LGBT

Standing to Seek Parentage: An Update on New York Courts' Applications of Brooke S.B.

By Christopher J. Chimeri

The New York State Court of Appeals' holding in *Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1 (2016) and subsequent decisions in the wake of the High Court's expansion of the definition of a parent under New York law was discussed in my September article in *The Suffolk Lawyer*. In effect, I believe that the *Brooke S.B.* decision functions as an expansion of the scope of our trial courts' authority to make determinations of parentage beyond the findings of a genetic marker test or the standard "equitable estoppel" provisions existing by statute. By now, it is therefore axiomatic to any domestic relations practitioner that parents include those of biology, those married to a biological parent at the time of birth (a rebuttable presumption), and, in the case of non-biological persons, where a party can show, by clear and convincing evidence, that a pre-conception agreement to conceive and raise a child as co-parents existed, that person too, is a parent with standing to seek custody or visitation rights.

This seems simple enough to reconcile and apply, doesn't it? Perhaps not.

We previously explored the *Dawn M. v. Michael M.*, 2017 N.Y. Slip Op. 27073 (Sup. Ct., Suffolk Co., March 8, 2017) matter in which Justice H. Patrick Leis III referred to the next "logical extension" of *Brooke S.B.* when he issued a tri-custody order (granting both biological parents their rights, but also granting rights to a third individual whom had functioned in a maternal roll).

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Some critics of the decision have pointed out that although Judge Leis clearly worked very carefully to consider the best interests of the child in that case, the decision likely runs afoul of Footnote 3 in the *Brooke S.B.* decision, in which the Court of Appeals makes it clear that the Domestic Relations Law allows only two parents for a child.

In Matter of Christopher YY v. Jessica ZZ, 2018 NY Slip Op 00495 (Jan. 25, 2018), the Third Department most recently tackled this same issue under similar, but not identical, circumstances; however, and when confronted with a paternity petition concerning filiation of a (then) infant child by a known biological father filed against a married lesbian couple to one of whom the child was born during the marriage, ruled that the known, biological father did not have standing under Article 5 to petition for paternity. In effect, the court held that, within its authority under Article 5 of the Family Court Act (which allows the court to deny a genetic marker test and/or dismiss a paternity petition if the test would not be in the best interests of the child) the paternity petition should be dismissed. The 18-page single spaced decision focuses intently on the legion of cases that interpret a court's authority under Family Court Act § 532 concerning genetic marker tests, but also addresses that, at the time of conception and birth, the women were not only married and entitled to the rebuttable presumption of legitimacy, but also fit squarely within the *Brooke S.B.* test (i.e. the pre-conception agreement to conceive a child and co-parent). However, this case is unlike *Brooke S.B.*, in that the petitioner was a known individual in the women's lives and the insemination was performed in the home not by a physician.

Absent from the decision is any reference to an argument by the father pertaining to the constitutionality of the denial of a genetic marker or the finding, without a hearing, that the undisputed biological father has no standing to petition the court.

Instead, the father's arguments appeared focused on the fact that the conception was not done under medical supervision, a requirement under Domestic Relations Law § 73. Pre-*Brooke S.B.*, a woman in the Second Department similarly argued that such an "at home" insemination procedure violated DRL § 73, which sets forth the requirements for artificial insemination, and attempted to "void" her married same-sex partner's parentage based on such. The Family Court Judge Deborah Poulos rejected the argument in a spectacular decision that was adopted, virtually in whole, by the Second Department in a lengthy decision. *Matter of Kelly S. v. Farah M.*, 139 A.D.3d 90 (2d Dep't 2016).

The *Christopher Y.Y.* matter is a case to watch for several reasons. First, if the biological father appeals to the Court of Appeals, he will need permission, as the Appellate Division issued a unanimous decision and it does not appear, unless the Third Department purposely ignored the issue, that the biological father raised fairly obvious constitutional arguments in his papers below. If the court grants leave to appeal, it may address whether a child may have only two parents, it may address the DRL § 73 argument, and it may also have occasion to consider a bright line rule pertaining to denial of standing to a potential biological parent.

