Y.2d 543, 387 N.Y.S.2d 82 (1976)

[5] Citing Stanley v Illinois, supra

[6] 70 N.Y.2d 141, 517 N.Y.S.2d 932 (1987)

[7] 77 NY2d 651 (1991)

parties ended their relationship. Respondent subsequently terminated petitioners' communication with the child. The Court of Appeals noted that DRL§ 70 gives either parent standing to apply to the supreme court for a writ of habeas corpus ... and authorizes it to award the custody of the child to either parent. It held that although DRL §70 does not define the term "parent," the petitioner was not a biological parent, within the meaning of the statute and could not achieve standing under DRL §70 to apply for a habeas corpus writ. The petitioner claimed to have acted as a "de facto" parent or that she should be viewed as a parent "by estoppel." The Court held that these claims were insufficient to give her standing because to allow the Court to award visitation, a limited form of custody, to a third person would necessarily impair the parents' right to custody and control.

Despite this clear expression of public policy, in Jean Maby H. v Joseph H.[8] the Second Department applied equitable estoppel to grant a step-father standing to seek custody or visitation at a best interest hearing. Its rationale was that recent decisions of the Court of Appeals placed a greater emphasis on the best interests of the child as the determinative or prevailing concern. The step-father was named as Kelly's father on her birth certificate; he was held out as her father to others for over seven years, during which time he established a strong father-daughter relationship, and he supported her financially throughout the marriage. He was the only father figure in her life, and until February 1995 she always believed that he was her biological father.

In 2010, in Debra H. v. Janice R.,[9] the Court of Appeals reaffirmed its holding that the term "parent" in Domestic Relations Law § 70 encompassed only the biological parent of a child or a legal parent by virtue of adoption and that a "de facto parent" or "parent by estoppel" could not seek visitation with a child who is in the custody of a fit parent. Significantly, the Court explained that although it cited Jean Maby H in its opinion in Shondel J. [10] the opinion was limited to the procedure for determining the paternity of an alleged father. It did not intend to signal disaffection with Alison D. by citing Jean Maby H., “one of a handful of lower court decisions applying equitable estoppel to custody and visitation proceedings despite Alison D.” where it considered and explicitly rejected this approach.[11]

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[8] Jean Maby H. v Joseph H., 246 A.D.2d 282, 676 N.Y.S.2d 677 (2 Dept.,1998)

[9] 14 N.Y.3d 576, 904 N.Y.S.2d 263 (2010)

[10] Matter of Shondel J. v Mark D., 7 N.Y.3d 320, 820 N.Y.S.2d 199 (2006)

[11] Citation omitted.

The Court of Appeals revisited Alison D. in Matter of Brooke S.B., v Elizabeth A. C.C., ("Brooke") and Matter of Estrellita A., v Jennifer L.D .[12] In Brooke the lower courts had held that an unmarried couple, a partner without a biological or adoptive relation to a child was not that child's "parent" for purposes of standing to seek custody or visitation under DRL § 70 (a), notwithstanding their "established relationship with the child". The Court of Appeals overruled Alison D. and abrogated Debra H. It held that the Petitioners, who similarly lacked any biological or adoptive connection to the children, should have standing to seek custody and visitation under DRL § 70 (a) in light of more recently delineated legal principles, which required it to conclude that that definition of "parent" established by it in Alison D. had become unworkable when applied to increasingly varied familial relationships. The Court noted that the petitioners had alleged in both cases that the parties entered into a pre-conception agreement to conceive and raise a child as co-parents. The Court held that where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody under DRL § 70. It referred to this as the "conception test" but did not opine on the proper test, if any, to be applied in situations in which a couple has not entered into a pre-conception agreement. The Court stated in dicta that it did not decide whether, in a case where a biological or adoptive parent consented to the creation of a parent-like relationship between his or her partner and child after conception, the partner can establish standing to seek visitation and custody. In *Estrellita A.*, the Court held that Family Court properly invoked the doctrine of judicial estoppel to recognize petitioner's standing to seek visitation as a "parent" where Respondent obtained an order compelling petitioner to pay child support based on her argument that petitioner was a parent to the child. Respondent was therefore estopped from taking the inconsistent position that petitioner was not a parent to the child for purposes of visitation.

