

Summer 2017 Newsletter

Brooke S.B. (Non-Parent Standing in Custody/Visitation): How We Got There and What's Happened Since

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Until very recently, the law in New York was unkind to those standing in parental roles who were not the biological or adoptive parent of the child. Those individuals include, among others, step-parents and same sex partners of biological parents. In Bennett v. Jeffreys, 387 N.Y.2d 543 (1976), the Court of Appeals held that a non-parent lacks standing to file for custody absent surrender, 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. This standard was nearly impossible to satisfy for step-parents and same sex partners of biological parents because the biological parent in those cases was typically still involved in the child's life. This "extraordinary circumstances" standard was also limited to custody only and could not be used to seek visitation with a child. Ronald FF. v. Cindy GG., 70 N.Y.2d 141 (1987).

Approximately 15 years later, the Court of Appeals narrowly defined a parent as a biological or adoptive parent and refused to entertain a custody petition by the biological mother's same sex partner who had planned for the conception of the child via artificial insemination with the biological mother and raised the child with her for 5 years. Alison D. v. Virginia M., 77 N.Y.2d 651 (1991). In 2006, the Court of Appeals found that, for purposes of filiation and child support, a person could be a parent by estoppel where he had mistakenly held himself out as the child's parent. Shondel J. v. Mark D., 7 N.Y.3d 320 (2006). The Court of Appeals reaffirmed Alison D. in 2010, and even stated that it found "no inconsistency in applying equitable estoppel to determine filiation for purposes of support, but not to create standing when visitation and custody are sought." Debra H. v. Janice R., 14 N.Y.3d 576 (2010). That meant a person could be liable for child support due to their position in a child's life but at the same time denied any access whatsoever to that same child.

In 2011, New York passed the Marriage Equality Act (DRL § 10-a) but, unfortunately, that did not fix this issue for same sex couples. In Paczowski v. Paczowski, 128 A.D.3d 968 (1st Dep't 2015), the First Department held that the marital presumption of legitimacy did not

apply to the nongestational spouse in a same sex marriage because it was a biological impossibility that she was the other biological parent of the child. As such, she was relegated to the extraordinary circumstances standard for non-parents, which she could not meet because her spouse was a part of the child's life. Id.

Finally, in 2016, the Court of Appeals decided Brooke S.B., 28 N.Y.3d 1 (2016), which granted standing to apply for custody and visitation to a nonbiological parent who had a preconception agreement to conceive and raise the child as a coparent. While certainly groundbreaking, this ruling was very limited in scope. It was completely inapplicable to the many parent-like figures who come into a child's life at any time after conception, such as step-parents. However, the Court of Appeals did leave the door open in such cases, stating "[w]hether a partner without such an agreement can establish standing and, if so, what factors petitioner must establish to achieve standing based upon equitable estoppel are matters left for another day, upon a different record." Id. at 28.

It appears that, to date, there have been five reported cases applying the Brooke S.B. standard. First, in Frank G. v. Renee P.-F., 142 A.D.3d 928 (2d Dep't 2016), it was used to find standing for a same sex male partner. In that case, Frank donated sperm which was used to impregnate his partner Joseph's sister, Renee, who acted as a surrogate pursuant to a surrogacy contract. The court found that the contract was evidence of their unequivocal intention to both be parents of the children but also noted that the contract was not enforceable against Renee pursuant to DRL § 124(1), which prohibits compensated surrogacy.

The second case, Paese v. Paese, 144 A.D.3d 770 (2nd Dep't 2016), held that a biological parent who sought child support from a nonbiological parent could subsequently be estopped from claiming the same person did not have standing to seek custody/visitation.

The third case, Dawn M. v. Michael M., 47 N.Y.S.3d 898 (Sup. Ct. Suffolk Co. Mar. 8, 2017), is by far the most interesting. In that case, the court approved of a tri-custody arrangement that it described as "the logical evolution" of Brooke S.B.. Dawn and Michael, husband and wife, had been unable to conceive a child. They became romantically involved with Audria and all 3 agreed to try IVF to impregnate Audria with Michael's sperm. When that was unsuccessful, they tried "naturally" and were successful. All three lived in the same home with the child for approximately a year and a half before the two women moved out together with the child. Dawn was granted standing to file for custody and visitation over Michael's objection.

Next, in K v. C, 2017 N.Y. Slip Op. 27118, 2017 WL 1356080 (Sup. Ct. N.Y. Co. Apr. 11, 2017), standing was denied to a same sex partner. The women had planned to adopt internationally together but after their relationship ended, only one of them moved forward with the adoption. The other woman then filed for custody and visitation with the child. The Court denied standing because the adoption plan had not continued unabated.

Finally, A.F. v. K.H., 2017 N.Y. Slip Op. 27196, 2017 WL 2541877 (Fam. Ct. Rockland Co. May 25, 2017), contained two important rulings: (1) nonbiological parents who were previously denied standing prior to Brooke S.B. may refile now without being barred by stare decisis or res judicata; and (2) a nonbiological parent may receive an order of parentage/filiation in addition to having standing to pursue custody and/or visitation.

These cases have already, in a relatively short period of time, substantially broadened the classes of individuals who now have standing to seek custody and/or visitation. However, step-parents are still without recourse. Hopefully an appropriate case will make its way to

the Court of Appeals so the standard can be broadened further and children's ability to maintain relationships with their other parent-like figures can be protected.

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