The *Christopher YY* case also presents as interesting because, at the very end of the decision, the Third Department noted that subsequent to the lower court proceedings, but prior to the appeal, both of the wives were subject of neglect proceedings and the child had been removed. The court declined to consider this factor, which may be error, in applying equitable estoppel.

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CONSUMER BANKRUPTCY

Like 'The Producers' — Posing a Little Academic Accounting Theory

By Craig D. Robins

A memorable scene in the 1968 movie classic, "The Producers," starring Zero Mostel and Gene Wilder (which later became a smash Broadway show) depicts Max Bialystock and Leo Bloom discovering a way to flim-flam investors and retire wealthy.

BIALYSTOCK: You were saying that under the right circumstances, a producer could make more money with a flop than he could with a hit.

BLOOM: Yes, it's quite possible.

BIALYSTOCK: You keep saying that, but you don't tell me how. How could a producer make more money with a flop than with a hit?

BLOOM: It's simply a matter of creative accounting. Let us assume, just for the moment, that you are a dishonest man.

BIALYSTOCK: Assume away!

BLOOM: Well, it's very easy. You simply raise more money than you really need.

BIALYSTOCK: What do you mean?

BLOOM: You've done it yourself, only you did it on a very small scale.

BIALYSTOCK: What did I do?

BLOOM: You raised $2,000 more than you needed to produce your last play.

BIALYSTOCK: So what? What did it get me? I'm wearing a cardboard belt.

BLOOM: Ahhhhhh! But that's where you made your error. You didn't go all the way. You see, if you were really a bold criminal, you could have raised a million.

Craig Robins

BIALYSTOCK: But the play only cost $60,000 to produce.

BLOOM: Exactly. And how long did it run?

BIALYSTOCK: One night.

BLOOM: See? You could have raised a million dollars, put on a $60,000 flop and kept the rest.

BIALYSTOCK: But what if the play was a hit?

BLOOM: Oh, you'd go to jail. If the play were a hit, you'd have to pay off the backers, and with so many backers there could never be enough profits to go around, get it?

BIALYSTOCK: Aha, aha, aha, aha, aha, aha!! So, in order for the scheme to work, we'd have to find a sure fire flop.

BLOOM: What scheme?

BIALYSTOCK: What scheme? Your scheme, you bloody little genius.

BLOOM: Oh, no. No. No. I meant no scheme. I merely posed a little, academic accounting theory. It's just a thought.

BIALYSTOCK: Bloom, worlds are turned on such thoughts!

Turning now to our local bankruptcy court in Central Islip, while waiting for their cases to be called, consumer bankruptcy practitioners often kill time, kibitzing outside the courtroom, sometimes posing their own little academic theories to each other as to how a debtor could conceivably game the system.

One such idea centered around the various automobile deductions on the means test and how a debtor is entitled to maximize the "Vehicle Ownership or Lease Expense" deduction for each car that is financed. Technically, even if a debtor has a car loan or lease requiring just a $50 a month payment, the debtor can take the full Vehicle Ownership or Lease Expense deduction, which is currently $485. Doing so makes it easier for higher income consumers to qualify for Chapter 7 relief or reduces the amount consumers must pay into a Chapter 13 plan.

One creative attorney then hypothesized that a business could be created which leases highly used cars to debtors. In this scheme, which essentially creates a means test deduction, the debtor would pay a service fee, say $995, and then a monthly lease fee of $50 a month for as little as just a few months to the car company. The cars would never have to leave the company's yard. The debtor would then be entitled to deduct the full Vehicle Ownership or Lease Expense deduction on the means test, which is currently $485, even though the debtor is only paying $50 a month.

The car company that orchestrates the scheme does quite well with the service fee and monthly payment, plus the cars never need to leave the yard, will never be driven, and do not even require any insurance. The cars could even be total lemons that cost the car company $100 each.

The debtor does quite well also, getting a valuable means test deduction for very little, thereby enabling some debtors to qualify for a Chapter 7 filing when previously they would not have, or, if the debtors were to file for Chapter 13 relief, they would reap savings of over $400 per month on what they would have had to pay into a Chapter

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