Matter of Brooke's definition of "parent" was applied in Matter of Frank G v Renee P.-F, [13] where Joseph P. and Frank G. were domestic partners and Joseph's sister, Renee P.-F. acted as a surrogate, and conceived twins. The Second Department found that Joseph had standing as a parent to seek custody or visitation where he sufficiently demonstrated by clear and convincing evidence that he and Frank entered into a pre-conception agreement to conceive the children and to raise them

[12] Matter of Brooke S.B., v Elizabeth A. C.C., 28 N.Y.3d 1, 39 N.Y.S.3d 89 (2011).

[13] 142 A.D.3d 928, 37 N.Y.S.3d 155 (2d Dept.,2016)

together as their parents. In Matter of Heather NN v Vinette OO,[14] the Third Department held that Heather NN, the non-biological, non-adoptive same-sex partner had standing, as a parent, to seek visitation and custody under the "conception test".

Matter of Brooke was extended in re K.G., v. C.H.,[15] where KG's claim of parental standing to seek custody of and visitation with A was predicated upon the fact that before A. was identified and offered to CH for adoption, the parties had an agreement to adopt and raise a child together. CH claimed that the agreement terminated when the parties' romantic relationship ended which was before A. was first identified and offered for adoption. Supreme Court denied KG standing and dismissed the because she did not remain committed to their agreement. The First Department held that "[a]lthough *Brooke* was decided in the context of children who were planned and conceived through means of artificial insemination, the Court's reasoning applies with equal force where, as here, a child is legally adopted by one partner and the other partner claims he or she is a "parent" with co-equal rights because of a preadoption agreement." However, it found that the record was incomplete, precluding it from reaching the merits of the parties' claims, including a determination as to whether equitable estoppel was applicable. it remanded the matter for further proceedings consistent with the decision.

Recently, in Matter of Chimienti v Perperis, [16] the Second Department agreed with the Family Court's determination to apply an equitable estoppel analysis to decide the issue of standing where there is no pre-conception agreement. It reasoned that the Court of Appeals, in Matter of Brooke S.B. recognized that another test may apply to situations in which a couple has not entered into a pre-conception agreement and expressly left open the issue of whether, in the absence of a pre-conception agreement, a former same-sex, nonbiological, nonadoptive partner of a biological parent could establish standing based upon equitable estoppel. The two children were born, via artificial insemination to Perperis. The parties began a romantic relationship shortly before the older child was conceived and continued their relationship as domestic partners through that child's birth, as well as through the conception and birth of the younger child and they ended their relationship in early 2017. Family Court held that Chimienti established standing, through equitable estoppel, to seek custody of or visitation with the children. The Appellate Division affirmed. It found that clear and convincing evidence demonstrated that Perperis created and fostered a parent-child relationship between Chimienti and the children and there was no basis to disturb the

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[14] 2019 WL 7173471 (3d Dept.,2019)

[15] 163 A.D.3d 67, 79 N.Y.S.3d 166 (1st Dept., 2018)

[16] 171 A.D.3d 1047, 98 N.Y.S.3d 251 (2d Dept., 2019)

court's finding that it would be detrimental to the children's best interests to disrupt their relationship with Chimienti.

Conclusion

A parent's interests in the upbringing, care, and custody of children are protected as a fundamental liberty interest by the Due Process Clause of the Fourteenth Amendment.[17] In Matter of Brooke, the Court of Appeals recognized, in overruling Alison D that it "…must, however, protect the substantial and fundamental right of biological or adoptive parents to control the upbringing of their children….. "[B]ecause of the fundamental rights to which biological and adoptive parents are undeniably entitled, any encroachment on the rights of such parents and, especially, any test to expand who is a parent, must be, … appropriately narrow."

Despite Brooke's limiting language, the Court concluded that "[w]hether a partner without such an agreement can establish standing and, if so, what factors a petitioner must establish to achieve standing based on equitable estoppel are matters left for another day, upon a different record." That record may be supplied by Chimienti v Perperis, which, despite the express limitation in Debra H. applied the doctrine of equitable estoppel, based upon the dicta in Matter of Brooke S.B., to grant standing to the petitioner to seek custody, where there was no pre-conception agreement. One thing is certain. The Appellate Division has re-defined the term "parent" to allow a biological stranger standing to seek custody with a child, without a showing of extraordinary circumstances. We wonder if this policy will withstand constitutional scrutiny.

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[17] Troxel v. Granville, 120 S.Ct. 2054, 2066, 530 U.S. 57, 77 (2000)