New York Law Journal

OUTSIDE COUNSEL

Court of Appeals Recognizes New Frontiers in Parenting

Amy Barasch and Kim Susser, New York Law Journal

September 19, 2016

Amy Barasch and Kim Susser

On Sept. 1, 2016, the Court of Appeals rendered a decision on two cases considered together on appeal: *Brooke M.* and *Estrellita X*. These important cases have received a fair amount of understandable attention for the victory the decision represents for gay and lesbian parents. The Court of Appeals decision should, however, be appreciated also as a decision about parenting in its myriad forms. For example, a disproportionately high number of litigated custody and visitation cases involve domestic violence. Under our current system, most abusers, who are biological parents, gain some access to children. Another common scenario is one in which a biological father, who has not had contact with his children since birth, files for custody and/or visitation immediately after being served with a petition for child support.

The Brooke M. and Estrellita X. decision illustrates that meeting the standard of the best interests of the child need not be exclusively about biology. In fact, the misguided and exclusive focus on biology, as well as adoption and marriage goes contrary to the research. As courts consider other fact patterns going forward, they should allow for the development of a broader standard to determine standing.

Agreement in Place

Both of the present cases involved lesbian couples who had decided together to have and raise a child by having one of the partners bear the child. After their respective children were born, the parties raised the children together but later separated. The non-biological mothers then sought standing to file for

custody/visitation. Under precedent set by *Alison D.*, a seminal case decided by the Court of Appeals in 1991, the lower courts denied standing to the non-biological non-adoptive unmarried parents. In *Brooke M.* and *Estrellita X*. the Court of Appeals overturned *Alison D.*, and with it the "foundational premise of heterosexual parenting and nonrecognition of same-sex couples…."

The court confined its explicit holding to the facts of these two cases, conferring standing on a parent who can prove "by clear and convincing evidence that the parties entered into a preconception agreement to conceive and raise a child as co-parents." However, stating that it would be "premature to consider adopting a test for situations in which there was no preconception agreement," the court simultaneously acknowledges the existence of other family situations its holding does not address, and anticipates that these cases create a foundational first step in the reconsideration of how the courts define parent.

By stepping away from the traditional litmus tests of biology and/or marriage, the court relied on a growing body of social science that documents the "trauma children suffer when separated from a primary attachment figure…regardless of that figure's biological or adoptive ties to the children."

Contrast the Brooke M. scenario with one in which a biological father who has had no contact with his child since birth seeks access to the child after being served with a petition for child support. Courts generally so appreciate the non-custodial parent showing up at all, that they often grant access in this scenario, without considering that Dad is a practical stranger to the child.

This scenario is particularly common when the father has a history of abusing the mother. These sorts of retaliatory court actions are referred to as "litigation abuse."[1] The unfortunate reality is that batterers get custody and visitation every day, while involved mothers like Brooke could not even request consideration—until this month.

Domestic Violence

The bench's strong preference for considering access for biological parents at all costs (including heretofore absent fathers) downplays any history of violence to the mother (in heterosexual relationships). All of us who have litigated in Family Court have heard judges, and attorneys for children, rationalize that an abusive partner who has never directly hurt the child should be considered on equal parental footing as a non-violent custodial parent. Some domestic violence advocates are therefore understandably concerned that opening the door to more people who are not biologically related to children to seek visitation with them might increase the number of abusers who can access the courts. That concern, however, is based in a mistaken belief that closing the door to some good parents is necessary in order to keep out the bad.

In fact, when domestic violence happens in same-sex couples, the court's biological and marital emphasis often inures to the abuser's benefit. When the biological parent is abusive, it is all too common for the biological parent to use that legally respected relationship to control their partner.[2]When the law is on their side, the abuser can accurately threaten his/her partner that if they try to leave, they will never see their child again. In this scenario, it is difficult to see how limiting standing is in the child's best interest.[3]

A Four-Part Test

Several amici to the Brooke/Estrellita appeal (including the authors here) encouraged the court to consider the creation of a careful four-part test for the determination of standing in these cases. This test, which is strict in its requirements, yet broad in the population it protects, would bring us closer to the goals of achieving the best interests of children in custody litigation.

The Wisconsin Supreme Court developed the H.S.H.-K. test more than 20 years ago. To demonstrate standing, a former partner seeking custody or visitation must establish: (i) that the biological or adoptive parent consented to, and fostered, his or her formation and establishment of a parent-like relationship with the child; (ii) that he or she lived together with the child in the same household; (iii) that he or she assumed the obligations of parenthood by taking significant responsibility for the child's care, education, and development,

including contributing toward the child's support, without expectation of financial compensation; and (iv) that he or she has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship that is parental in nature. *In re Custody of H.S.H-K.*, 533 N.W.2d 419 (Wis. 1995).

Scholarly reviews of the application of this standard show that it is workable for the courts and has not resulted in an increase in meritless petitions.[4] These factors protect against biological parents who engage in abuse gaining standing. An important part of the four-part H.S.H.-K test is that it emphasizes past action over the possibility of future action as in the scenario above. Going forward, this case has made it possible to consider that any parent who wants to be recognized by the law as a parent should act like a parent.

The presumption that parentage can only be based on biology, marriage, or adoption is unnecessarily narrow, flies in the face of social science research, and prevents many nurturing parents—gay and straight—from being given the opportunity to maintain close relationships with their children when they separate from their partners. We appreciate the invitation the court has offered, and look forward to seeing a continued dialogue about how New York can improve its implementation of the best interests of the child.

Endnotes:

1. See e.g. Mary Przekop, "One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of their Victims Through the Court," 9 Seattle J. for Soc. Just. 1053 (Spring/Summer, 2011); Leora N. Rosen & Chris S. O'Sullivan, "Outcomes of Custody and Visitation When Fathers Are Restrained by Protection Orders: The Case of the New York Family Courts," 11 VIOLENCE AGAINST WOMEN 1054, 1057, 1073 (Aug. 2005).

2. Joanna Bunker Rohrbaugh, "Domestic Violence in Same-Gender Relationships," 44 Fam. Ct. Rev. 287, 293 (April, 2006).

3. To argue that the solution is that non-biological parents can either marry or adopt is an unfair burden to impose, both to those who cannot afford it and those who choose not to. Even if a non-biological parent wanted to adopt, that course is time-consuming and often prohibitively expensive.

4. Carlos Ball, "Rendering Children Illegitimate In Former Partner Parenting Cases: Hiding Behind the Facade of Certainty," 20 Am. U. J. Gender Soc. Pol'y & L. 623, 651-56 (2012); Josh Gupta-Kagan, "Children, Kin, and Court: Designing Third Party Custody Policy to Protect Children, Third Parties, and Parents," 12 N.Y.U. J. Legis. & Pub Pol'y 43, 88 (2008).

Amy Barasch is executive director of Her Justice, which connects low-income women and children with lawyers, and former executive director of the New York State Office for the Prevention of Domestic Violence. Kim Susser is director of the Matrimonial & Family Law Unit of the New York Legal Assistance Group and visiting assistant clinical professor at Touro College, Jacob D. Fuchsberg Law Center.