Standing to Seek Visitation and Custody

New York Expands Definition of 'Parent'

In a recent case, New York's highest court held that, where it is shown 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, as a parent, to maintain a proceeding pursuant to Domestic Relations Law (DRL) Section 70 seeking custody and visitation.

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In the recent case of *Matter of Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1, 61 N.E.3d 488, 39 N.Y.S.2d 89 (2016), New York's highest court, the Court of Appeals, held that, where it is shown 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, as a parent, to maintain a proceeding pursuant to Domestic Relations Law (DRL) Section 70 seeking custody and visitation. In so holding the court, citing the overarching "best interests of the child" standard applicable in custody and visitation cases in New York State, expanded the definition of "parent" under DRL Section 70, and overruled its 25-year-old prior holding in *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 (1991). In *Alison D.*, the court, citing the need to preserve the rights of biological parents to custody and control of a child, had held that a biological stranger to a child who is properly in the custody of his biological mother has no standing to seek visitation with the child pursuant to DRL Section 70.

Factual and Procedural Background

In *Brook S.B. v. Elizabeth A.C.C.*, the parties were an unmarried same-sex female couple in a committed relationship. At one point, the parties agreed to have a child together. The parties agreed that the respondent would become pregnant through artificial insemination and carry the child. The respondent became pregnant in 2008. During the pregnancy, the petitioner regularly attended prenatal doctor appointments, remained involved in the respondent's care and joined the respondent in the emergency room when she had a complication during pregnancy. The petitioner was present when the child was born and the parties gave the child the petitioner's last name. Further, after the child was born, the parties continued to reside together and raised the child jointly, sharing all major parental responsibilities. The petitioner stayed home with the child for a year while the respondent returned to work.

In 2010, the parties ended their relationship. Initially, the respondent permitted the petitioner to have regular visits with the child. However, in 2013, after the parties' relationship had deteriorated, the respondent terminated the petitioner's contact with the child. Thereafter, the petitioner commenced a proceeding in Family Court seeking visitation. The petitioner's application was supported by the attorney for the child appointed by the court, as being in the child's best interests. The respondent moved to dismiss the petition, arguing that under the New York Court of Appeals holding in *Alison D.*, the petitioner lacked standing to seek custody or visitation pursuant to DRL Section 70 because, in the absence of a biological or adoptive connection to the child, the petitioner was not a "parent" with the meaning of the statute. The petitioner argued, among other things, that in light of the enactment of the New York Marriage Equality Act, which legalized same sex marriage, and other changes in the law, the holding in *Alison D.* should no longer be followed.

The Family Court, noting that the petitioner had not adopted the child, granted the motion to dismiss on the basis of *Alison D.* The attorney for the child appealed from the order dismissing

the petition. New York's Appellate Division, Fourth Department, affirmed, concluding that because the petitioner had not married the respondent, had not adopted the child and had no biological relationship to the child, *Alison D.* prohibited Family Court from ruling that petitioner had standing to seek custody and visitation. The Court of Appeals granted the attorney for the child leave to appeal.

Matter of Estrellita A. v. Jennifer L.D.

In the companion case of *Matter of Estrellita A. v. Jennifer L.D.*, the parties were a same-sex couple who registered as domestic partners in 2007 and thereafter decided to have a child. In 2008, the respondent became pregnant through artificial insemination. The petitioner was present during the birth of the child and the child referred to the petitioner as Mama. Thereafter, the parties resided together and shared parental responsibilities for the next three years. However, in 2012, they ended their relationship. After the petitioner moved out, she continued to have contact with the child.

In late 2012 the respondent commenced a proceeding in Family Court seeking child support from the petitioner. While the support proceeding was pending, the petitioner commenced a proceeding in which she sought visitation with the child. After a hearing, the Family Court granted the support petition, finding that the petitioner was a "parent" to the child and, as such, "was chargeable with the support of the child." Thereafter, the petitioner amended her visitation petition to indicate that she had been adjudicated a "parent" of the child.

The respondent moved to dismiss the visitation petition on the ground that the petitioner did not have standing to seek custody or visitation under DRL Section 70 as interpreted by *Alison D.* The Family Court denied the motion to dismiss, finding that although the petitioner would not otherwise have standing to seeking visitation, given the respondent's successful support petition in which she asserted that the petitioner was a parent for support purposes, the doctrine of judicial estoppel conferred standing on the petitioner to request visitation with the child.

Thereafter, the court, after an evidentiary hearing, granted the petitioner visitation rights. The respondent appealed.

The Appellate Division, Second Department, affirmed, determining that while DRL Section 70, as interpreted by *Alison D.*, conferred standing to seek custody and visitation only on a biological or adoptive parent, *Alison D*. did not preclude recognition of standing based upon the doctrine of judicial estoppel. The Appellate Division noted that, under that doctrine, a party who assumes a certain position in a prior legal proceeding and secures a favorable judgment is precluded from assuming a contrary position in another action simply because his or her interests had changed.

