Legally Speaking (2016)

Guest authors: Denise Seidelman and Nina Rumbold

The guest authors are partners in the law firm of Rumbold & Seidelman, LLP which has been concentrating exclusively in the areas of adoption and reproductive law since 1996. They are licensed in the states of New York and New Jersey and are members of the ASRM Legal Professional Group as well as the American Academy of Adoption Attorneys and the American Academy of Assisted Reproductive Technology Attorneys.

## Three States Address Parentage Claims and Rights of Former Same-Sex Couples

Three recent appellate court decisions in NY, Arizona and Massachusetts, all recognizing the parental rights of non-biological intended parents, harbinger an increasing judicial awareness that genetics alone cannot fairly determine legal parentage of a child born through third party reproduction.

**New York:** In a truly momentous decision in that state, the New York Court of Appeals in *Matter of Brooke S.B. v. Elizabeth A. C.C.*[1] overruled it's much criticized rule of *Alison D. v. Virginia M.*[2], which famously rejected the legal concept and protections of "de facto" parenting and limited standing to petition (the right to sue) for custody and visitation of a child only to biological and adoptive parents.

In the *Brooke S.B.* case, decided in August, Brooke and her domestic partner, Elizabeth, decided to have a child together. They agreed that Elizabeth would be inseminated with donor sperm and that she would gestate the child. Brooke participated fully in the pregnancy, was present at the birth of the child, the child took her last name and Brooke was the primary care giver for the child for approximately a year after Elizabeth returned to work. Although Brooke and Elizabeth ended their intimate relationship approximately a year after the child's birth, Brooke maintained an ongoing relationship with the child for another three years until Elizabeth cut off all contact between them. The couple were never legally married, and Brooke had no genetic connection to the child, so when Brooke then petitioned the New York Family Court seeking custody and visitation with the child the question was whether the *Alison D.* refusal to recognize "de facto" parents applied and barred her claims.

Admitting that the 25 year old rule of *Alison D.* had become "unworkable when applied to increasingly varied familial relationships" the New York Court held that where there was a pre-conception agreement to conceive and parent the child together, the partner of that child's parent has standing to seek custody and visitation.

**Arizona:** In *McLaughlin v. Jones*,[3] the Arizona Court of Appeals ruled that, following the US Supreme Court decision in *Obergefell v. Hodges*,[4] that state's paternity statute must be read in a gender neutral way. Accordingly, the statute was construed so that the wife of a woman who gave birth was the

---

[1] *In the Matter of Brooke S.B. v. Elizabeth A.C.C.*, 2016 NY Slip Op 05903 at *2 (Aug. 30, 16)
[2] *Alison D. v. Virginia M.*, 77 N.Y. 2d 651 (1991)
[3] *McLaughlin v. Jones*, 2016 Ariz. App. LEXIS 256, 2016 WL 5929205 (Oct. 11, 2016).
[4] *Obergefell v Hodges*, ___ U.S. ___, 135 S. Ct. 2584 (2015). in which the United States Supreme Court held that the right to marry is a fundamental right which cannot be denied to same-sex couples.

presumed parent of her wife's child, just as a husband would be the presumed parent of a child born to his wife.

In *McLaughlin*, Kimberly and Suzan were legally married. They agreed to have a child through artificial insemination, using an anonymous sperm donor selected from a sperm bank. Kimberly became pregnant and in anticipation of the birth, they entered into a joint parenting agreement and executed mirror wills, declaring they were to be equal parents of the child Kimberly was carrying. After the child's birth, Suzan stayed at home and cared for him, while Kimberly worked. When the child was almost two years old, Kimberly moved out of the home, taking the child with her and cutting off his contact with Suzan.

Importantly, in its October, 2016 decision, the Arizona court precluded Kimberly from arguing that Suzan could not be the child's parent based on lack of a genetic connection. The court estopped Kimberly from rebutting the marital presumption because she and Suzan had agreed to have a child together through artificial insemination while they were married, and in reliance on their shared intent to parent, Suzan had stayed home to care for the child for two years before Kimberly cut off contact.

**Massachusetts:** Finally, in *Partanen v. Gallagher*,[5] the Massachusetts Supreme Judicial Court determined that the unmarried same-sex partner of the woman who gave birth was a presumed parent under Massachusetts law. Here, that state's highest court read Massachusetts' presumed parentage law in a gender neutral way, as required by Massachusetts law, and determined that the non-biological mother established that she was a presumed parent under the law's two part test: (1) that the child was "born to" both her and the biological mother; and (2) that she and the biological mother jointly received the child into their home and openly held out the child as their child.

In *Partanan*, Karen, the non-biological mother, and Julie had been in a committed, nonmarital relationship for years. They decided to have a family together and with Karen's acknowledgment, participation, and consent, Julie became pregnant and had a child two separate times through IVF. The couple brought the respective children home and jointly raised them. They represented themselves as the children's parents in various contexts including: "..at the children's schools…for medical appointments…in their interactions with friends and family…".

The court held that Karen satisfied the "born to" prong of the statute based on her having "fully acknowledged, participated and consented" to Julie using IVF with the shared intent that they would both be parents to the resulting children; and (2) after each child's birth, Karen and Julie brought the children into their home and represented themselves publicly as the children's parents.

**A Diminishing Role for Genetics in Determining Parentage?**

Importantly, all three cases relied, at least in part, on the parties' pre-conception intent to jointly parent in order to determine the parental status of the non-biological parent. While these decisions most dramatically impact the LGBT community, who are required to rely on third party reproduction and donated genetic material to conceive a child, judicial reliance on intent, rather than genetics, to determine parentage reflects a much needed shift in the context of third party reproduction and may indeed be an indication of a growing trend to do so.

---

[5] *Partanen v. Gallagher*, ___ N.E.3d ___, ___, SJC-12018, 2016 WL 5721061(Mass. Oct. 4, 2016)

As recognized by the New York Court of Appeals in *Brooke S.B.*, biology and adoption alone are an "unworkable" rubric under which to determine legal parentage where an assisted reproduction arrangement involves a third party. Hopefully, the law will continue to evolve in the area of collaborative reproduction to a point where those intending to be parents are charged with parental responsibility and those without that intent are not unfairly burdened with it. While we await consistent jurisprudence and laws across the country, the increasing judicial recognition of the importance of intent to determine parentage is encouraging. It should also highlight how important it is to ascertain and accurately document all participants' intentions as they undertake to build families through assisted reproduction.