NY Joins Growing Movement Protecting Same-Sex Parental Rights

BY MARCIA COYLE

WITH ITS decision Tuesday, New York's highest court joined the majority of states that are protecting the parenting rights of the nongenetic, same-sex parent—married or unmarried.

The decision by the Court of Appeals gave individuals who are not the biological or adoptive parent of a child legal standing to seek visitation or custody, essentially reforming the definition of "parenthood" within the state.

Questions involving custody, support, visitation and other parental rights of the nonbiological parent are still being litigated in state courts around the United States, most states have opened the door to those parents seeking to assert their rights, either by legislation or judicial decision. Until now, New York had been considered behind other states in granting such rights to nonbiological parents.

Shannon Minter, of the National Center for Lesbian Rights

The court's ruling in *Matter of Brooke S.B. v. Elizabeth A.C.C.*, 91, and *Matter of Estrellita A. v. Jennifer D.*, 92, reversed decisions by family courts in Chautauqua and Suffolk counties that had denied visitation sought by the former same-sex partners of the children's biological mothers. The petitioners had not married their partners nor adopted the children in either case.

Since the U.S. Supreme Court's 2015 decision in *Obergefell v. Hodges* struck down state bans on same-sex marriages, roughly a dozen state appellate courts have dealt with the parental rights of the married, nonbiological spouse, said Shannon Minter, legal director of the National Center for Lesbian Rights.

"Thus far every appellate court that has ruled has said: yes, states must treat same-sex couples equally with respect to parental rights tied to marriage," he » Page 6

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said. "I don't expect we will get negative rulings. It would be blatantly unconstitutional for a state to deny such an important marital protection to married same-sex couples."

Minter himself was arguing Wednesday in the Arizona Court of Appeals on whether, in light of the U.S. Supreme Court's decision, the female spouse of a woman who gave birth to a child during the parties' marriage as a result of artificial insemination that both parties agreed to has parental rights to that child under Arizona law.

But, he added, there is still work to be done in the courts and legislatures to protect the rights of the unmarried, nonbiological parent.

In an amicus curiae brief before the Court of Appeals, Family Law Academics, representing 45 faculty members who teach and write about family law in New York, said the highest courts of Arkansas, Minnesota and Pennsylvania and an appellate state court in North Carolina have applied the in loco parentis doctrine that the New York court accepted in its ruling Tuesday.

"All of these courts based their rulings on the features of functional parenthood that amici endorse throughout this brief: the courts required demonstration of the legal parent's consent, the functional parent's intent to assume parental responsibilities, and a parent-child attachment," Suzanne Goldberg, professor of law and director of the Sexuality and Gender Law Clinic at Columbia Law School, wrote for the family law scholars.

New York, and until July, Maryland, were out of line with a trend that goes back more than two decades, said Susan Sommer of Lambda Legal, counsel to Brooke S.B. The plaintiff, Brooke Barone, was one of two women who the Court of Appeals said had grounds to seek visitation of children to whom their former female partners gave birth while they were together. The Maryland Court of Appeals, overturning a 2008 decision, unanimously ruled that judges may consider whether a person is a "de facto" parent in custody and visitation cases.

In 1995, the Wisconsin Supreme Court announced a test for "de facto" parental status to assess whether a non-biological, same-sex parent had standing as a person entitled to custody or visitation, Sommer recalled. The test imposed four conditions for "de facto" parental status: That the biological or adoptive parent consented to the establishment of a parent-like relationship with the child; that the petitioner and child lived together in the same household; the petitioner assumed parental obligations by taking "significant responsibility" for the child's care, education and development without expectation of financial compensation; and the petitioner had been in a parental role for a length of time "sufficient to have established" a bonded, parental relationship.

A number of other courts and legislatures adopted the Wisconsin test, she added, for example, Delaware and then New Jersey in 2000. In the following decade or more, many other states also recognized nonbiological parental status, including Rhode Island, Colorado, Massachusetts and Washington state, Sommer said.

"Post-Obergefell, decisions came down out of the Oklahoma and Kansas high courts that did recognize the parental status of the intended second parent," she said. "And we see a lot of decisions also coming from lower appellate courts."

The standards or tests applied to these cases vary, but "they generally boil down to consent of the legal parent to the formation of a parent-child relationship," Sommer said. In New York as elsewhere, courts are generally coming to honor the emotional bond between children and their parental figures regardless of genetic or adoptive relationship.

In March, the U.S. Supreme Court in *V.L. v. E.L.* became tangentially involved in parenting issues when it unanimously ruled in an unsigned opinion that the Alabama Supreme Court was wrong when it refused to give full faith and credit to a judgment by a Georgia court making a woman the legal parent of the three children she had raised with her same-sex partner, the biological parent, since birth. She had sought visitation rights after their relationship ended.

Sommer sees the state court decisions as part of a "national unfolding of respect for same-sex families and parenting." *Obergefell*, she said, helped tremendously with its recognition of the dignity and equality of same-sex couples, particularly those with children. But there are still many exceptions, both Minter and Sommers agreed. Litigation in Michigan, for example, is not very promising.

"I do think there's greater hope that courts will become increasingly receptive and understanding of these issues," Sommer said. "It's also recognition that there are many diverse forms of family, children being raised by parents who are not their genetic, adoptive or married parents. It's a much more child-focused standard."

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Calendar

TODAY

New York City Bar
Fighting for Justice, the Rule of Law, and Democracy in Africa: Lessons from Uganda—A Talk by Dr. Kizza Besigye
6 p.m. - 7:30 p.m.
42 W. 44th St.
www.nycbar.org

TUESDAY

Columbian Lawyers Association Of Brooklyn
CLE Dinner Meeting: Municipal Law Update
6 p.m.
Rex Manor
1100 60th St., Brooklyn
718-875-0158

Have an event to list?
E-mail the details to rbaker@alm.com.