The Court of Appeals Decision

In *Brook S.B. v. Elizabeth A.C.C.*, the Court of Appeals, citing the bests interests of the child and the court's inherent equitable powers, reversed the decision of the Appellate Division, holding that where it is shown by clear and convincing evidence that the parties entered into a pre-conception agreement to conceive and raise a child as co-parents, the non-biological party will have standing as a "parent," pursuant to DRL Section 70, to seek custody or visitation for the child. In the companion case of *Matter of Estrellita A. V. Jennifer L.D.*, the court held that the lower courts properly determined that the respondent was judicially estopped from asserting that the petitioner was not a "parent" in the visitation proceeding, based on the contrary position adopted by the respondent in the support proceeding. Although the court in *Brook S.B. v. Elizabeth A.C.C.* expanded the definition of a "parent" for purposes of standing to seek custody and visitation, the decision is limited in its application.

In reaching its decision, the court noted that pursuant to DRL Section 70, either "parent" may seek custody or visitation of a child. However, the court also stated that the statute does not define the term "parent," leaving it to the courts to do so. The court stated that in *Alison D.*, a case also involving a child raised by a same-sex couple, the term was defined narrowly. In *Alison D.*, the court held that the word "parent" in DRL Section 70 should be interpreted to preclude standing for a *de-facto* parent who, under a theory of equitable estoppel, might otherwise be

recognized as the child's parent for visitation purposes. Specifically, it was held in *Alison D.* that a biological stranger to a child who is properly in the custody of his biological mother has no standing to seek visitation under DRL Section 70. In *Brook S.B.*, the court noted that the determination in *Alison D.* was based primarily on the need to preserve the rights of a biological parent to determine the care and custody of a child.

In its decision in *Brook S.B.*, the Court of Appeals discussed several decisions in which, despite its prior holding in *Alison D.*, the best-interests-of-the-child standard was the basis to confer parental status on a party who did not have a biological relationship to the child. These cases included *Matter of Jacob*, 86 N.Y.2d 651 (1995), in which the court held that an unmarried partner of a child's biological mother, whether heterosexual or homosexual, who is raising the child with the biological parent, can become the child's second parent by means of adoption.

In *Matter of Jacob*, the court found that its holding therein was consistent with the adoption statute's legislative purpose, which is the child's best interests. The court in *Brook S.B.* stated that the outcome of *Matter of Jacob* was to confer standing to seek custody or visitation upon unmarried, non-biological partners — including a partner in a same sex relationship — who adopted the child, notwithstanding the restrictive definition of "parent" set forth in *Alison D.*

The court also discussed its prior holding in *Matter of Shondel J. V. Mark D.*, 7 N.Y.3d 320, (2006), in which the court applied a best-interests-of-the-child analysis to arrive at the determination that a man who has mistakenly represented himself as a child's father may be estopped from denying paternity, and made to pay child support, when the child justifiably relied on the man's representation of paternity, to the child's detriment.

The court in *Brook S.B.* also referred to *Debra H. v. Janice R.* 14 N.Y.3d 576 (2010), a case also involving an unmarried same-sex couple. It noted that although in *Debra H.* it had declined to expand the definition of a parent under DRL Section 70 to include an individual who had no biological or adoptive relationship to the child, it had found that the petitioner had standing to seek visitation with the children. In that case the court invoked the doctrine of comity to rule that

because the parties had entered into a civil union in Vermont prior to the child's birth — and because the union afforded *Debra H*. parental status under Vermont law — her parental status should be recognized under New York law as well.

After reviewing the aforesaid cases, the court in *Brook S.B.*, in essence, determined that consideration of the best interests of the child and the equitable powers of the court warranted overruling the holding in *Alison D*. The court noted that the narrow definition of the term "parent" set forth in *Alison D*. foreclosed all inquiry into the child's best interests in custody and visitation cases involving parental figures who lacked biological or adoptive ties to the child. It also stated that *Alison D.'s* foundational premise of heterosexual parenting and non-recognition of same-sex couples was unsustainable in light of the enactment of same-sex marriage in New York and the United States Supreme Court's holding in *Obergefell v. Hodges*, 576 U.S. ___, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), in which state bans on same-sex marriages were found to be unconstitutional.

Notwithstanding the overarching concern regarding the best-interests-of-the-child standard, the court in *Brook S.B.* also found that it was still required to protect the often countervailing substantial and fundamental right of biological or adoptive parents to control the upbringing of their children, the driving factor behind its prior decision in *Alison D*. The court stated that, in view of this fundamental right, any test to expand who is a "parent" must be appropriately narrow. Accordingly, it limited its holding to the facts of the case before it and held that, where it is shown by clear and convincing evidence that the parties entered into a pre-conception agreement to conceive and raise a child as co-parents, a person who is not a biological or adoptive parent will have standing to seek custody and visitation.

However, the court specifically stated that it was not deciding the issue of whether, in a case where a biological or adoptive parent consented to a creation of a parent-like relationship between his or her partner and the child after conception, the partner can establish standing to seek visitation and custody. Thus, this issue, which would be applicable to a much wider range

of cases than the factual situation presented in *Brook S.B.*, remains to be decided by New York's highest court.

Conclusion

The decision in *Brook S.B.* demonstrates the continuing evolution of the law in the area of custody and visitation in response to society's recognition of non-traditional familial relationships. A reading of the decision makes clear that the driving force in such cases is often consideration of the best interests of the child. However, the court in *Brook S.B.* has also indicated that due consideration will continue to be given to the often countervailing interest of the fundamental right of biological and adoptive parents to control the upbringing of their children. It remains to be seen if the court will continue the erosion of this recognized fundamental right by conferring standing to seek rights of custody and visitation on other classes of individuals with no biological or adoptive ties to a child, based on other types of parental relationships prevalent in modern society.

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